

CITATION: McKee v. Reid's Heritage Homes Ltd., 2009 ONCA 916
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COURT OF APPEAL FOR ONTARIO

MacPherson, Simmons and LaForme JJ.A.

BETWEEN:

Elizabeth McKee and Bribet Holdings Inc.

Plaintiffs (Respondents)

and

Reid's Heritage Homes Ltd.

Defendant (Appellant)

R. Ross Wells, for the appellant

Kirk F. Stevens, for the respondents

Heard: November 25, 2009

On appeal from the judgment of Justice John R. Belleghem of the Superior Court of Justice dated November 19, 2008.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant, Reid's Heritage Homes Ltd. ("RHH"), appeals the judgment of Belleghem J. dated November 19, 2008, in which he decided that the respondent Elizabeth McKee ("McKee") had been an employee of RHH and awarded her damages in lieu of 18 months notice.

[2] RHH appeals on the grounds that the trial judge erred in finding that the parties' written contract had expired, that McKee was an employee, that 18 months was reasonable, and that McKee was not obliged to mitigate her damages by accepting an offer to continue her relationship for a period of time.

[3] The principal issue on the appeal is whether McKee was an employee of RHH or a dependent contractor.

B. FACTS

(1) The parties and events

1987 Agreement

[4] On January 8, 1987, Orin Reid, the owner and directing mind of RHH, and McKee both signed an agreement that Reid wrote by hand entitled "Sales + Advertising Agreement". McKee signed it on behalf of her business style, Nu Home Consultant Services ("Nu Home").

[5] The Agreement provided that RHH supply approximately 69 homes in Guelph for McKee to advertise and sell, for which McKee would charge a fee of \$2,500 for each home that she sold.

[6] The Agreement included something of an exclusivity clause, providing that “RHH will have sole use of [Nu Home] services unless RHH agrees to allow [Nu Home] the right to sell for another company that is controlled by Orin Reid” and it then listed two other companies under Orin Reid’s control, but also added “or a company that could be formed in the future.”

[7] Finally, McKee requested, and the Agreement included, a termination provision: “Either party can terminate this agreement for any reason with giving the other party 30 days notice.”

Work under the Agreement and Thereafter

[8] There is no precise, explicit evidence on how quickly McKee sold the 69 homes, but it was probably very quickly in 1987 because her reported income for 1987 was \$449,300, whereas the 69 homes at \$2,500 per home would have provided only \$172,500. After the first 69, RHH continued to provide homes for McKee to sell, but RHH hired someone else to handle the advertising aspect and paid McKee \$1,500 per home sold instead.

[9] Around the same time, RHH also began supplying the necessary stationery and forms for selling homes to McKee and RHH gave her the title “Sales Manager”, though RHH paid her through her corporation, whose name changed to Bribet Holdings Inc. (“Bribet”) in 1988. McKee became very busy with work for RHH and over time she hired, trained, and managed her own subagents with whom she split her commissions on their sales, without intervention, direction, or interference from RHH. At all times, McKee both invoiced RHH and paid her subagents through Bribet. McKee testified that Reid “pretty well left me on my own to do what I was supposed to do.”

[10] The working relationship continued in this way. In 2000, Reid died and his son-in-law, Tim Blevins, succeeded him, but the relationship continued. However, in 2004, Blevins hired Doug Sider as Corporate Sales Manager and decided to restructure RHH’s entire sales force – which at that time consisted of a number of different contracted real estate agents, dependent contractors, and in-house employees – so that each commissioned agent would report directly to Sider.

End of the Relationship

[11] Blevins told McKee on January 10, 2005, that she and her subagents would have to work for RHH as “direct employees”. As part of their discussions in January toward negotiating for McKee to adjust to RHH’s new structure, McKee and Blevins discussed a 100-lot assurance to McKee for the following two years. McKee, who was 64 years old,

decided that she would agree on these terms. Blevins referred McKee to Sider to work out the details, as McKee wanted to put the agreement in writing.

