

Court of King's Bench of Alberta

Citation: Yakubow v Edmonton Granite Memorials Ltd., 2026 ABKB 360

Date: 20260508
Docket: 2303 01893
Registry: Edmonton

Between:

Dwayne Yakubow

Plaintiff

- and -

Edmonton Granite Memorials Ltd.

Defendant

Reasons for Judgment of the Honourable Justice K.H. Oviatt

I. Overview

1. This is a constructive dismissal claim heard by way of a streamlined trial.
2. The Plaintiff, Dwayne Yakubow, resigned from his employment of more than 20 years after the Defendant, Edmonton Granite Memorials Ltd. (the Employer), presented him with a new employment contract. He claimed he was constructively dismissed and sought damages for wrongful dismissal and aggravated damages for the manner in which he was terminated.
3. The Employer, through its owner Paul Crosty, denied that it constructively dismissed Yakubow, arguing the new employment contract presented was never implemented, and that its terms were open for negotiation. In the alternative, the Employer argued that Yakubow

failed to reasonably mitigate his damages and that aggravated damages are not appropriate on the facts.

4. For the reasons that follow, I find the Employer constructively dismissed Yakubow. He is entitled to 15 months' pay in lieu of reasonable notice. No deduction on that notice period is appropriate because the Employer did not meet its burden of proof to establish a failure to mitigate. Aggravated damages are similarly not appropriate in the circumstances.

II. Issues

5. The broad issues for this trial are (a) whether the Employer constructively dismissed Yakubow, and (b) if so, what damages is he entitled to?
6. To determine constructive dismissal, the following questions must be answered:
 1. Did the Employer breach an essential term of the unwritten employment contract?
 2. If so, did the Employer show intention to no longer be bound by the unwritten employment contract?
7. If constructive dismissal is established, the damages issues are:
 1. What was Yakubow's reasonable notice period?
 2. How should the damages be calculated?
 3. Did Yakubow fail to reasonably mitigate his damages?
 4. Should Yakubow's damages be reduced for actual mitigation?
 5. Are aggravated damages appropriate in the circumstances?

III. Analysis

A. Constructive Dismissal

The Test for Constructive Dismissal

8. The test for constructive dismissal was set out in *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 [*Potter*]. It has two branches: *Potter* at para 32.
9. The first branch asks whether the employer breached an express or implied term of the employment contract and further inquires if the breach was to an essential term of the contract: *Potter* at para 34.
10. The second branch asks whether the employer's conduct, viewed in all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the contract: *Potter* at para 42.
11. The burden of proof to establish constructive dismissal is on the employee: *Potter* at para 31.
12. In *Wronko v Western Inventory Service Ltd*, 2008 ONCA 327, leave to appeal to SCC refused, 2008 CanLII 53793 (SCC) [*Wronko*], the Ontario Court of Appeal summarized three options for an employee when an employer attempts to unilaterally change the terms of an employment contract:

1. Accept the change and continue employment under the new terms: *Wronko* at para 34.
 2. Reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term: *Wronko* at para 35.
 3. Reject the change, continue working, and insist on the original terms unless the employer terminates employment with proper notice and offers re-employment on the new terms: *Wronko* at para 36.
13. Yakubow argued that he followed the second option to reject the unilateral changes to the employment contract and sue for damages. He alleged the Employer presented him with a new contract and pressured him to sign it while repeatedly communicating that the form of contract was not negotiable.
14. The Employer argued that the new contract was merely a draft, open for negotiation, and never imposed.

