CITATION: DeBon v. Hillfield Strathallan College, 2018 ONSC 5590
COURT FILE NO.: CV-14-2724
DATE: 2018 09 28

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KIMBERLY DEBON	)	A. Haber and C. J. Haber, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
HILLFIELD STRATHALLAN COLLEGE	)	W. P. Dermody, for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** April 10 and 16, 2018 in Milton

REASONS FOR JUDGMENT

EMERY, J.

[1] By all accounts, Kimberly DeBon was an excellent teacher for the six and one half years she was employed at Hillfield Strathallan College ("HSC"), a private school in Hamilton, Ontario.

[2] Due to a series of unfortunate events occurring over 2012 and 2013, Ms. DeBon came to believe by December, 2013 that HSC no longer supported her as a teacher. By this time, Ms. DeBon was troubled that a culture had developed at HSC that allowed for, and encouraged faculty to review and to adjust student grades upwards. Ms. DeBon was worried that this mindset would compromise her ability as a teacher, and could damage her professional integrity.

[3] Ms. DeBon did not return to teaching at HSC after the Christmas break in December, 2013. Instead, she retained counsel to send a letter to the school advising the principal, Mr. Bob Neibert that she had been constructively dismissed from her teaching position and would be seeking damages.

[4] Ms. DeBon commenced this action in early 2014, shortly after the school holiday. HSC defended the action, alleging that Ms. DeBon had no grounds to make a claim of that nature.

[5] Counsel for Ms. DeBon filed a Trial Record to set the action down for trial on March 16, 2016. The significance of passing the record will be considered later in these reasons.

THE MOTION

[6] HSC now brings this motion for summary judgment to dismiss the action in its entirety. HSC submits that a judge on a motion for summary judgment is in as

good a position as a judge would be at a conventional trial to decide whether Ms. DeBon's action for constructive dismissal should fail.

[7] Ms. DeBon opposes the motion, arguing that there are genuine issues of credibility that require a trial. Ms. DeBon also submits the action raises issues of education law that are better left for determination by a trial court.

[8] Ms. DeBon has not brought a cross-motion for summary judgment on liability. Nor does she seek a converse finding in her favour on the HSC motion.

[9] The motion therefore proceeded on the question of whether there is sufficient evidence before the court to determine whether the conduct of HSC on the evidence does not amount to a claim for constructive dismissal.

CONTEXTUAL BACKGROUND

[10] Ms. DeBon was hired by HSC in 2007 to teach English and related subjects. She was employed continuously since that time until she resigned on December 27, 2013, taking the position that she had been constructively dismissed.

Claim that HSC failed to accommodate in 2010

[11] Ms. DeBon was on maternity leave during 2010. She contacted HSC in December 2010 to arrange for her return to teaching commencing January 2011 on a part time basis. When HSC proposed that Ms. DeBon teach a course in

history as a subject, Ms. DeBon made it clear she had been hired to teach English. HSC immediately withdrew its proposal to include a history class in Ms. Debon's course load.

[12] Ms. DeBon claims that HSC did not provide medical benefits coverage to her when she returned to part time teaching, even though coverage had been extended to Imogen Pearson, the teacher who had replaced Ms. DeBon during her maternity leave.

[13] During the time Ms. DeBon was on maternity leave in 2010, HSC cut a padlock off a storage cabinet in the classroom Ms. DeBon customarily used to teach class. Certain items and materials Ms. DeBon stored in that cabinet were removed and placed into another cabinet until she returned. Ms. DeBon considers this conduct to be an invasion of her privacy, and a breach of her contractual relationship with HSC.

Marking issues in 2013

[14] Counsel for the parties have agreed that any reference to a student on the motion and in these reasons shall be made by using a student identifier, rather than a name. This agreement was reached to protect the privacy of the student and by extension, the parents of that student.

[15] Student 1 had been taught by Ms. DeBon in her grade 11 English class during the school year 2012/2013. After the summer break in 2013, Cheryl

Diefenbaker, Head of the Student Success Centre at HSC, informed Ms. DeBon that the mother of Student 1 had contacted HSC to express concern that Ms. DeBon would be her teacher for the upcoming school year. Student 1 had been placed in two classes, namely English and Writer's Craft, that Ms. DeBon would start teaching in September 2013. The mother complained about Ms. DeBon because she was dissatisfied with an 80% mark that Ms. DeBon had given to Student 1 the previous year.

[16] On October 18, 2013, Ms. DeBon returned the first assignment of the year in the Writer's Craft class to Student 1 in which she gave her a mark of 76%. Upon receiving back the assignment, Student 1 reportedly behaved in a rude manner to express her dissatisfaction with that mark.

[17] Student 1 emailed Ms. DeBon later that day to request a meeting to discuss the mark. Ms. DeBon set 1:30 p.m. on October 24, 2013 as the time and date to meet with Student 1 for that discussion.

