

Member's Quarterly

Fall 2016 Edition

Feature

Demystifying Constructive Dismissal: Minimize Your Risk

Get back to the basics

In our current economy, change in the workplace is a constant presence. Restructuring, reorganization and downsizing are human resource realities of the current times. What is constructive dismissal? What are the consequences of constructive dismissal and how can you avoid hidden traps and risk in this area when implementing changes within your workplace?



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I. Constructive Dismissal Basics

Once a contract of employment has been formed, whether this be in writing, verbal or implied, neither party has the right to change a significant term of the contract unless both parties agree to the change. In certain circumstances, unilateral changes by an employer to an employee's position, job responsibilities, compensation package or other terms, can amount to a potential constructive dismissal. The issue is whether the changes that have been made to the employment relationship are so significant as to amount to a breach of a fundamental term and condition of the employment contract. If the changes to an employee's position or responsibilities are so significant as to amount to a breach of a fundamental term, this gives rise to a potential constructive dismissal claim. Also, where the employer, through its behaviour, has created a situation which makes it untenable for an employee to continue, in certain circumstances, an employee may argue that that behaviour constitutes a constructive dismissal.

The damages an employee would be entitled to in an action for constructive dismissal are equivalent to the damages the employee would receive had the employee been wrongfully dismissed.

In order to establish whether a unilateral change gives rise to a potential constructive dismissal, the Courts will consider three general issues:

1. What are the terms of the employment contract?
2. Has there been a breach of one or more of those terms?
3. If there has been a breach, is it a fundamental breach?

In keeping with a proactive theme, the important question is: How can an employer implement a fundamental change to an employee's conditions of employment without risking a lawsuit for constructive dismissal? Generally, there are two methods to accomplish such a change in a legally acceptable manner:

1. Reasonable Notice

No matter how dramatic the change to the employee's conditions of employment it can be appropriately implemented so long as the employee is given reasonable notice of the change. The length of the reasonable notice period is the same as the notice period that is required to give the employee notice of termination. Basically, the period of reasonable notice will vary depending on the employee's years of service, position and age. Please note that if at the time of hiring an employee you specifically agreed on the amount of notice required, (which is an approach we strongly recommend), then it is the same amount of notice that must be provided in order to implement a fundamental change.

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2. Informed Consent

As discussed above, a fundamental change is only a constructive dismissal if the change is unilaterally imposed. As a result, if the employee consents to the change the employee waives his or her right to allege constructive dismissal. While there are no formal requirements for consent, the bottom line is an employer must be able to prove clear consent, if subsequently challenged by the employee. The steps we recommend to properly document the employee's consent are as follows:

- The employee should be provided with an adequate opportunity to consider the change which is provided to them in writing. Ideally, this period should not be less than one week; and
- The employee should be required to sign an acknowledgment indicating that they understand, accept and agree to be bound by the changes having had a reasonable opportunity to consider them.

II. Application of Constructive Dismissal in Recent Case Law

Recent cases from the Supreme Court of Canada (*Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10) and the Alberta Court of Appeal (*Thompson v Cardel Homes Limited Partnership*, 2014 ABCA 242) both serve as a warning to employers that compelling an employee to cease performance of their duties, even if their pay is continued, can place the employer at risk of a claim for constructive dismissal. In *Potter v New Brunswick Legal Aid*, the employer placed the employee on a paid leave while it attempted to negotiate an agreed conclusion of employment. The employee successfully sued for constructive dismissal. In *Thompson v Cardel Homes*, the employee had only one month remaining in a one year fixed-term contract and was told that he was not required to work during the last month but would be fully paid. He successfully sued for constructive dismissal triggering a twelve month severance obligation in the employment contract. The primary lesson and legal principle arising from both of these cases is that removal of an employee from their duties, even with full pay, can expose the employer to claims for constructive dismissal with potential significant liability and consequences.

III. Concluding Comments

In summary, the increasing potential for restructuring, reorganization and downsizing make an understanding of the concept of constructive dismissal all the more important. The fundamental take-away points can be summarized as follows:

1. When changes within your organization or workplace affect an employee, there is the potential that those changes could trigger the risk of the employee quitting and suing for constructive dismissal as if they had been terminated.
2. Practically, changes within organizations that are arguably constructive dismissals occur regularly, often without the employer or employee even recognizing the potential for a constructive dismissal or even being aware of the concept.
3. In addition to being aware of the potential risk, the key proactive tools for your organization to eliminate or minimize this risk are to either obtain the consent of the employee to the change or provide the employee with sufficient working notice of the change which is equivalent to the notice that would be required for a termination.

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