Issue 1 on Constructive Dismissal: Breach of Fundamental Term of the Contract

15. The first branch of *Potter* requires a review of the contract terms to determine whether the Employer unilaterally breached an essential term of the employment contract.
16. Yakubow was hired in 2002 and promoted to sales manager in 2015. There was never a written employment contract in place. As a result, common law implied terms applied, including reasonable notice of termination and the absence of restrictive covenants.
17. On January 20, 2023, Crosty presented a new written employment contract to Yakubow. This new employment contract substantially altered at least five terms of the unwritten employment agreement, including:
- a change to job title and duties;
 - the formalization of a bonus structure replacing discretionary bonuses;
 - limitation of termination pay to Employment Standards Code minimums;
 - the imposition of a non-solicitation clause; and
 - the imposition of a non-competition clause.
18. Each of these changes affected essential terms of the unwritten employment contract. Any one of the changes would likely suffice to establish the first branch of *Potter*. Here, there were five. Yakubow was particularly concerned with the limitations on termination pay and the addition of two restrictive covenants.
19. The Employer acknowledged that, if imposed, these would have constituted changes to fundamental terms. However, it argued there was no breach because the new terms were not implemented. I address this argument below under the second branch of the *Potter* test. For the purposes of the first branch of the *Potter* test, I accept that the terms of the new written employment contract included changes to essential terms of the contract, and these changes were substantial.

Issue 2 on Constructive Dismissal: Employer's Intent to No Longer be Bound

20. The second branch of *Potter* considers whether the Employer's conduct, viewed objectively and in its entirety, communicated an intention to no longer be bound by the existing contract.
21. The events unfolded over less than a week. The contract was presented on Friday, January 20, 2023. Yakubow resigned on Thursday, January 26, 2023, claiming constructive dismissal. During that period, Crosty repeatedly emphasized that the form of the contract, including the restrictive covenants and termination provision, was required. He applied ongoing pressure on Yakubow to sign.
22. The evidence established the following facts:
 - The contract was presented late on a Friday afternoon, with an expectation of a response by Monday, leaving no clear business days for legal review. Further, Crosty did not advise Yakubow of his right to seek legal advice.
 - The contract was dated as accepted on the date it was presented, January 20, 2023, and stated to be effective January 23, 2023, the Monday when Yakubow was asked to give his response. The document did not indicate anywhere on it that it was a draft or subject to negotiation.
 - Crosty repeatedly advised Yakubow that other employees had signed similar agreements. This placed pressure on Yakubow to accept all the terms as drafted.
 - In a Sunday email exchange, Crosty stated that a signed contract was required regardless of Yakubow's job title and asserted that new ownership could impose whatever agreement it chose. This suggested that although negotiation was open on the job title, negotiation was not possible on other fundamental changes to the contract.
 - Despite Yakubow's request for time and space to consider the contract, Crosty repeatedly approached him at work to discuss the contract and to repeat the message that other employees had accepted the new terms so Yakubow should as well. Crosty even brought in two respected colleagues to speak about the new contract directly to Yakubow on January 25, 2023.
 - At no time did Crosty communicate or suggest that the terms of the contract around termination pay, restrictive covenants, or other essential terms of the contract were open for negotiation.
 - At no time did Yakubow condone or agree with the proposed changes to his employment agreement.
23. Viewed objectively, this conduct communicated that the Employer intended to proceed with the new contract terms, particularly the termination and restrictive covenant provisions.
24. Although Yakubow acknowledged that he could refuse the new job title and return to his role as sales manager, the evidence did not support the Employer's claim that the termination provisions and restrictive covenants were negotiable. The Employer's communications consistently conveyed that those terms were mandatory.

25. The Employer's argument that it never implemented the new contract does not assist it on these facts. Constructive dismissal may arise from an anticipatory breach, where an employer clearly communicates an intention not to be bound by essential future obligations: *Potter* at para 149; *Baraty v Wellons Canada Corp*, 2019 BCSC 33 at para 56; *MacGregor v Lethbridge College*, 2016 ABPC 72 at para 92; *Davies v Canadian Satellite Radio Inc*, 2010 ONSC 5628 at para 53.
26. The Employer's case of *Rampre v Okanagan Halfway House Society*, 2018 BCSC 992 is distinguishable on its facts. In that case, the employer had sent the plaintiff a letter indicating that a salary reduction would come into effect. The day before the proposed changes, the plaintiff raised concerns about the pay reduction, claiming constructive dismissal as a result but also advising that he would remain on staff for a few weeks to assist with the transition. The employer reversed its decision and asked the plaintiff to return to his position. The plaintiff refused and the court held his refusal to do so was unreasonable.
27. Here, there was no evidence that the Employer changed course when it learned that Yakubow had concerns with the non-competition clause in the new contract or after Yakubow claimed constructive dismissal. On the contrary, every communication from the Employer confirmed that the form of the contract, with limits on termination pay and restrictive covenants, was required going forward. The Employer repeatedly communicated that these terms were required and final, or a *fait accompli*.
28. I conclude that the Employer constructively dismissed Yakubow.

