

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	)	
	)	
	)	
LEE FLOHR	)	<i>L. Flohr</i> , self-represented appellant
	)	
	)	<i>Appellant</i>
	)	
– and –	)	
	)	
	)	
	)	
SUSUR LEE GROUP INC.	)	<i>K. Alexander and R. Wozniak</i> , for the
	)	respondent
	)	
	)	<i>Respondent</i>
	)	
	)	
	)	
	)	
	)	HEARD: April 24, 2026
	)	

On appeal from the judgment of Deputy Judge Kahane-Rapport of the Superior Court of Justice (Small Claims Court), dated May 13, 2025, with reasons reported at 2025 CanLII 154498.

REASONS FOR DECISION

SCHRECK J.:

[1] Lee Flohr has worked at a restaurant operated by the Susur Lee Group Inc. since 2015. On March 18, 2023, he was laid off while the restaurant relocated. On June 12, 2023, Susur Lee Group resumed paying Mr. Flohr’s wages, but the restaurant did not resume operations and Mr. Flohr was unable to earn gratuities as he had done before the layoff. On June 20, 2023, Mr. Flohr’s lawyer sent a letter to his employer stating that he took the position that the layoff amounted to a constructive dismissal. The restaurant resumed operations on July 28, 2023 and Mr. Flohr continued to work there. On December 12, 2023, he commenced a claim for constructive dismissal in the Small Claims Court.

[2] Mr. Flohr's claim was dismissed following a trial in the Small Claims Court. The trial judge concluded that although the layoff was a breach of the employment contract, Mr. Flohr effectively condoned the breach by accepting wages from the employer after June 12, 2023. In the trial judge's view, the letter from Mr. Flohr's lawyer "did not constitute taking an irrevocable legal position or making a clear election" that he accepted his employer's repudiation of the employment contract because he did not commence legal proceedings until several months later.

[3] Mr. Flohr appeals the decision dismissing his claim and submits that the trial judge erred in her application of the law respecting condonation of the repudiation of an employment contract. Counsel for the Susur Lee Group submits that the trial judge did not err and that her findings of fact are entitled to deference.

[4] The appeal is allowed for the following reasons.

I. FACTS

A. The Parties

[5] The respondent, the Susur Lee Group, owns and operates a restaurant in Toronto. The appellant, Lee Flohr, has worked for the respondent since 2015. In 2023, his position was that of senior server. At that time, he usually worked 35 hours per week and was paid an hourly wage in addition to gratuities. The appellant worked primarily in the restaurant's private dining area, although he sometimes also worked in the main dining area and on the patio.

B. Sequence of Events

(i) The Lay Off

[6] On March 18, 2023, the appellant and the other employees of the restaurant received a letter from the respondent advising them that they were being temporarily laid off, effective March 12, 2023, while the restaurant moved to a new location. The letter stated that the layoff would not last for more than 13 weeks within a consecutive 20-week period and that the restaurant was anticipated to reopen in May 2023. The letter included a section for employees to sign indicating that they acknowledged and agreed to the lay off. The appellant did not sign it.

[7] On April 18, 2023, the appellant and the other employees received an e-mail from the respondent which stated: "As you are aware, we were hoping to begin the recall process by early May. Unfortunately that date will not be achievable." According to the e-mail, the respondent expected to send out recall notices at the end of May "with the goal of returning to work the first week of June."

[8] On May 4, 2023, the appellant retained an employment lawyer from the firm Levitt LLP.

(ii) The Recall

[9] On May 18, 2023, the appellant received a letter from the respondent which stated:

You are expected to return to work on June 12, 2023.

....

Your compensation and schedule will remain the same as before your temporary layoff once regular business operations will resume. The first two weeks upon recall will involve training and setup, and schedules may vary.

[10] Between May 19, 2023 and June 5, 2023, the appellant and the respondent's general manager exchanged a number of e-mails about the appellant's employment conditions and compensation once operations resumed. On June 6, 2023, the respondent's general manager sent an e-mail to the appellant stating:

... We are definitely not anticipating any further layoffs, once the training period and setup are complete we will be launching into service. ... With construction it is difficult to foresee exactly when certain things will be done at what time so getting them in the most efficient order is something we are working on....