[18] On the morning of October 24, Ms. DeBon learned that the mother of Student 1 also planned to attend the meeting. At the start of the Writer's Craft class that morning, Ms. DeBon told Student 1 that it would not be appropriate for her mother to meet with herself as the teacher until Student 1 and Ms. DeBon could address the reasons for the mark between them.

[19] Ms. DeBon made her apprehension about meeting with the mother of Student 1 known to Ms. Diefenbaker and to Katherine Webber, Head of the English Department. Both Ms. Diefenbaker and Ms. Webber agreed that Ms. DeBon should contact the mother about scheduling a parent-teacher interview, and to clarify that Ms. DeBon intended to discuss the mark only with Student 1.

[20] Since Ms. DeBon did not have the email address for the mother of Student 1, she sent a message through an email to Student 1 to dissuade her mother from coming to the school that day. She also sent an email to William Peat, Vice Principal at HSC of the Senior School about the situation, describing how it "has become a bit of a 'tempest in a teapot'…"

[21] Student 1 and her mother attended the meeting at 1:30 that afternoon. Ms. DeBon states that she extended her hand to greet the mother and explained she had not yet had an opportunity to discuss the assignment with Student 1. Ms. DeBon tells of how the mother immediately charged towards her, coming within inches of her face. Ms. DeBon describes in her evidence that the mother of Student 1 yelled at her, behaving in a threatening manner as she accused her of mistreating and attacking Student 1 in class.

[22] Ms. DeBon relates in her affidavit how she expressed to the mother that her behavior was inappropriate, especially in front of Student 1. She suggested to the mother that she speak with Ms. Diefenbaker. She then told Student 1's

mother that she was still willing to discuss the assignment with Student 1, who replied “like that is going to happen.” According to Ms. DeBon’s evidence, Student 1 and her mother then stormed out of the classroom.

[23] The exit by Student 1 and her mother was witnessed by another teacher, Misty Ingraham, who confirmed what she had seen in a memorandum.

[24] Mr. Neibert is the senior school principal at HSC. Ms. DeBon informed Mr. Neibert the next day about the confrontation that had taken place with the mother of Student 1. On October 28, Mr. Neibert told Ms. DeBon that he would arrange a time for herself and the parents of Student 1 to meet with him.

[25] Despite this arrangement, Mr. Neibert met with the parents of Student 1 on October 30, 2013 without inviting Ms. DeBon. She believes the assignment of Student 1 that had caused the emotional response from Student 1 and her mother in the first place was not even discussed at that meeting.

[26] On October 31, 2013, Mr. Neibert sent an email to Student 1 with a copy to her parents, to Ms. DeBon and to three other staff members. In this email, Mr. Neibert sets out his decision to have two pieces of Student 1’s work from the two classes she is taking from Ms. DeBon marked by Ms. Webber to diffuse allegations made by the parents of Student 1 that Ms. DeBon had a bias against her. There was no reprimand given in this email, and no requirement for Student

1 or her parents to apologize to Ms. DeBon or to otherwise acknowledge their behavior had been unacceptable.

[27] Ms. DeBon met with Ms. Webber on November 1, 2013 to express her concerns about this email and Mr. Neibert's solution. She refrained from contacting Mr. Neibert as his son was undergoing surgery that day.

[28] Ms. Webber re-marked Student 1's assignment and arrived at the same conclusion reached by Ms. DeBon as to the mark Student 1 deserved for the work.

[29] Ms. DeBon subsequently scheduled a meeting for November 6, 2013 to meet with Mr. Neibert. This meeting was short and perfunctory. Mr. Neibert would not look at Student 1's assignment, preferring his co-marking solution. He stood by his decision that the next assignment Student 1 handed in for English should be marked by Ms. DeBon and Ms. Webber to prove there was no bias in Ms. DeBon's marking. He said that this was "a perfectly good solution and he would do it again." He then exclaimed he had more conflict with Ms. DeBon involving students and parents than he had encountered with any other teacher in his career. Ms. DeBon refuted this statement and expressed her views on the importance of giving honest grades before Mr. Neibert left the meeting.

[30] A subsequent meeting was arranged for November 14, 2013 between Mr. Neibert, Ms. DeBon, and Eleanor Kerr, of the Human Resources department. At

that meeting, Mr. Neibert admitted there was no bias in the way Ms. DeBon had marked Student 1's assignment or the mark she had given. He also admitted that Ms. DeBon should have been included in the meeting with Student 1's parents on October 30. However, Mr. Neibert refused to acknowledge that Ms. DeBon's credibility with the parents of Student 1 had been undermined, and that her integrity had been put in question by having a second teacher re-mark the assignment to prove she had marked it fairly to begin with.

[31] Ms. DeBon handed back a subsequent assignment in the Writer's Craft class to Student 1 with a mark of 74% where the class average was 90%. Student 1's father emailed Ms. DeBon later that day to request a meeting.