B. Damages

Issue 1 on Damages: Reasonable Notice Period

29. Damages for wrongful dismissal are calculated based on the reasonable notice period the employee was entitled to receive upon termination.
30. Determining the reasonable notice period is highly fact dependent: *Carroll v ATCO Electric Ltd*, 2018 ABCA 146 [*Carroll*] at para 21.
31. Courts apply a non-exhaustive list of factors, including the nature of the employment, length of service, age, availability of similar alternative employment, having regard to the employee's experience, training and qualifications: *Bardal v Globe & Mail Ltd*, 1960 CanLII 294 (ONSC); *Alberta Computers.com Inc v Thibert*, 2021 ABCA 213 [*Alberta Computers*] at para 60; *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701 at paras 81-82; *Honda Canada Inc. v. Keys*, 2008 SCC 39 [*Honda*] at para 28.
32. "At its heart, the period of reasonable notice is an attempt to estimate the period of time it will take the employee to find commensurate employment": *Alberta Computers* at para 60; see also *Humphrey v Mene Inc.*, 2022 ONCA 531 at para 48.
33. In *Nelson v Champion Feed Services Inc.*, 2010 ABQB 409 at para 87 this court explained the rationale for each of the non-exhaustive factors the court considers when assessing the reasonable notice period for a wrongfully dismissed employee:
 1. **The nature of the employment** - the more senior the position, the longer it is likely to take to find a replacement position. There are fewer senior management jobs around.

2. **The length of service** - the longer an employee has worked for one employer, the more difficult it may be to find an alternate job. Either because the employee has narrowed his or her skills by working for one employer for a long time, or the employee has been paid more than the job is worth because of long service.
 3. **The age of the employee** - the older the employee is, the less likely he or she is to find a suitable position, or the longer it is likely to take. Older employees are sometimes perceived as less worthwhile to invest in.
 4. **The availability of suitable similar employment** having regard to the employee's experience, training and qualifications together with surrounding economic circumstances - what is the realistic prospect of this employee getting a similar replacement job? What is the job market like? In good economic times, jobs may be plentiful and the employee may have little difficulty finding a good replacement job; in poorer times, there may be few jobs around. [emphasis added]
34. The nature of the employment was a sales manager position. Yakubow characterized himself as being near the top of the organization, but this was only because it was a relatively small organization. Yakubow managed 2-3 sales managers. It was a middle management position. This factor is neutral, not weighing for or against a lengthy notice period.
35. The length of service here was considerable at 20 years and 10 months, almost 21 years. Yakubow spent most of his working life to that point for the Employer. This factor weighs in favour of a lengthier notice period.
36. Yakubow's age at the time of the constructive dismissal was 45. He was mid-career with good experience behind him and many working years ahead of him. This factor weighs against a lengthy notice period.
37. Lastly, on the availability of alternative suitable employment, Yakubow argued he worked in a niche market, selling custom memorial headstones. This meant limited potential employers in that specific industry. However, viewed more broadly, he was in general sales and more specifically sales management, which skills could be used in many different industries. This factor is neutral.
38. The parties both provided several precedents where the notice periods ranged from 14 months to 24 months. Each turned on its own facts and although I have reviewed and considered all the authorities, I do not intend to review each in detail.
39. Considering all factors, the appropriate reasonable notice period is 15 months.

Issue 2 on Damages: Calculating the Damages

40. Employees are generally entitled to their entire remuneration package from employment during the reasonable notice period. Here, this includes base salary, bonuses, and the value of benefits.
41. Yakubow's base salary at the time of the constructive dismissal was \$103,500 per year, or \$8,625 per month.
42. Bonuses were discretionary, with the agreed statement of facts providing the bonuses paid over the last three years. The average of those bonuses was \$6,000 per year. Courts have

sometimes used a three-year average to estimate the value of bonuses during the notice period, although how the court calculates the bonuses will depend on the evidence, including whether there are any upwards or downwards trends that should be considered: *Carroll v Oracle Canada ULC*, 2025 ONSC 4889 [*Carroll v Oracle*] at para 39; *Clark v BMO Nesbitt Burns Inc.*, 2008 ONCA 663 at para 35. The evidence here supports relatively consistent bonuses over the past three years, so it is appropriate to use the three-year average. This amounts to \$500 per month.