[11] The restaurant did not resume operations on June 12, 2023, but the appellant began receiving an hourly wage of \$16.55 for a number of hours that were calculated based on his last seven weeks of work prior to the layoff. While there were training activities during this period, the restaurant did not resume operations until July 28, 2023 and the appellant was unable to earn income from gratuities until that time.

(iii) The Letter From the Appellant's Lawyer

[12] On June 20, 2023, the appellant's lawyer wrote a letter to the respondent stating he took the position that the layoff on March 12, 2023 constituted a constructive dismissal and offering terms of settlement. There is no evidence of any response from the respondent. The appellant continued to be employed by the respondent after this and took the position that he did so to mitigate his damages. He also sought other employment, although the details respecting this are unclear.

(iv) Subsequent Events

[13] Once the restaurant's operations resumed on July 28, 2023, there was less work available in the private dining area than before. As a result, the appellant received fewer gratuities. The respondent offered the appellant shifts working in the main dining area of the restaurant, which the appellant declined to accept as he viewed this as a demotion.

[14] On December 12, 2023, the appellant commenced an action for wrongful dismissal in the Small Claims Court. He continued to work for the respondent.

C. The Trial Judge's Findings

[15] The trial judge made the following findings:

- The appellant was not constructively dismissed because (1) he did not advise the respondent that considered himself constructively dismissed before being recalled to work; (2) he “acted as if he accepted the recall back”; and (3) although his lawyer’s letter put the respondent on notice of his position, “it did not constitute taking an irrevocable position or making a clear election.”
- If the appellant was constructively dismissed, he condoned the dismissal by accepting the recall, accepting payment of wages, waiting for six months after his lawyer sent a letter before initiating the claim, and continuing to work for the respondent.
- The appellant failed to demonstrate that he attempted to mitigate his damages and his continuing to work for the respondent was not mitigation.

II. ANALYSIS

A. Jurisdiction and Standard of Review

[16] The appellant appeals to this court pursuant to s. 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The standard of review on an appeal is well established. Question of law are reviewable for correctness, questions of fact are reviewable on a standard of palpable and overriding error, and questions of mixed fact and law are also reviewable on a standard of palpable and overriding error unless there is an extricable question of law, which is reviewable for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 18-15.

B. Grounds of Appeal

[17] The appellant submits that the trial judge erred by (1) misapplying the legal test for condonation of a change in the terms of an employment contract; (2) treating the appellant’s receipt of payments mandated by the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”) after June 12 as a return to work; and (3) selectively relying on a Workplace Safety and Insurance Board (“WSIB”) form that was filed as an exhibit for some purposes but not others. The respondent submits that the trial judge made no legal errors and her factual findings are entitled to deference.

[18] In my view, there is no basis to interfere with the trial judge’s decision to draw some inferences but not others from the WSIB form and I would not give effect to the third ground of appeal. However, for reasons I will explain, I am persuaded that the trial judge erred in her analysis with respect to the issues of condonation and the effect of the appellant’s receipt of payments after June 12.

C. Overview of Relevant Legal Principles

[19] The principles to be applied in assessing claims of constructive dismissal are well established and may be summarized as follows:

- Constructive dismissal occurs when an employer evinces an intention not to be bound by the terms of an employment contract by unilaterally breaching an express or implied term of the contract resulting in a substantial change in the employee's working conditions: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at paras. 37-43; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 24.
- Unless permitted by the employment contract, a unilateral layoff of an employee will constitute a breach of the contract resulting in a substantial change and will amount to constructive dismissal: *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255, at para. 29.
- An employee faced with an employer's breach of a contract can choose to accept the employer's breach or treat it as a repudiation of the contract and sue for wrongful dismissal. If the employee accepts the breach, it is not unilateral and cannot amount to constructive dismissal: *Potter*, at paras. 30, 37.
- The employee is permitted reasonable time to choose whether to accept the breach or treat it as a repudiation: *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.), at para. 26; *Persaud v. Telus Corp.*, 2017 ONCA 479, at para. 14-15, aff'g 2016 ONSC 1577, at para. 43. What constitutes a reasonable period of time is a fact-specific determination based on a number of factors: *McGuinty v. 1845035 Inc.*, 2020 ONCA 816, 154 O.R. (3d) 451, at para. 25.
- Acceptance or condonation of the changes to the contract must be expressed by positive action and mere silence on the part of the employee is insufficient: *Pham*, at para. 55; *Webb v. SDT North America*, 2023 ONSC 7170, 92 C.C.E.L. (4th) 235, at para. 36. An employee will have condoned the breach where his or her conduct was such that the employer would reasonably believe that the employee consented to the change. The burden of establishing condonation is on the employer: *Pham*, at para. 45.
- The fact that an employee returned to work or continued to work is not determinative of condonation: *McGuinty*, at para. 26. However, in most cases, an employee's willingness to continue to work under the altered terms of the contract for a significant period of time will be viewed as condonation: *Persaud* (S.C.J.), at para. 43.