[32] Ms. DeBon informed HSC about this request, not having an interest in a repetition of the event on October 24 concerning the mark for the first assignment. She therefore advised the school she would defer the request for a parent-teacher meeting to the Department Head, or to the principal, stating she would be prepared to meet with Student 1 directly.

[33] On December 9, 2013, Mr. Neibert sent an email to Ms. DeBon in which he suggested that he not be used as the communication hub between Ms. DeBon and her students any longer. He asked that she take over all communications with Student 1 and her family.

[34] Ms. DeBon states that she felt bullied and under-valued after receiving this message. She perceived any further discussions with Mr. Neibert would be disciplinary in nature. She felt threatened, and believed her employment was in jeopardy.

[35] Ms. DeBon put off requests from Ms. Kerr to attend further meetings before the Christmas holiday to discuss how to resolve the marking issue, and the tensions that had built up since September. She had lost confidence in the school's ability or willingness to handle the situation properly or fairly. She states that she did not feel physically, emotionally or mentally capable of attending further meetings.

[36] Rather than meeting with senior staff, Ms. DeBon instructed counsel during the holiday season to send a letter to HSC claiming she had been constructively dismissed.

[37] Ms. DeBon considers the marking issue with Student 1 as evidence that HSC catered to the wishes of the Student 1 and her parents. She submits that how HSC handled the issue with Student 1 and her parents is further evidence of an institutional compromise of standards at HSC when it comes to giving marks to students. She refers to at least two other examples:

(a) Student 2 in Ms. DeBon's grade 11 English class suffered a concussion near the end of the first semester in later 2011. This student did not submit any work from January to June, 2012, completing less than one

third of the course work, and did not complete the final examination. Although Ms. DeBon was reluctant to grant Student 2 a credit for this course, Mr. Neibert assigned her a mark of 82% and put Ms. DeBon's name, not his own, beside the mark.

(b) Student 3 was in Ms. DeBon's Writer's Craft course during the 2012/2013 school year, and was also on the list for intervention. Although Student 3 only completed 40% of the course work, HSC increased his mark from 33% to 50% without Ms. DeBon's consent.

[38] Ms. DeBon refers to an instance involving a student identified in her factum as Student 4. The instance involving Student 4 was not pursued in argument. I do not intend to mention Student 4 further, or to rely on any evidence given by Ms. DeBon about Student 4 in these reasons.

[39] Ms. DeBon contests Mr. Neibert's evidence that a principal of a private school in Ontario has the final say in what mark a student receives for a course, in the event the principal disagrees with the mark the teacher is recommending.

[40] At the time of her resignation, Ms. DeBon's compensation from her employment at HSC consisted of:

1. Annual base salary of $48,380;

2. Medical, dental and disability benefit coverage; and

3. Contributions to the employer-sponsored pension.

ISSUES

[41] HSC brings this motion for summary judgment to dismiss Ms. DeBon's action for damages based on her claim that she was constructively dismissed.

[42] In the course of deciding the motion, I must consider whether I can find the necessary facts on the evidence to which I am to apply the relevant legal principles in order to decide if there is a genuine issue requiring a trial. If the evidence allows me to find the necessary facts to resolve the case, proceeding to trial will likely not be proportionate, timely, or cost effective to either party, and the summary judgment procedure will be a fair process to decide whether the claims made in the action have merit.

[43] The legal principles relevant to the evidence on this motion are those that relate to the law of constructive dismissal in the employment law context. In *Potter v. New Brunswick Legal Aid Services*, [2015] 1 S.C.R. 500, Justice Wagner (now, the Chief Justice) wrote the majority judgment that redefined the law of constructive dismissal. Justice Wagner explained that the test for constructive dismissal is made up of two parts. The court must first determine whether the employer's conduct, by a singular act or generally through a series of events, demonstrates the employer's intention to no longer be bound by the employment contract.

[44] In Ms. DeBon's case, this would be an implied contract of indefinite duration. At this stage of the analysis, the court must determine if there is

evidence that proves the breach of an implied term of the contractual relationship, and that the kind of the breach evinces an intention on the part of HSC that it is no longer bound to the employment contract as her employer.

[45] If a breach evincing an intention of that nature is established, the court is to proceed to the second part of the inquiry. At that stage, the court must determine on the evidence whether the breach is sufficiently serious that the employee has been constructively dismissed. In this part of the test, seriousness is measured by degree.

[46] In each part of the *Potter* analysis, the test is objective, to be viewed by how a reasonable person in the same circumstances as the employee would act.