43. Lastly, Yakubow requested an additional 10% of his base salary to compensate for the value of health benefits he no longer received but should have during the reasonable notice period. I accept that the Employer provided benefits and these benefits were part of Yakubow's compensation; he should therefore receive damages for the loss of that compensation during the reasonable notice period: *Andros v Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679 at para 65.
44. Yakubow referred to *Carroll v Oracle* where the Ontario Superior Court of Justice accepted that "Courts have consistently approved awards for benefits equal to 10% of salary": at para 54. This approach has not been clearly endorsed in Alberta. Nevertheless, I agree that is appropriate here because there was clear evidence that there was benefits package available to all employees, including an annual health spending account, disability benefits, life insurance, and accidental death and dismemberment. The health spending account alone had an annual value of \$2,500.
45. Although the evidence did not firmly establish the value of the combined benefits, I agree that those benefits were proven to exist and they have value. In the interests of litigation efficiency, particularly for a streamlined trial, a 10% value is a reasonable estimate on the facts established here. That amount is \$10,350 annually or \$862.50 per month. I include the health spending account in that calculation.
46. Yakubow's total income during the notice period should therefore be calculated as \$9,987.50 per month.

Issue 3 on Damages: Failure to Mitigate

47. Plaintiffs who are entitled to wrongful dismissal damages have a duty to mitigate their losses: *Red Deer College v Michaels*, [1976] 2 SCR 324 at 330 [*Red Deer College*]. An employee is not entitled to recover damages for losses that could have been avoided.
48. The duty is to take reasonable steps to find comparable employment: *Red Deer College* at 331-332. The reasonableness of an employee's mitigation efforts is assessed on an objective standard: *Evans v Teamsters Local Union No. 31*, 2008 SCC 20 at para 33.
49. Although the duty to mitigate is on the plaintiff, the burden of proof to establish a breach of the duty to mitigate is on the employer: *Red Deer College* at 331-332; *Rodrigues v Fort McKay Strategic Services LP*, 2025 ABKB 414 at para 75 [*Rodrigues*].
50. The Employer must prove two things on the balance of probabilities:
 - (a) that Yakubow did not take reasonable steps to find comparable work; and
 - (b) that Yakubow would have been able to find comparable work had they searched for it.

Rodrigues at para 75, citing *Richmond v Panther Industries (Alberta) Inc*, 2019 ABQB 705, at para 12; see also *Plotnikoff v Associated Engineering Alberta Ltd*, 2024 ABKB 706 at para 118.

51. While Yakubow's search for alternate work was imperfect, including significant deficiencies on his resume, these efforts did not fall below the standard of reasonableness in the circumstances. Most significantly, however, the Employer did not meet its burden of proof to establish that Yakubow would have been able to find comparable work had he searched for it.
52. The Employer's evidence of available comparable work consisted of a few emails where a competitor in the headstone industry indicated certain positions had been filled. Some of these positions were in the relevant time frame. However, the evidence was vague. What were the salaries? Were the positions filled internally? Were there job postings for them? Was it, in fact, comparable employment for Yakubow? The Employer failed to provide any other evidence of available comparable work.
53. The availability of comparable work, or lack thereof, was underscored by the fact that the long-term permanent employment Yakubow ended up taking was at one of the Employer's competitors, but it took three years to find the job and Yakubow ended up earning approximately half the pay he did for the Employer.
54. I am not satisfied that the Employer met the burden of proof to establish that had Yakubow taken further steps in his job search that he likely would have found reasonable alternative employment. There was no breach of the duty to mitigate on the facts.