D. The Trial Judge's Condonation Analysis

[20] There was no dispute that the employment contract in this case had no implied or express term allowing the respondent to unilaterally lay off its employees and that doing so was a substantial change in the terms of the contract. The trial judge correctly observed that in this situation, the appellant could choose whether to accept the change in the terms of the contract or treat it as repudiation and that the choice had to be made within a reasonable period of time (paras. 50-51).

[21] The trial judge found that the appellant accepted the employer's changes to the contract based on the following:

- “...between the time he was laid off and until he was recalled back to work, the [appellant] did not advise the [respondent] that he considered himself constructively dismissed” (para. 54);
- the appellant “accepted the call back” without advising the respondent that he considered himself to be constructively dismissed before doing so (para. 54);
- after receiving the “recall notice” in May 2023, the appellant “acted as if he accepted the recall back” (para. 55);¹
- although the appellant’s lawyer sent a letter to the respondent on June 20, 2023 taking the position that he had been constructively dismissed, this “did not constitute taking an irrevocable position or making a clear election” and the appellant “took an irrevocable legal position only in December of 2023” when he filed the Statement of Claim (para. 56);
- it was “too late” for the appellant to treat the lay off as constructive dismissal “after he was called back to work and returned to work” (para. 57);
- the appellant’s claim that he continued to work for the respondent in order to mitigate his damages and not as an indication of condonation could not be accepted because there was no “offer of re-employment after termination which the [appellant] had to take to mitigate his damages” (para. 68).

[22] The trial judge appears to have viewed the issue of condonation as separate from the issue of the appellant’s acceptance of the changes to the contract, because after concluding that the appellant had accepted the changes, at para. 59 she stated:

If I am incorrect in my assessment that it was not reasonable for the Plaintiff to wait until after he returned to work to elect to treat the lay-off as bringing the employment relationship to an end, for the following reasons I find that the Plaintiff condoned the lay-off.

The trial judge once again referred to the evidence that that the appellant “returned to work after the call back” as well as that he accepted payment from the respondent notwithstanding the position he had taken in his lawyer’s letter, did not commence his claim for six months, and continued to work for the respondent after doing so (paras. 60-61). It was the trial judge’s view that “The Plaintiff’s continued employment with the Defendant is inconsistent with his position that he was constructively dismissed” (para. 62).

E. Errors in the Analysis

¹ The trial judge referred to Exhibit 10 on this point. Exhibit 10 is an e-mail to the appellant dated May 15, 2023 from someone employed at an insurance company apparently offering him advice on the contents of his resumé. This was presumably tendered as evidence of mitigation. I am assuming that the trial judge intended to refer to a different exhibit.

(i) *Factual Context*

[23] The trial judge's factual findings are entitled to deference. However, as counsel for the respondent points out, most of the critical facts were not in dispute, including the relevant chronology of events:

- March 18, 2023: The appellant is laid off with an anticipated return to work in May 2023.
- April 18, 2023: The respondent advises the appellant that he would not be recalled to work in May.
- May 4, 2023: the appellant retains an employment lawyer
- May 18, 2023: the appellant is told that he would return to work on June 12, that the first two weeks will involve “training and setup” and that his “compensation and schedule will remain the same as before your temporary layoff *once regular business operations will resume.*”
- June 12, 2023: the appellant begins to receive hourly wages without gratuities and training activities are scheduled. The restaurant has not yet resumed operations.
- On June 20, 2023: the appellant's lawyer writes a letter to the respondent advising that the appellant considers himself to have been constructively dismissed as of March 12, 2023. There is no evidence of any response from the respondent.
- July 28, 2023: the restaurant resumes operations and the appellant works shifts in the private dining area.
- December 12, 2023: the appellant files a Statement of Claim.

