

Members Quarterly

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Feature

Restructuring Brings Constructive Dismissal Charges

A primer for employers

In the current economic climate, many organizations are in the process of restructuring their workforces to boost efficiency. Restructuring is often associated with layoffs, but it can also include changes to the terms of the employment of remaining employees. When restructuring, employers should be aware that moving an employee to a different position, redefining an employee's job responsibilities or changing an employee's compensation and benefits without the employee's agreement can result in a claim of constructive dismissal.

The Supreme Court of Canada defined constructive dismissal in *Farber v. Royal Trust*, [1997] 1 S.C.R. 846. According to the Court, constructive dismissal occurs when an employer makes a unilateral change that substantially alters a fundamental term of an employee's employment contract, which allows the employee to treat the employment relationship as terminated and to claim damages.

It is hard to predict whether a change in the terms of employment will amount to a fundamental change as the determination of whether there has been constructive dismissal depends on the facts of each case. However, Courts will compare an employee's position both before and after the change was imposed and will consider, from an objective point of view, whether a reasonable person in the employee's position would have felt that the fundamental terms of the employment contract had substantially changed.

The following are examples of unilateral changes to employment contracts which may constitute constructive dismissal:

- Change in salary: A significant reduction in base remuneration may constitute constructive dismissal. Generally, a reduction in salary of less than 10% is unlikely to be held to be constructive dismissal, while a reduction of greater than 10% carries a significant risk of a finding of constructive dismissal.
- Change in position or responsibilities: Where a change in position or responsibilities constitutes a serious demotion rather than a lateral move, Courts are likely to find constructive dismissal. This is especially likely where a management function is removed or where the new role is considerably less important or prestigious than the previous role.
- Change in working hours: Where a Court finds that certain working hours were an express or implied term of an employment contract, a change in those hours (such as a substantial increase, decrease or a change in the time of day that an employee is expected to work) is likely to result in a finding of constructive dismissal.
- Change in bonus or benefits: Similar to reductions in salary, changes in bonus structure or benefits that result in a significant reduction in remuneration, such a reduction of more than 10%, are likely to be held to be constructive dismissal. However, Courts are less likely to find constructive dismissal where base salary is unchanged or where changes are brought about by economic pressures.



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- Imposing geographical transfers: Courts have generally not found constructive dismissal where it is an express or implied term of the employment contract that the employee can be transferred and there is a legitimate reason for the transfer. However, in the absence of such a term, or where the place of work is an essential term of the contract, Courts are likely to find constructive dismissal.

Until 2008, it was widely believed that a fundamental change to an employment contract could be unilaterally implemented by the employer so long as reasonable notice was provided. However, this belief was rejected by the Ontario Court of Appeal in the now-widely cited case, *Wronko v. Western Inventory Ltd.* (2008), 66 C.C.E.L. (3d) 135 (C.A.) ["Wronko"]. The Court in Wronko found that an employee faced with a unilateral change to a fundamental term of her employment contract has three options:

1. The employee may accept the change expressly or through apparent acquiescence;
2. The employee may reject the change and sue for damages; or
3. The employee may expressly reject the change and continue to perform her functions as before the change. In this case, the employer may terminate the employee with proper notice and offer re-employment on the new terms; or, if the employer permits the employee to continue to work as if under the original contract, the employer is considered to have acquiesced to the employee's position.

Following the direction from the Court in Wronko, employers attempting to make a fundamental change to an employee's contract of employment should do one of two things to avoid a possible finding of constructive dismissal:

1. Obtain the employee's express or implied agreement to the change, and offer some form of consideration, such as a signing bonus, in exchange for such agreement; or
2. If the employee does not agree to the change, terminate employment and provide reasonable working notice or pay in lieu thereof. Following termination, the employer may either offer the employee a new position under the proposed new terms or search for a replacement.

If an employer offers an employee a new position under the proposed new terms and the employee does not accept the new position, the employee may be owed less for pay in lieu of reasonable notice. Dismissed employees are required to mitigate their damages by accepting reasonable alternative employment. If an employee does not mitigate her damages, the employer may be entitled to a deduction from any wrongful dismissal damages owed. Accordingly, if the employee does not accept the new position, the employee may not have mitigated her damages and the employer may therefore be entitled to a deduction for the employee's failure to mitigate. Employers should consider offering the employee the new position after both parties understand that the original contract of employment has been terminated, in accordance with the recent decision in *Farwell v. Citair Inc. (General Coach Canada)*, [2014] ONCA 177.

An employee who continues to work under a fundamentally changed term with little or no complaint may be considered by the Courts to have condoned the change, and therefore to have given up her right to sue for constructive dismissal. In order for Courts to find that an employee has condoned a change, the employee must have been provided with a reasonable amount of time to assess the new circumstances. In determining whether an amount of time is reasonable, Courts will consider the employee's age, education, work experience and length of service with the employer.

It was held in *Russo v. Kerr Bros. Ltd.*, [2010] O.J. No. 4654 (S.C.J.) ["Russo"] that the employee who expressly told his employer that he rejected a change to his employment contract,

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then continued to work under the new contract terms, had not condoned the change, but was instead mitigating his damages. Courts will only make this finding where a finding of constructive dismissal is also made.

Employers seeking to change a term of an employee's contract should strongly consider following the Court's direction in Wronko by seeking the employee's consent and providing consideration for the change, or, in the absence of consent, terminating employment with reasonable notice.

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