[47] The *Potter* case introduces the concept of substantial breach to this area of the law. This concept is distinct from the fundamental breach of an essential term to the employment contract that was central to the test set out in *Farber v. Royal Trust Co*., [1997] 1 S.C.R. 846. In *Farber,* fundamental breach was discussed in these terms:

> 33. In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. The leading case on this question is an English decision, In re Rubel Bronze and Metal Co. and Vos, [1918] 1 K.B. 315, in which the following was stated at pp. 321-22:
>
> > But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of

> master and servant. . . . It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract". . . . The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. . . . But . . . a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain. . . .
>
> Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice.

[48] Justice Wagner is careful in *Potter* to explain that the new test is not a departure from the approach taken by the court in *Farber*. The emphasis in *Farber* was placed on the second part of the test. The key issue in *Farber* was the evidentiary basis on which to assess whether the perceived magnitude of the breach amounted to the repudiation of the employment contract by the employer.

[49] In *Shah v. Xerox Canada Ltd.,* 2000 CanLII 2317, the Court of Appeal held that an employment relationship can be deemed to have been repudiated if and when the employer creates a poisonous work environment that makes continued employment at that workplace intolerable. Even then, the test for the court to apply is objective in nature. Serious, wrongful behavior by an employer must be demonstrated on the evidence for the court to find a workplace has become

poisoned for the purpose of a constructive dismissal claim: *General Motors v. Johnson*, 2013 ONCA 502.

[50] The court in *Potter* recognizes that a single, unilateral act of an employer can give rise to a breach of an essential contractual term. However, except in the case of a particularly egregious act, a poisoned workplace is not created, as a matter of law, unless the wrongful behavior that is sufficient to create a hostile or intolerable work environment is persistent or repeated.

[51] Ms. DeBon brings her claim for constructive dismissal on five grounds:

1. HSC did not protect her from a confrontation with the parent of a Student 1 about the mark she had given to Student 1 on an English assignment, and HSC took steps that excluded her from the process of reviewing that mark;

2. HSC granted an arbitrary mark for the year ending June 2012 to Student 2 in Ms. DeBon's class, without her agreement;

3. HSC increased the grade for the year ending in June 2013 to Student 3 in Ms. DeBon's class, without her permission;

4. HSC attempted to change Ms. DeBon's teaching assignments, and failed to accommodate her after she returned to teaching after taking maternity leave in 2010; and

5. HSC allegedly tampered with Ms. DeBon's personal property locked in a filing cabinet while she was on maternity leave in 2010.

[52] Each of the claims are defended and put at issue in HSC's statement of defence. HSC now brings this motion for summary judgment on the claims made by Ms. DeBon, and asks the court to dismiss the action.

ANALYSIS

[53] The Supreme Court of Canada in *Hryniuk v. Mauldin*, 2014 SCC 7 has directed that summary judgment shall be granted where no genuine issue requiring a conventional trial is found on the motion. The same mandatory language appears in Rule 20.04.

[54] Ms. DeBon argues that a conventional trial is required because the facts of the case involve issues of credibility, particularly around the events concerning Student 1. She submits that issues of credibility raise a genuine issue requiring a trial, and that better evidence will be available at that time. She also submits that a trial is the appropriate forum because of the public interest in the division of responsibility between a teacher and a principal for marking students in the Ontario school system.

[55] HSC argues that the summary judgment procedure is a fair process for adjudicating the issues in this case. It submits that the evidence is sufficient to

allow the court to make the necessary findings of fact on which to apply the law in order to decide the matters in dispute on their merits.

[56] It is incumbent on each party to put their best foot forward on a motion for summary judgment. The court is entitled to presume that the parties have put all evidence into the record that would be available at trial. Ms. DeBon's argument that there will be better evidence for trial, or that the issues relating to marking at HSC require a trial to fully appreciate the facts, are answered by these evidentiary requirements.

[57] I propose to take a disciplined approach in the course of reviewing the claims made by Ms. DeBon to determine if the evidence given in respect of one or more of them raises a genuine issue that will require a trial to determine.

Singular grounds

1. <u>October, 2013 – Student 1</u>

[58] Ms. DeBon argues that HSC had the responsibility to ensure no parent of a student harassed her or threatened her physical safety, contrary to the School Policies on Harassment and Violence.

[59] The Policy on Harassment and Violence is in evidence as Exhibit "C" to Ms. DeBon's affidavit. The policy is directed by its language to the workplace/educational environment. It provides, among other things, for the

reporting of any instance of harassment by parents who use intimidating or aggressive behaviour, or engage bullying tactics.

[60] The HSC policy provides the definition for “harassment” and identifies it as a health and safety issue under the *Occupational Health and Safety Act*. The policy also sets out the procedure for an effected person to follow for making a complaint in order for the school to conduct an investigation.

[61] Ms. DeBon made it known to HSC that she was apprehensive about meeting with Student 1’s mother. However, she made no request of the school to contact the parent, or to provide security. Ms. DeBon herself took no steps to cancel the meeting. Instead, she sent a message to the mother by emailing Student 1 with a request that she pass the message along.