Accepting these facts, in my view the trial judge committed a number of extricable errors of law in considering whether the appellant condoned the respondent's breach of the employment contract.

(ii) *Specific Errors*

(a) *Equating Silence With Condonation*

[24] First, the trial judge erred by equating the appellant's silence during the period between March 18, 2023 and June 12, 2023 as condonation, particularly in circumstances where the appellant had declined to sign the portion of the layoff letter which indicated that he consented to the layoff: *Pham*, at paras. 54-55.

(b) *The “Return to Work”*

[25] Second, while the trial judge's conclusions were largely based on the appellant's “return to work” on June 12, 2025, this was not the date on which the restaurant resumed operations. It

was the date on which the respondent began to receive payment of wages from the respondent, presumably to prevent a statutory deemed termination of his employment pursuant to s. 56 of the *ESA*. The appellant was not working shifts during this period, nor was he earning gratuities, which would have resulted in a reduction in his income. In my view, the trial judge erred by failing to consider these changes to the conditions of the appellant's employment when assessing whether his "return to work" amounted to condonation.

(c) Reasonable Time to Assess Changes

[26] Third, and relatedly, while the trial judge was aware that an employee is permitted reasonable time to assess changes to the employment relationship before being forced to choose whether to accept those changes, she failed to apply that principle. At the time the appellant's lawyer sent the letter to the respondent, the appellant was no longer laid off, but nor had the circumstances of his employment returned to what they had been prior to the lay off. It is unclear whether anyone knew when the restaurant would resume operations.

[27] An employee is permitted a reasonable period of time to decide whether to accept an employer's repudiation of the employment contract because "it is understandable that such employees may wish to try to adjust to the new terms and conditions ... before taking the radical step of advancing a constructive dismissal claim": *Belton*, at para. 26. This presupposes that the nature of the new terms and conditions is known. In this case, it was not as it was unclear when the restaurant would resume operations. This fact had to be taken into account in determining what was a reasonable period of time. The trial judge failed to do so.

(d) The Lawyer's Letter

[28] Fourth, the trial judge erred in concluding that the appellant's lawyer's letter "did not constitute taking an irrevocable position or making a clear election" because he did not file a Statement of Claim until December. An employee is not required to formally initiate court proceedings in order to take an "irrevocable legal position." All the employee is required to do is to clearly communicate to the employer that he has accepted its repudiation of the employment contract: *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, at paras. 46-47; *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721, at para. 55. The decision to do so is sometimes described as "irrevocable" because a claim of constructive dismissal often has permanent effects on the employee's harmonious relations with the employer: *Belton*, at para. 26.

(e) Continuing to Work for the Respondent as Mitigation

[29] Finally, the trial judge's rejection of the appellant's position that he continued to work for the respondent in order to mitigate his damages was based on a misapprehension of the applicable law. The law on this issue was explained in *Wronko v. Western Inventory Services Ltd.*, 2008 ONCA 327, 90 O.R. (3d) 547, where the court adopted the reasoning of Mackay J.A. in *Hill v. Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124 (Ont. C.A.). An employee faced with an employer's unilateral alteration of an employment contract has three options (at paras. 34-36):

First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.

Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a “constructive dismissal”, as discussed in *Farber*, although this term was not in use when *Hill* was decided.

Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then -- unless proper notice of termination is given -- the employer is regarded as acquiescing to the employee’s position. As Mackay J.A. so aptly put it: “I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit.”

[30] The trial judge appears to have been of the view that the appellant’s continued work for the respondent could only constitute mitigation if the respondent had made an offer of re-employment (at paras. 67-68):

The Plaintiff argued that he returned to work, continued to work for the Defendant even after commencing this Claim, and is still working for the Defendant as of the day of this trial, to mitigate his damages. The Plaintiff argued that this is not a sign of condonation of the lay-off or of the change in his employment conditions.