[12] McKee met with Sider on February 4, 2005 to finalize a contract, but Sider repudiated McKee's and Blevins' understanding, refusing to agree to the 100 lots per year guarantee (having never spoken with Blevins about it). Blevins wrote a letter to McKee on February 11, offering only a standard form employee contract with a 14-day notice period and "first pick" of one phase of any project in Guelph. In this same letter, Blevins opined that McKee's subagents performed badly and this might have something to do with "how much [McKee was] taking off the top of every deal." McKee rejected this offer. She also rejected Blevins' March 3 offer of a six-month engagement whereby she could sell in her choice of one of two subdivisions.

[13] McKee testified that she rejected the time-limited offer because she felt that at her age she would do better to look for non-time-limited employment. Further, the "animosity" in the February 11 letter made her feel "uncomfortable". However, she also testified that she would have returned to work for RHH if they had officially offered the January plan guaranteeing 100 lots in writing. McKee tried and failed to get a real estate agent licence because she found studying difficult at her age. In 2006, she sold new homes for another builder, but earned only \$45,000.

[14] McKee sued RHH for wrongful dismissal.

(2) The trial judgment

[15] Following a four-day trial in Guelph, the trial judge released a 51-page judgment.

[16] The trial judge held that the original 1987 Agreement was “spent” after the sale of the initial 69 homes. It followed that the 30-day termination period in that agreement did not survive to govern the consequences of McKee’s termination 18 years later.

[17] However, although the Agreement was “spent”, the trial judge found that McKee and Reid had “through their continued practice and business relationship, implicitly agreed that she would continue to work for him, and he would continue to pay her for selling homes.” Although some terms changed from the 1987 Agreement, she was still paid a fixed commission for each home and “it was implicit in the fact that she never worked for anyone else ... that there must have been between them a tacit agreement that she would work exclusively for [RHH]” in a different manner to that contemplated by the Agreement but, again, with some continued practices.

[18] On the crucial issue of McKee’s status when she was terminated, the trial judge determined that McKee was an employee, not an independent contractor or even a dependent contractor. On this issue, he concluded: “Finally, the plaintiff’s activity in the present case is part of the business of the defendant. Selling the homes is the most integral part of the defendant’s business. It is the defendant’s business in which the plaintiff is engaged.”

[19] The trial judge then considered the question of notice. Applying the factors from *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), as recently confirmed in *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, he concluded that McKee's position, years of service and age, in light of the limited availability of comparable employment for someone of her experience, training and qualifications, warranted eighteen months severance in lieu of notice. The trial judge declined to award aggravated or punitive damages.

[20] Finally, the trial judge held that there was no duty on McKee to mitigate her damages by accepting an offer from RHH of continuing employment in a different position.

C. ISSUES

[21] The appellant raises four issues on the appeal:

- (1) Did the trial judge err by determining that McKee was an employee, not a dependent contractor?
- (2) If the answer to (1) is 'Yes', did the trial judge err by finding that the 1987 Agreement was "spent" and that the 30-day notice period in that Agreement was, therefore, inapplicable?
- (3) If the answer to (1) is 'Yes', did the trial judge err by ordering an 18-month notice period?

- (4) Did the trial judge err by holding that there was no duty on McKee to mitigate her damages by accepting RHH's offer of employment in a different position?

D. ANALYSIS

(1) Employee vs. dependent contractor

[22] RHH submits that the law provides for an intermediate position of “dependent contractor” between employee status and independent contractor status. I agree. The caselaw's evolution demonstrates the existence of an intermediate category, defined by economic dependency in the work relationship, requiring, *inter alia*, some reasonable notice for termination.

[23] RHH further submits that the trial judge erred in determining that McKee was an employee because a proper application of the law to this case necessitates a conclusion that McKee was a dependent contractor of the sort defined above. For the reasons that follow, I disagree. Although I conclude that a “dependent contractor” category exists, I nevertheless conclude that the existing principles defining the employee category remain intact. Employing these principles, the trial judge concluded that McKee is an employee, a decision for which he is owed substantial deference.