[62] It is conceded by Ms. DeBon that no policy is in place at HSC to prevent potential harassment or violence by a student’s parent against a teacher. In the absence of a specific school policy, it is reasonable for a teacher to rely upon the laws of the land and their deterrent effect to police any threat to her or his safety or well-being.

[63] There is also no policy at HSC for a teacher to meet alone with a student before another meeting is scheduled with parental involvement. Ms. DeBon refers to a letter proposing this protocol that she sent to each of her students at the start of the school year. There is evidence that Ms. DeBon asked Mr. Neibert

in 2008 to approve an earlier iteration of this letter. However, this was a personal policy Ms. DeBon implemented for her own students. There is no evidence that the process set out in this letter was ever adopted by HSC as school policy or any other kind of guidance for interaction between teachers, students and parents.

[64] The confrontation between Ms. DeBon and Student 1's mother was undoubtedly upsetting to all concerned. If it occurred as it is described by Ms. DeBon, the mother's conduct towards Ms. DeBon was totally unacceptable. It certainly provided a poor example of adult behavior to Student 1.

[65] Ms. DeBon did not file an official report to the school under the Policy on Harassment and Violence about it, or ask the school to conduct an investigation. Instead, she holds HSC accountable for not taking measures to prevent the mother from attending the meeting in the first place, or including her in any meeting with the parents about what occurred on October 24.

[66] In the absence of evidence what school policy about teacher and parent meetings was in effect during Ms. DeBon's employment, I have little, if any evidence to conclude that a term of her employment was altered, changed or ignored by HSC for failing to patrol Ms. DeBon's interaction with Student 1 and her mother on October 24, 2013.

[67] Ms. DeBon was clearly upset by the solution Mr. Neibert employed to address the allegation of bias made by Student 1 and her mother against her. However, I heard no evidence of a formal policy at HSC that Mr. Neibert altered, changed or ignored when he omitted to include her in the meeting with Student 1 and her parents on October 30.

[68] I also have no evidence that Mr. Neibert's solution to have Ms. Webber re-mark Student 1's work somehow breached the terms of Ms. DeBon's employment in a substantial way.

[69] It should be apparent to an outside observer that it would not have been productive at the time for Ms. DeBon and the parents of Student 1 to meet soon after the confrontation to address their differences. The resentment of the parents about the mark Ms. DeBon had given to Student 1 the year before, coupled with the event on October 24, makes it difficult to conclude otherwise.

[70] Mr. Neibert explains in his affidavit that he did not include Ms. DeBon in the meeting as he had little time to organize it. The meeting was admittedly arranged in haste because his own son was in hospital awaiting surgery, and Mr. Neibert was anxious to be at his side.

[71] The fact that Ms. Webber confirmed the mark Ms. DeBon had given to Student 1 on the assignment should be taken by Ms. DeBon as complete vindication of any attack on the impartiality of her marking. I find as a fact that

this arrangement was not intended to undermine her credibility, or to impugn her professional integrity in any way. There is also no evidence that this re-marking was the result of pressure to inflate Student 1's grade as Ms. Webber arrived at the same conclusion.

[72] Ms. DeBon agreed to the co-marking solution in any event, even though she did so grudgingly. In *Potter*, Justice Wagner explains that if the employee consents to, or acquiesces in a change to a term of the employment contract, the act of the employer is not unilateral and will not constitute a breach. Justice Wagner further added that the change must be detrimental to the employee to qualify as a breach.

[73] Ms. DeBon submits that the evidence shows HSC disregarded her role as the teacher at the meetings that followed these events. Mr. Neibert did not provide her with a fair opportunity to address what had happened and why when he met with her on November 6 and November 14.

[74] Ms. Kerr contacted Ms. DeBon on December 5, 2013 to set up a meeting with Student 1's parents. Ms. DeBon declined this invitation, deferring it to a time in the new year when she would feel better able to address the situation. It was a meeting that would never take place as Ms. DeBon retained counsel over the Christmas break.

[75] Reference was made to the Code of Conduct at HSC and how its provisions could be considered implied terms to the employment contract with Ms. DeBon. The Code of Conduct governs the standard of behavior expected from faculty, staff and volunteers at HSC. The objectives described in the Code of Conduct are reciprocal undertakings between staff, employees and volunteers alike. The obligations undertaken by all involved individuals are mutual. This is made abundantly clear by the use of the word “collectively” in front of the list of objectives that staff, employees and volunteers must strive to meet.

[76] Mr. Neibert could have provided greater communication with Ms. DeBon. He could have fostered a collaborative approach that better recognized her professional integrity when arranging a meeting with parents, or developing the strategy to co-mark Student 1’s assignments. The greater problem arose when Student 1 and her parents expected that subsequent assignments turned in by Student 1 would be co-marked. Ms. DeBon submits that this placed her in the subservient position, with the student and the parents calling the shots and HSC condoning the new hierarchy.