The issue of mitigation arises when an employee was terminated and was offered, after termination, a position with the prior employer which is similar in responsibilities and remuneration to his prior position. Under the circumstances of this case, the recall back of May 18, 2023, would have to be considered an offer for re-employment after termination. However, in this case, the Plaintiff was recalled back from lay-off before he elected to treat the lay-off as a conduct that brought an end to the employment relationship. I do not agree that the recall back was in fact an offer of re-

employment after termination which the Plaintiff had to take to mitigate his damages.

With respect, there did not need to be an offer of re-employment for the appellant's continued work to constitute mitigation.

[31] The situation in this case is similar to that in *Russo v. Kerr Bros. Ltd.*, 2010 ONSC 6053, 326 D.L.R. (4th) 341, at paras. 39-45:

The plaintiff does not merely sue on the original terms of employment. He accepts the alteration of his terms and conditions of employment as a repudiation or constructive dismissal, but he says he is remaining in his employment under the new terms as a means of mitigating his damages....

In my view, there is no reason in principle why the plaintiff cannot adopt the course of action that he has.

Through counsel's letter dated July 27, 2009, the plaintiff made two things clear: first, that the unilateral change in the plaintiff's terms and conditions constitutes constructive dismissal; second, that the plaintiff did not consent to the alteration....

Nothing in counsel's letter, or in any other communication between the parties, changed that state of affairs. The defendant could not have been under any illusions. The defendant was clearly on notice that the plaintiff took the position that he had been constructively dismissed, and that he did not consent to the changes in his terms and conditions of employment. Thus, when the plaintiff remained in the workplace under the reduced terms, the defendant had no right to assume that the plaintiff had elected to do so under a new contract of employment. The only basis on which the plaintiff could be in the workplace under the reduced terms was by his acceptance of the reduced terms as a means of mitigating his loss during what would be a period of reasonable notice.

While I accept Mr. Newcombe's submission that upon a constructive dismissal the plaintiff is required to make an election, the defendant is also required to make an election. This is clear, in my view, from paras. 32-36 of Winkler C.J.O.'s judgment in *Wronko*, reproduced above.

Once the defendant had been told that the plaintiff accepted that a constructive dismissal had occurred, and that he did not accept the new terms and conditions, the defendant could have told the plaintiff to leave the workplace. Alternatively, the defendant could have kept

the old terms and conditions in place for the period of reasonable notice. However, the defendant did neither. It simply allowed the plaintiff to remain in the workplace knowing that the plaintiff took the position that he had been constructively dismissed, and that he did not accept the new terms.

In the circumstances, the defendant must be taken to have understood that the plaintiff was remaining in the workplace, but not under the acceptance of any changed terms and conditions of employment. There is no reason in principle, in my view, why the plaintiff cannot be considered to be mitigating his loss by so doing.

These conclusions are apposite to the case at bar.

[32] As noted in *Kerr*, at para. 47, the appellant continuing to work for the respondent can only constitute mitigation during whatever reasonable notice period he is entitled to if his claim of constructive dismissal succeeds.

F. The Appropriate Order

[33] In addition to setting aside the decision in the court below, the appellant requests that this court substitute a finding of constructive dismissal and determine damages. I decline to do so. While the underlying facts were largely not in dispute, the appropriate forum for determining whether those facts establish the appellant's claim and the quantum of any damages is the trial court. In my view, the appropriate order is for a new trial.

III. DISPOSITION

[34] The appeal is allowed and the decision dismissing the appellant's claim is set aside, as is the decision awarding costs to the respondent. The case is remitted to the Small Claims Court for a new trial before a different Deputy Judge.

[35] The appellant is self-represented and while I accept that he has devoted time towards preparing his materials and the argument of his appeal, there is little evidence that this resulted in any lost opportunity costs. As a result, while he is entitled to the costs of any disbursements, he is only entitled to nominal costs for preparation time: *Girao v. Cunningham*, 2021 ONCA 18, 13 C.C.L.I. (6th) 1, at paras. 9-11. Costs are fixed at \$2500.00, all inclusive, payable by the respondent to the appellant.

Schreck J.

CITATION: *Flohr v. Susur Lee Group Inc.*, 2026 ONSC 4380
COURT FILE NO.: DC-25-00000535-0000
DATE: 20260728

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LEE FLOHR

Appellant

– and –

SUSUR LEE GROUP INC.

Respondent

REASONS FOR DECISION

Schreck J.

Released: July 28, 2026