(a) Existence of an Intermediate Category

[24] In 1936, this court recognized the existence of an “intermediate” position “where the relationship of master and servant does not exist but where an agreement to terminate

the arrangement upon reasonable notice may be implied”: *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290, at p. 297. *Carter* emphasized the permanency of the working relationship between the parties as a determinant in delineating this intermediate category: see *Carter* at pp. 297-98.

[25] A number of courts in several Canadian jurisdictions have since found such intermediate workers in a number of reasonable notice cases, particularly where the worker is economically dependent on the defendant, generally due to complete exclusivity or a high-level of exclusivity in their work: see, e.g., *Marbry Distributors Ltd. v. Avreca International Inc.* (1999), 171 D.L.R. (4th) 436 (B.C.C.A.), at paras. 35-38, 46; *JKC Enterprises Ltd. v. Woolworth Canada Inc.* (1986), 300 A.R. 1 (Q.B.); *Erb v. Expert Delivery Ltd.* (1995), 167 N.B.R. (2d) 113 (Q.B.), at paras. 6-14.

[26] This court impliedly recognized the existence of an intermediate category for work relationships involving a distributorship agreement in *Paper Sales Corporation Ltd. v. Miller Bros. Co. (1962) Ltd.* (1975), 7 O.R. (2d) 460. There, the court upheld, orally, Stark J.’s decision below, which held that a non-employment relationship whereby the plaintiff was “the exclusive distributor of the defendant’s products in [two provinces]” was “closer to a contract of employment than to a commission agency” and thereby required reasonable notice for termination: *Paper Sales* at pp. 463-64.

[27] *Mancino v. Nelson Aggregate Co.*, [1994] O.J. No. 1559 (C.J. (Gen. Div.)), at paras. 9-13, applied the reasoning in *Paper Sales* to self-employed truckers, requiring

reasonable notice where the work relationship was permanent and exclusive in nature, such that the plaintiff was in a “position of economic dependence”. *Mancino* thereby exemplifies the applicability, in Ontario, of the intermediate category analysis beyond merely sales or distributorship relationships.

[28] Recently, this court again impliedly recognized the intermediate category where the case required the court to determine the status of a commissioned salesperson. In *Braiden v. La-Z-Boy Canada Ltd.* (2008), 294 D.L.R. (4th) 172, at para. 24, Gillese J.A. noted the trial judge’s suggestion that a “third category of relationship has emerged, between [the employer-employee and independent contractor relationship categories], in which reasonable notice of termination must also be given”, while upholding his conclusion that the plaintiff, Braiden, was nevertheless an employee.

[29] Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of “dependent contractor” in Ontario,¹ which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:

[A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the

¹ The *Labour Relations Act* defines “dependent contractor” for purposes of permitting such individuals to participate as “employees” in collective bargaining under the *Act*: *Labour Relations Act*, s. 9(5).

relationship of an employee than that of an independent contractor.

[30] I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as “dependent contractors” and they are owed reasonable notice upon termination.

(b) Distinguishing between Employees and Dependent Contractors

[31] RHH submits that exclusivity and economic dependence are hallmarks of the dependent contractor relationship, such that although they take a relationship out of the independent contractor category, they do not give rise to an employment relationship. Though I do not disagree with this characterization, it requires some refinement.

[32] Having concluded that there is an intermediate category between independent contractor and employee, namely “dependent contractor”, I also conclude that the legal principles applicable to distinguishing between employee and independent contractors apply equally to the distinction between employees and dependent contractors. In this way, the dependent contractor category arises as a “carve-out” from the non-employment category and does not affect the range of the employment category.

[33] In *Braiden*, at para. 35, Gillese J.A. employed the general principles for distinguishing between an employee and an independent contractor, as laid out by

Juriansz J.A. in *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.), at para. 11. Had Braiden been a contractor, he would have been a dependent contractor, as he worked exclusively for the defendant, La-Z-Boy: *Braiden* at para. 35. However, Gillese J.A. did not have to consider what sort of contractor Braiden might be, because she concluded that Braiden was in fact an employee: *Braiden* at para. 37.