[77] It is regrettable that Ms. DeBon encountered the unpleasantness of a difficult student, compounded by the interference from her parents. Her impression of an unfriendly workplace was no doubt reinforced by the decisions Mr. Neibert made, and by his answers to address the issues. However, there

are no express or implied term of her employment as a teacher at HSC was altered, changed or ignored by HSC by the event in the fall of 2013 to meet the first part of the test in *Potter.*

[78] I find as a fact that Mr. Neibert had grown impatient of dealing with Ms. DeBon's conflict with marking Student 1's work and the repercussions that would come from her parents, and that Ms. DeBon had lost respect for Mr. Neibert as the senior school principal. These feelings were mutual, but irreconcilable.

[79] It was the parents of Student 1 who insisted that later assignments their daughter turned in for marking by Ms. DeBon should be marked again for assurance purposes by another teacher. This was a requirement beyond the solution fashioned by Mr. Neibert in his meeting with them on October 30. The continuation of having her marking reviewed did not come from within the school. It came from the parents as external forces that threatened Ms. DeBon's professional integrity. HSC cannot be held responsible for the conduct of those parents.

[80] I conclude that a reasonable person with a dispassionate perspective would not view the teaching environment at HSC to be untenable for Ms. DeBon to continue teaching there on these facts. There is no evidence before this court that the workplace was made poisonous for Ms. DeBon by HSC's conduct. The

requirements of the test for constructive dismissal under *Farber*, or the second stage of the *Potter* analysis, cannot be found on the record.

[81] There were other options available to Ms. DeBon short of resigning. These options include seeking a teaching position at another school in the private or the public school system. If advised by her doctor, taking a leave of absence was another option.

[82] The argument advanced on behalf of Ms. DeBon that a trial is necessary so that experts can testify is not an argument I can accept. Not only is the prospect of expert evidence not a ground to support the argument that there is a genuine issue requiring a trial, Ms. DeBon filed no expert evidence of any sort on the motion. Each party to an action must put all evidence forward to make their best case on a motion for summary judgment. This requirement applies equally to the moving party and to the party responding to the motion. See *Mazza v. Ornge Corporate Services Inc*., 2016 ONCA 753 and *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, affirmed at 2014 ONCA 878.

[83] In *Sanzone v. Schecter*, Justice D.M. Brown explains that the evidentiary burden shifts to the responding party, in that case as well as the case before me, if and when the moving defendant has satisfied the court there is no genuine issue requiring a trial with respect to a claim or defence. In *Sanzone*, Justice Brown also explains that the summary judgment motion is the time to introduce

any evidence from an expert to meet that evidentiary burden, and the proper manner to put that expert evidence before the court.

[84] Ms. DeBon relies on the decision of the Court of Appeal in *Bahlieda v. Santa*, 2003 Canlii 2883 to argue that actions requiring expert evidence, particularly those having broad policy implications, are not appropriate for summary judgment. In *Bahlieda*, the motions judge had granted partial summary judgment in an action for defamation on the basis of conflicting expert opinions on a number of issues, among them, whether the word “dissemination” can properly apply to information distributed over the Internet, and whether Internet publication is immediate or transient in nature. The court in *Bahlieha* was faced with an appeal concerning emerging principles, on which expert evidence had been given by both sides.

[85] That is not the case before me here. Neither party has filed any evidence from an expert on this motion. Ms. DeBon, as the responding party, has made the prospect of expert evidence at trial an issue. It was up to her to have that expert evidence before the court to show there is a genuine issue requiring a trial relating to the duties and responsibilities of principals and teachers with respect to marking, and the broader implications of those duties and responsibilities in education.

[86] Since Ms. DeBon introduced no evidence from an expert, HSC was not required to provide an expert evidence to meet or refute it. Since there is no evidence either way from an expert or a basis to conclude expert evidence would assist the trier of fact, I conclude that the appeal decision in *Bahlieda* does not apply here.

[87] I would also note that Ms. DeBon's evidence does not raise or define any issue on which her claim depends as one requiring expert evidence under *White Burgess Langille Inman v. Abbott and Haliburton Co*., [2015] 2 SCR 182, and *R. v. Mohan*, 1994 Canlii 80 (SCC). Consequently, there is no evidence before the court that expert evidence will be required to resolve the issues in dispute on this motion, or at trial.

2. Mark increased for Student 2

[88] Student 2 completed less than a third of the course work and did not write the final examination. Mr. Neibert assigned her a mark of 82%. This mark was given despite Ms. DeBon's statement that she was reluctant to give Student 2 a credit for the course, or at least a mark above 75%.

[89] Even though Ms. DeBon opposed Mr. Neibert's exercise of authority as the principal to give this mark, Ms. DeBon cannot provide any term of employment that she considers HSC to have breached.