Issue 4 on Damages: Actual Mitigation

55. The underlying purpose of wrongful dismissal damages is to put the plaintiff into the position they would have been in had the employer performed its contractual duties. The amount of damages is calculated by calculating the amount the employee would have earned during the notice period, less any amounts received in mitigation during the notice period: *Brake v PJ-M2R Restaurant Inc*, 2017 ONCA 402 [*Brake*] at para 96.
56. As outlined above, the notice period was 15 months, from January 26, 2023 until April 26, 2024. Income that Yakubow earned working a temporary minimum wage job between April 30, 2024 and mid-June 2024 fell outside this notice period and is therefore not considered. Likewise, Yakubow's eventual employment with a competitor fell outside the notice period.
57. Other income, which fell within the notice period, included hockey referee work. However, to be deducted, the income earned must be a direct substitute for the employee's previous income: *Brake* at para 140 citing *Karas v Rowlett*, [1944] SCR 1.
58. The evidence established that Yakubow had regularly refereed hockey while employed full-time for the Employer. Even if he had stayed with the Employer, he likely would have continued to supplement his income through hockey refereeing. Although the evidence suggested that Yakubow was able to referee more games than he did while working full time, the amount earned was not significant and the evidence did not clearly establish the difference between the amounts Yakubow earned refereeing while working full time compared to the amounts earned refereeing during the notice period. I make no deduction for this income.

Issue 5 on Damages: Aggravated Damages

59. Yakubow also claimed aggravated damages due to the manner in which he was terminated. Aggravated damages occur when the conduct of the employer in the dismissal is “unfair or in bad faith by being, for example untruthful, misleading or unduly insensitive” or otherwise abusive: *Honda* at para 57. Hurt feelings from the fact of termination, without *more* from the employer, are not usually compensable: *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112 at para 72 [*Elgert*]; see also *Honda* at paras 54–57. Employees should have a reasonable expectation that their employers will act in good faith when dismissing them, and if employers fail to do so damages may be due to the wronged employee: *Honda* at para 58; see also *Elgert* at para 73.
60. The Alberta Court of Appeal has given some examples of situations or conduct that may lead to aggravated damages being awarded:

I stress that the unfairness or insensitivity must be in the methods used, not in the mere fact of dismissal. One thinks of examples; one is a boss who tells all the fellow employees, or the employee’s spouse and children, that the dismissed employee is stupid or incompetent. It is hard to think of circumstances where there would be any need to do that. Another example might be dismissing the employee within a day or two of a daughter’s wedding, or of the death of a parent. Another example would be insincerely alleging to others embarrassing or demeaning (but unfounded) reasons for the dismissal (whether or not they would be just cause if true), when the employer does not honestly believe those grounds exist.

Merrill Lynch Canada Inc v Soost, 2010 ABCA 251 at para 16 [*Soost*] [emphasis added]

61. There is no such conduct here. I have found that the Employer’s conduct amounted to constructive dismissal, but the manner in which it was carried out was not dishonest, in bad faith, or with malicious intent. Crosty did not publicly disparage Yakubow, accuse him of any misconduct, or act in any manner that would humiliate or demean him.
62. Crosty did exert pressure on Yakubow to sign the new employment agreement which was inappropriate and led to the finding of constructive dismissal on the facts. However, his conduct falls far short of the conduct contemplated by the Supreme Court of Canada in *Honda* and the Alberta Court of Appeal in *Soost*.

IV. Conclusion

63. The defendant, Edmonton Granite Memorials Ltd. constructively dismissed the plaintiff, Dwayne Yakubow.
64. Yakubow shall have judgment against the defendant Employer in the amount of \$149,812.50, representing compensation for a notice period of 15 months.
65. Yakubow is entitled to pre and post judgment interest in accordance with the *Judgment Interest Act*, RSA 2000, c J-1.
66. No aggravated damages are awarded.

67. Yakubow is presumptively entitled to costs. If the parties cannot agree on costs, they may file written submissions, not exceeding 5 pages, within 60 days of this decision.

Heard on the 12th day of February, 2026 to the 13th day of February, 2026.

Dated at the City of Edmonton, Alberta this 8th day of May, 2026.

K.H. Oviatt
J.C.K.B.A.

Appearances:

Illya Shcherba, Taylor Janis LLP
for the Plaintiff

Paul D. Anderson, Ritzen Warshawski LLP
for the Defendant