[34] In this way, the proper initial step is to determine whether a worker is a contractor or an employee, for which the *Sagaz/Belton* analysis, described in the next section, controls. Under that analysis, the exclusivity of the worker is listed as a *factor* weighing in favour of the employee category (*Belton*'s first principle). The next step, required only if the first step results in a contractor conclusion, determines whether the contractor is independent or dependent, for which a worker's exclusivity is *determinative*, as it demonstrates economic dependence. Therefore, exclusivity might be a "hallmark" of the dependent contractor category vis-à-vis the broader category of contractors. However, it continues also as a factor in determining whether the worker is not a contractor at all, but rather an employee, in the first-step analysis.

[35] This process of analysis serves the policy purposes that underlie the jurisprudence. In summarizing the caselaw, Geoffrey England, Roderick Wood & Innis Christie, *Employment Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada) vol. 1, at s. 2.33, describes the frequently stated policy reasons for recognizing an intermediate category:

These decisions have frequently acknowledged the policy justification for using the “intermediate” status doctrine in order to extend the safeguards of the employment contract to self-employed workers who are subject to relatively high levels of subordination and/or economic dependency, but who, technically, do not qualify as “employees” *strict sensu*.

[36] Given this concern to safeguard workers who are formally “contractors” but who are in a position of economic vulnerability, it only makes sense to carve the dependent contractor category out of the broader existing contractor category and leave the range of the employee category intact. Therefore the appropriate analysis for distinguishing employees from “contractors” generally is the existing analysis for distinguishing employees from independent contractors.

(c) Deference to the Trial Judge

[37] The legal principles to be applied in labelling the status of a work relationship admit of broad discretion to the trier of fact. As the Supreme Court of Canada has recognized, “there is no one conclusive test which can be universally applied”: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at para. 46. Instead, Major J. stated, at para. 45, that “what must always occur is a search for the total relationship of the parties.” He then approvingly quoted MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, at p. 563:

The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned.... [N]o magic formula can be propounded for

determining which factors should, in any given case, be treated as the determining ones.

[38] In my opinion, this language endorses a case-specific, discretionary analysis. Such analyses are best left to the trier of fact, who is closest to the facts of the case and has the best handle on the true nature of the work relationship. More specifically, the trier of fact is best equipped to settle the “central question” based on the balance of factors put forth in *Sagaz* at para. 47:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[39] In *Belton*, Juriansz J.A., writing on behalf of the court, upheld the use of the following five principles, modelled on the *Sagaz* factors, at paras. 11, 15:

1. Whether or not the agent was limited exclusively to the service of the principal;
2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;

3. Whether or not the agent has an investment or interest in what are characterized as the “tools” relating to his service;
4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;
5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

[40] In the present case, the trial judge reviewed the *Sagaz* balancing inquiry.

Although he did not explicitly reference the five *Belton* principles, his description of the “established practice” between McKee and RHH was clearly patterned on them:

[Principle 1:] [T]here was a tacit agreement, carried out in practice for almost twenty years, that the plaintiff would sell “exclusively” for the defendant. [Principle 2:] The defendant assigned particular subdivisions to the plaintiff, built model homes and told her which lots she could sell. The defendant told her [when she] could sell, and maintained control over how the lots were sold. The defendant set the prices and conditions of sale, and retained the right to set the hours that the model homes were open.... [Principle 3:] [T]he principle tool was the model home – provided by [RHH]. [Principle 4:] The plaintiff here had no risk in the business and was paid on a strictly commission basis. [Principle 5:] Finally, the plaintiff’s activity in the present case is part of the business of the defendant. Selling the homes is the most integral part of the defendant’s business. It is the defendant’s business in which the plaintiff is engaged.

[41] Based on this review of the practice, the trial judge held: “I am satisfied that the plaintiff was an ‘employee’ of the defendant when she was terminated in 2005.” The appellant does not challenge the trial judge’s summary of these facts.