[90] Ms. DeBon did not provide, or may not have known about the small percentage of grade adjustments made by HSC each year, and the policy reasons for making those adjustments. Mr. Neibert provided the following evidence in his affidavit sworn in reply to Ms. DeBon's assertion that a culture aimed at inflating student marks exists at HSC:

> 41. The College had approximately 470 students that particular June, each carrying an average of 8 courses during the year, each having 100 potential marks. The total marks that could have been awarded were 376,000 and only 38 adjustments were made over the 3760 courses taken that year, representing approximately 0.0001% of the total awardable marks. All adjustments were carefully reviewed and within reason.
>
> 42. (Ms.) Diefenbacher would discuss with me and the teacher who assigned the mark as to whether or not there was any room for adjustment. The maximum marks assigned to any particular student could only change their average by 0.5%.
>
> 43. This does not illustrate a school culture aimed at inflating marks, rather, it is reflective of a practice that exists in education across the province placing the emphasis on students and their achievements. It is imperative that a holistic, reflective and differentiated review of student grades occur in education. This is why the Ontario Ministry of Education in *Growing Success, 2010* (that) directs educators to follow a much more individualized and students enter approach to learning.
>
> 44. In response to paragraph 81, *Growing Success, 2010* mandates that the "primary purpose of assessment and evaluation for students with special educational needs, as for all students, is to improve student learning. Modification made to the grade level expectations for a subject or course in order to meet a student's needs are supported."

[91] Mr. Neibert's adjustment of Student 2's mark did not breach any express or implied term of Ms. DeBon's employment. If Mr. Neibert adjusted a mark to meet a student's needs or circumstances, it was his prerogative to do so as the

principal. In that regard, the Policy and Procedures Manual for Private Schools published by the Ministry of Education Field Services Branch in September 2013 provides permissive powers to the role of a principal at a private school over student marks.

3. Mark assigned to Student 3

[92] Student 3 was in the Writer's Craft course that Ms. DeBon taught during the 2012/2013 school year.

[93] Student 3 was also on the intervention list. Although Student 3 completed only 40% of the course work and did not sit the final examination, HSC increased Student 3's mark from 33% to 50% without Ms. DeBon's permission.

[94] I do not consider that giving an improved mark to Student 3 amounted to a breach of the employment contract. For the same reasons that apply to Student 2, I conclude that increasing the mark that Student 3 was given in the Writer's Craft course did not breach an express or implied term of the employment contract between Ms. DeBon and the school.

4. Employer's failure to accommodate

[95] Ms. DeBon makes the argument that HSC failed to accommodate her when she was off work on maternity leave to have a child in 2010. She bases this claim on two grounds:

1. Mr. Neibert proposed that she teach a history course upon her return in January 2011; and
2. HSC could not arrange medical benefits coverage for her because she would only be working a 4/6 week.

[96] I do not give either of these grounds any weight. First, Mr. Neibert withdrew the proposal that Ms. DeBon teach history upon being advised by Ms. DeBon that she had been hired to teach only English. Withdrawing the proposal shows that HSC was respectful and responsive to the views of Ms. DeBon, and recognized the terms of her employment.

[97] Second, HSC could only offer the medical benefits coverage that its insurer would provide under the group policy. The evidence is unclear whether that coverage was ultimately extended during Ms. DeBon's return to teaching part-time, or whether Ms. DeBon made any claim that would or should have been covered by the group policy.

[98] Ms. DeBon only raised this issue as an alleged breach of the terms of her employment when she brought this action. There was no evidence that medical coverage for a teacher returning to teach at HSC on a part-time basis could have been provided coverage under the group policy. Furthermore, no evidence was filed on the motion that Ms. DeBon suffered a loss at the time if it was not.

[99] In *Lancia v. Park Dentistry,* 2018 CarswellOnt 1791*,* Justice A.J. Goodman explained that there must be a causal link between the reason given for the an employee's resignation and the actual term of the employment contract the employer allegedly breached. The focus of the court is trained on the question of whether there is evidence that the conduct of the employer represented a manifestation of its intention to no longer be bound by the employment contract.

[100] I agree. Causation is an important element as it provides the evidentiary link between the cause and effect of conduct alleged against an employer central to the *Potter* analysis.

[101] I find as a fact that the evidence Ms. DeBon relies upon does not establish the causal link between the allegations that HSC failed to accommodate her transition back to teaching in 2010, and the real reason she resigned. These allegations are unrelated to the marking issue and the meetings with Mr. Neibert in November 2013 that she has made the predominant reasons for her resignation. In view of this finding, issues that Ms. DeBon may have had with HSC do not qualify as a possible ground for claiming constructive dismissal in 2013.

[102] There is a certain irony to Ms. DeBon's claim that HSC failed to accommodate her. In an email exchange with Ms. Kerr dated December 11, 2013 that is attached as Exhibit Z to her own affidavit sworn on September 12,

2016, Ms. DeBon acknowledges that HSC had agreed to her request to a 3/6 position for the coming year, which I take to mean the 2013/2014 school year. Ms. DeBon wrote in an email that “I am thrilled, of course…”, and went on to express her gratitude to Ms. Kerr.

