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Feature

Navigating Constructive Dismissal in Tough Economic Times

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Trim employee costs without termination

In the midst of economic uncertainty and widespread cost-cutting measures, many employers this year are facing the challenge of how to taper wage costs while avoiding -constructive dismissal claims. Whether particular changes to terms and conditions of employment constitute constructive dismissal is usually a grey area. Can employers make modest changes to spare the bottom line without generating significant exposure to termination claims?

What is Constructive Dismissal?

The general rule of constructive dismissal is that an employer cannot make changes to employee terms and conditions of employment that are unilateral, fundamental and negative.

The exceptions to this general rule include where:

1. there is consent to the change;
2. there is acceptance of the change after the fact;
3. there is reasonable advance notice of the change or notice consistent with terms of an agreement (e.g., the employment agreement allows for changes on certain specified notice) [note the caution to this approach discussed below];
4. the changes are not fundamental;
5. the changes relate to matters that are within the employer's control to change without the employee (e.g., discretionary programs);
6. you make the changes in exchange for something else of value to the employee (e.g., a pay increase, promotion, added benefit, etc.).

Employers have many options available to them that are in line with these exceptions. First is to see if changes can be made that are not objectively viewed as being fundamental. An example of interest these days is across-the-board compensation or benefit changes that are negative, but modest, as a cost cutting measure.

Are Changes Fundamental?

Although constructive dismissal is a grey area, it is most easily found in cases involving compensation reductions, because compensation is usually the most essential term of employment for employees. However, some compensation reductions have been accepted. Some cases have found that reductions in remuneration of less than 10 - 15% (without more) are not fundamental breaches, however caution must be exercised.

Reductions in hours may also be possible without constituting constructive dismissal. This is more easily done for wage-earning employees rather than salaried employees. In the recent case of *Bonsma v. Tesco Corp*., the Alberta Court of Appeal held that a reduction in hours did not

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constitute constructive dismissal because there were no guaranteed hours. Other cases have found requiring employees to reduce their weekly hours by 20% or more did constitute constructive dismissal.

In *Otto v. Hamilton & Olsen Surveys Ltd.,* the Alberta Court of Appeal found that "reductions in the benefit package due to external economic pressures, but where salaries are maintained, have consistently escaped characterization as fundamental breaches." In that case, vacation was reduced from 6 weeks to 4 and the 5% employer RRSP match was eliminated. The ability to reduce benefits generally would depend on the significance of the benefits and the reductions in question.

Courts look at the amount of the reduction, the economic situation of the employee, as well as the portion of the overall remuneration package that is being affected. Economic pressures do not protect an employer from the principles of constructive dismissal, but they will be considered. The threshold for this inquiry depends on individualized factors.

How to Properly Notify Employees of Fundamental Changes

Notifying employees that negative changes will be made to their terms and conditions of employment has long been thought to protect against lia-bility. Often it does. However, there are technical aspects of how to properly deal with such notice that are critical to protecting employers. In 2008, the Ontario Court of Appeal set out the proper approach.

In *Wronko v. Western Inventory Service Ltd.*, the Court stated that an employee has three choices when faced with unacceptable changes to terms and conditions of employment:

1. accept the change in the terms of employment;
2. reject the change and sue for constructive dismissal; or
3. clearly reject the new terms and continue working. If that happens, the employer may respond by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. As the Court stated: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

Duty to Mitigate

If there is a constructive dismissal, employers have the ability to offer continued employment under the new terms as a way for the employee to mitigate any damages. There may be an obligation upon the employee to accept such offers where not demeaning and where reasonable in the circumstances.

Conclusion

In looking to trim employee costs without terminating employees, employers should look for changes that are not fundamental, seek agreement or terminate the terms in accordance with proper notice. When all else fails, mitigation or litigation may be the result.

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