[42] Instead, the appellant submits that the trial judge’s error in determining that McKee was an employee was based, in part, on a palpable and overriding factual error in finding that McKee had “a limited freedom to recruit others also to work exclusively for [RHH], but only to the extent that they worked under her and discharged her own sales responsibilities.” For RHH, this limitation actually underscores that she was a dependent contractor, so the trial judge misapprehended the evidence. However, the trial judge does not offer this finding as a factor weighing in favour of employee status, as RHH submits. Instead, he makes this finding in the context of characterizing the work that continued after the 1987 Agreement was “spent”. It continued “pursuant [to] a mutual understanding” or “tacit agreement”. It incorporated elements of the 1987 Agreement, but evolved over the subsequent 18 years in several aspects, such as McKee’s “limited freedom” to hire subagents. Read in context, therefore, this finding was to establish that the 1987 Agreement ended and the ensuing relationship evolved therefrom, and was not material to deciding that McKee was an employee. Therefore, the deference due in this case is not undermined by palpable and overriding factual errors.

[43] As such, I would defer to the trial judge, unless the facts of this case could not support the trial judge's decision that McKee is an employee under the applicable legal principles.

(d) Employee Determination Defensible under Law

[44] In my opinion, the trial judge's decision is defensible under the legal principles defining work relationships and the employee category.

[45] Recently, Gillese J.A., writing on behalf of the court, applied the *Belton* principles in *Braiden*, at paras. 33-36. She emphasized the fifth principle at para. 34:

In many ways, the question posed at the end of the fifth principle -- whose business is it? -- lies at the heart of the matter. Was the individual carrying on business for him or herself or was the individual carrying on the business of the organization from which he or she was receiving compensation?

[46] Gillese J.A. considered Braiden's relationship with La-Z-Boy under each of the principles and concluded that Braiden was an employee: *Braiden* at para. 35. Her comprehensive consideration of each principle further elucidates their meaning and facilitates application to this case.

[47] On the first principle: McKee, like Braiden, also worked exclusively for the defendant company and the trial judge found that this was pursuant to her implied agreement with RHH.

[48] Second: the trial judge's findings demonstrate that McKee was, as Gillese J.A. characterized Braiden's work relationship, subject to the defendant's control as to "where [s]he was to sell, the promotional methods [s]he was to use, what [s]he was to sell and how much [s]he was to sell it for." With respect to the promotional methods, the evidence revealed that RHH took advertising responsibilities away from McKee. This is indicative of the sort of specialization of tasks that one expects to find with respect to an in-house agent rather than an independent, or even dependent, realty firm. Gillese J.A. also noted that La-Z-Boy "regularly monitored Mr. Braiden's sales performance and measured it against the performance of other of La-Z-Boy's sales agents". Although the trial judge did not refer to it, there was also evidence in this case that RHH had engaged "professional shoppers" to review the sales performance of McKee's subagents.

[49] Third: the third principle places McKee's situation further in favour of employee status than Braiden's. Gillese J.A. questioned the applicability of the "tools" consideration to the case at hand, but noted, at para. 36: "If 'tools' includes anything necessary to perform one's contractual responsibilities, it would encompass Mr. Braiden's car and office, both of which he furnished and maintained at his own expense." McKee, by contrast, performed her sales function in model homes provided by RHH and the evidence indicates that RHH supplied her stationery and forms.

[50] Fourth: McKee, like Braiden, "was financially dependent on [the defendant] and had no expectation that [s]he might earn a profit as distinct from the fixed commissions."

Throughout the contract, McKee's profit was based on "fixed commissions" from RHH alone. Further, there is no indication that McKee risked any significant capital in her sales operation, given that RHH supplied the necessary facilities and "tools".

[51] Finally, fifth: although RHH gradually came to make use of other sales services in addition to McKee's, the evidence suggests that, like Braiden, "the sales force of which [McKee] was a member was a crucial element of [RHH's] business organization."

[52] Nevertheless, RHH submits a number of reasons that *Braiden* should be distinguished. However, I do not find them persuasive.

[53] First, the submission that McKee differs in that Braiden began his work relationship as an employee places the cart before the horse: McKee's status in her work for RHH since the end of the 1987 Agreement is the issue at hand.