[103] Ms. Kerr also advised Ms. DeBon that her contract would be revised for the 2013/2014 year to include benefits (subject to carrier approval), and to contain a statement about “returning to full time status next year.” It therefore appears that, at the time of her resignation, Ms. DeBon was, or would have been working in a 3/6 position at HSC, with what benefits the insurer of the benefit plan would provide. This is evidence, in my view, of anything but a failure to accommodate.

5. Tampering with personal property

[104] Ms. DeBon has brought her claim that she was constructively dismissed from HSC on the ground that the school took a padlock off a storage locker in her classroom while she was on maternity leave, and removed her personal property from that locker to another cabinet.

[105] There is also evidence that the materials removed from the locker consisted of reference books belonging to the school, and one or two items of a personal nature.

[106] Ms. DeBon has not established that she was storing reference materials and personal items in a locked cabinet in a classroom as a term of her employment contract with HSC. The storage locker was HSC property in an HSC classroom. Ms. DeBon had been asked to clean it out. She has not put sufficient evidence before the court on this motion that the removal and relocation of those items amounted to a breach of her employment contract.

[107] This complaint was not made to the school to inquire about or to investigate in 2010 or 2011. It found its voice as a ground for constructive dismissal with the commencement of this action. There is no causal connection between this reason and Ms. DeBon's resignation to constitute a ground for claiming she was constructively dismissed in 2013.

Cumulative effect of HSC conduct

[108] The cumulative effect of the several grounds on which Ms. DeBon brings her claim does not, by objective standards, meet the second part of the test in *Potter.* Ms. DeBon has clearly brought her claim because of the sequence of events relating to the communication breakdown with Student 1 and her parents, and how Mr. Neibert managed the conflict.

[109] Ms. DeBon did not make an issue of the marks Mr. Neibert gave to Student 2 or Student 3 as a ground for constructive dismissal prior to October 24, 2013. Those instances have been introduced in evidence to provide context, if

not corroboration to the sequence of events involving Student 1. These circumstances do not, in my view, add to or take away from evidence before the court on the conduct of HSC, or how Ms. DeBon responded to it.

[110] Ms. DeBon refers to the provisions of the *Education Act* that confer supervisory power on a principal, and identifies the teacher as the person who should make any decision about marks a student is given. However, this action is not an indictment on the marking practices at HSC, or an inquiry into the authority of a principal to assign or adjust a mark with, or without, consulting the teacher. The action is a claim for damages in which Ms. DeBon is seeking a finding of liability against HSC for constructively dismissing her, and an award of money representing the compensation in lieu of the notice she is entitled to receive, subject to her duty at law to mitigate.

[111] Ms. DeBon set this action down for trial on March 16, 2016. She has never brought it forward to obtain a trial date. By setting it down for trial, she signalled that she was ready for trial and had all evidence available to prove her case. This fact goes a long way to answer any argument that Ms. DeBon may have better evidence at a trial.

[112] I am confident that the evidentiary record on this motion contains all of the evidence necessary to make the findings of fact on which to apply the law in

order to determine the issues on the merits. HSC has met its evidentiary burden to satisfy the court that the facts do not raise a genuine issue requiring a trial.

[113] The evidentiary burden shifted to Ms. DeBon as the responding party to show on the evidence there is a genuine issue requiring a trial, and that her claim has a real chance of success. Ms. DeBon has not discharged that evidentiary burden. I find on the facts relating to each ground on which Ms. DeBon bases her claim that she was not constructively dismissed, and that she resigned voluntarily on December 27, 2013.

CONCLUSION

[114] The motion for summary judgment brought by HSC is therefore granted, and Ms. DeBon's action is dismissed.

[115] I strongly recommend that the parties speak with each other through counsel to resolve the issue of any claim for costs of the action and this motion. In the event they cannot, HSC may file its written submissions by October 12, 2018. Ms. DeBon shall then have until October 26, 2018 to file responding submissions. All submissions must be limited to three typewritten, double spaced pages, not including any bill of costs or offer to settle. No reply submissions shall be permitted, without leave.

[116] Written submissions may be filed by sending them by fax to (905) 456-4834, or by email to my judicial assistant, Ms. Melanie Powers at melanie.powers@ontario .ca in Brampton.

EMERY J.

Released: September 28, 2018

CITATION: DeBon v. Hillfield Strathallan College, 2018 ONSC 5590
COURT FILE NO.: CV-14-2724
DATE: 2018 09 09 28

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KIMBERLY DEBON

Plaintiff

- and -

HILLIFIELD STRATHALLAN COLLEGE

Defendant

REASONS FOR JUDGMENT

EMERY, J.

Released: September 28, 2018