[54] Second, the fact that McKee operated through a business in her work for RHH from the beginning is not determinative of her work status: see *Braiden* at para. 30; *Kordish v. Innotech Multimedia Corp.* (1998), 46 C.C.E.L. (2d) 318, at paras. 16-17 (Ont. C.J. (Gen. Div.)), aff'd [2000] O.J. No. 2557 (C.A.).

[55] Third, I am of the opinion that an "employee" can have the intermediary relationship between subordinate staff and higher management that McKee did. As RHH submits, McKee preferred that RHH communicate with "her sales staff" through her. However, this is consistent with certain organizational set-ups where employees who

manage certain divisions, such as sales, act as a conductor between higher management and staff within their division.

[56] Finally, it is true that McKee obtained greater profit than a salesperson in Braiden's situation by employing subagents. However, McKee's services to RHH included supervision of a subordinate sales staff, for which she received a fixed commission. Therefore, in respect of the facts relevant to principle 4, McKee did not have an "expectation of profit in the delivery of her services" distinct from a "fixed commission".

[57] As such, I adopt Gillese J.A.'s conclusion in *Braiden*, at para. 37:

Accordingly, I see no basis on which to interfere with the trial judge's determination that the continued relationship between the appellant and [respondent] was that of employer and employee. This determination was based on careful, thorough findings of fact which are fully supported on the record, and was responsive to the issues raised by the parties. Although the reasons do not identify the factors set out above, the findings reflect a consideration of the appropriate factors.

(2) The 1987 Agreement

[58] The 1987 Agreement provided that either party could terminate the agreement by giving the other party 30 days notice. The appellant concedes that if McKee was an employee at RHH throughout the 1987-2005 duration of their relationship, the 30-day notice period in the 1987 Agreement would contravene s. 57 of the *Employment*

Standards Act 2000, S.O. 2000, c. 41. I agree. Accordingly, since McKee was an employee, not a dependent contractor, this issue does not arise.

(3) Reasonable notice

[59] If McKee was a dependent contractor, RHH would challenge the 18-month notice ordered by the trial judge. However, I have determined that McKee was an employee. RHH does not contend that an 18-month notice order for an employee in McKee's position and circumstances is unreasonable. Hence this issue does not arise.

(4) Mitigation

[60] RHH contends that McKee failed to mitigate her damages by declining to accept RHH's offer on March 3, 2005 of continuing employment for six months.

[61] The trial judge carefully reviewed and applied the recent decision of the Supreme Court of Canada dealing with mitigation in an employment law context, *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661.

[62] The trial judge described the parties' two-month-long negotiations over McKee's continuing role with RHH in this fashion:

The circumstances surrounding her dismissal related to a drastic reduction in her responsibilities and income earning capacity, both of which must have been seriously demoralizing. Despite this, she agreed to stay on if mutually agreeable conditions of employment could be arranged. She was sixty-four years of age. She had given, what could

arguably be said were, her best earning years to the defendant company. Had the situation not deteriorated over the two months following her initial meeting with Mr. Blevins, the employer in this case may have been able to mount a successful argument that she ought to have returned in order to mitigate her damages, at least for the six months proposed in one of the final offers to her. However, those final offers themselves, when looked at in the context of Mr. Blevins' admittedly "angry" letter, demonstrate that the relation between the defendant and the plaintiff had already drastically changed. By the final letter, the relationship was irreparably damaged.

[63] In my view, the record amply supports this analysis. Although McKee was willing to consider continuing to work for RHH when this was being discussed in January 2005, the course of negotiations between January and March, with the nasty and hurtful February 11 letter from Blevins to McKee in the middle of that period, caused such a rupture that it would be unfair to conclude that McKee had a duty to accept RHH's offer of time-limited continuing employment.

E. DISPOSITION

[64] I would dismiss the appeal.

RELEASED:

"DEC 23 2009"

"JCM"

"J.C. MacPherson J.A."

"I agree Janet Simmons J.A."

"I agree H.S. LaForme J.A."