Managing Flexibility in the Workplace While Avoiding Constructive Dismissals

INTRODUCTION

In *Michaud* v. *RBC Dominion Securities Inc.*, K. Smith J. stated:

> An employer is entitled to restructure its operation to accord with its view of good business practices and, as well, to change the work assignments of its employees to give effect to the reorganization.

In today's economic and technological climate, the issue of restructuring is becoming increasingly important. The goal of such restructuring is to reduce costs while maintaining the most valuable employees.

While the court accepts that an employer is free to restructure, the law makes it clear that in so doing, an employer must be careful to avoid constructively dismissing its employees. Constructive dismissals are the enemy of restructuring: they result in the loss of typically valued employees and cost the bank the money it sought to save on severance packages.

The area of restructuring job duties and responsibilities while avoiding or minimising the risk of potential constructive dismissal presents a huge challenge to human resources professionals. Some of the difficulties facing an employer when carrying out any restructuring of duties are caused by the fact that, unlike an ordinary dismissal, the control over what happens lies for the most part in the hands of the employee. The employee is the one who makes the claim and determines whether to accept the changes made to his position or to resign and seek damages for wrongful dismissal. A factor which creates further uncertainty is that the employee also controls when to make the claim.

Litigation of constructive dismissal cases often involves an in-depth analysis of all the factors at play and so, tends to be more expensive than the ordinary case of dismissal.

Although the employee has greater control over constructive dismissal claims, an employer can take steps to limit the risk of an employee making a claim of constructive dismissal. This paper will identify some of the pitfalls and discuss how an employer can take steps to limit its liability.

WHAT IS A CONSTRUCTIVE DISMISSAL?

In general terms, a constructive dismissal occurs where an employer makes a **unilateral** change to a **fundamental term** of the employment contract that:

(i) an employer has **no contractual authority** to make, and

(ii) **goes to the root of the contract** so as to amount to a repudiation of the contract by an employer.

Constructive dismissal is said to occur when an employer commits a fundamental breach of the employment contract but continues to employ the employee. In that case, the employee has the right to treat the employer's action as a "dismissal" and to resign and sue for damages arising from wrongful dismissal.

The elements of constructive dismissal were outlined by the Supreme Court of Canada in *Farber* v. *Royal Trust*, which was an appeal from Quebec. The Supreme Court of Canada held that the law regarding constructive dismissal was similar as between Quebec and the common law provinces, and referred to common law cases in reaching its decision. The Court, however, noted that each case must be decided on its own facts.

Gonthier J. stated:

> 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. …
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> In an article entitled "Constructive Dismissal", in B. D. Bruce, ed., Work, Unemployment and Justice (1994), 127, Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:
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> > A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract **without providing reasonable** notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

The test of whether a constructive dismissal occurs is an objective test. Factors the court will consider include whether the change leads to a considerable loss of status and employment related prestige and whether there is a significant reduction in remuneration.

Analysing a Potential Constructive Dismissal Claim

When analysing the risk of a constructive dismissal claim, the following questions arise?

1. Did the employer unilaterally change the employment contract?

2. If so, was the change a fundamental change, amounting to a constructive dismissal?

3. If so, to what notice period is the employee entitled?

4. Is the employee obliged to take the new position offered in order to mitigate his damages?

1. Is the Change a Unilateral Change?

In most cases, restructuring and changes to a position are made unilaterally. However, even if the employee initially agrees to the change, the employee may later reject the change and allege that he has been constructively dismissed. The law affords the employee a reasonable time during which to consider the changes before resigning and claiming constructive dismissal. Thus an employee is not forced into making quick decisions about whether he must resign, without having had the benefit of assessing the changes, or seeking reasonable alternate employment. The amount of time an employee has to decide varies from case to case, but can be as long as 11 months.

2. Is the Change a Fundamental Change?

The British Columbia Court of Appeal has stated that if an employee asserts that he has been constructively dismissed, he or she must establish that there has been conduct on the part of the employer which breaches an express or an implied term of the contract of employment that is **fundamental in that it goes to the very root of the contract**. If no such term is breached, then the employee has not been constructively dismissed. For instance, reducing the vacation pay entitlement is unlikely to give rise to a constructive dismissal. Also, a constructive dismissal does not occur where the "core" responsibilities of the employee remain, notwithstanding changes to the employee's other duties and responsibilities.

Whether a constructive dismissal has occurred is to be determined objectively based on the facts before the court. The court will consider the terms of employee's employment, the nature of the business, the reason behind the restructuring, the employee's position with the employer and any relevant employer policies. The court will also consider the employee's position within the overall structure of the employer, and will even consider the employee's career trajectory.

One of the most common examples of a constructive dismissal is a demotion, meaning that the employee's new position involves less prestige and status than the former position. On the other hand, a lateral move is not likely to be a constructive dismissal. Therefore it is important to consider the exact nature of the change. Whether a change is truly a demotion, as opposed to a lateral move, remains a question to be determined in each individual case.

In some instances, a failure to promote may lead to a claim of constructive dismissal, however, there is usually no implied obligation on an employer to transfer an employee to a position of increased responsibility, stature and remuneration. Any such obligation depends on the terms of the employment contract in each circumstance. This factor becomes important if you are dealing with "streamed" employees, who are expected to be promoted.

The other most common change giving rise to a claim of constructive dismissal is a change in compensation from, for instance, a fixed salary to an income based on straight commission, particularly where the industry in which the commission earned is volatile and high risk and thus an income is unpredictable.

Examples of conduct amounting or contributing to a finding of constructive dismissal include:

- Removal of key duties and responsibilities;
- Unilateral decrease in salary or payment terms;
- Transfer to a new location;
- Loss of status, profile and prestige;
- Termination of bonus;
- Transfer into a "dead-end" position;
- Failure to promote;
- Change in hours or number of shifts worked;
- Loss of seniority;
- Decreased supervisory powers of employee or the imposition of additional supervision.

Examples of situations where constructive dismissal has not been found by the court include the following:

- Loss of reporting status;
- Reduction in benefits package due to economic conditions;
- Non-payment of sick benefits according to company policy;
- Transfer of employee from one project to another / lateral transfer;
- Reorganization necessitated by capital cutbacks;
- Non-payment of a bonus;
- Change of duties within portfolio; and
- Bilateral change to employment contract.

As may be seen by comparing the above list of conduct amounting or contributing to a finding of constructive dismissal with the list of situations wherein constructive dismissal has not been found by a court, the determination of whether a constructive dismissal has occurred in any given case is largely a question of fact. For example, an employer's failure to pay a bonus to an employee is unlikely to constitute wrongful dismissal in and of itself unless the bonus is found to constitute a significant part of the employment contract. In each

case, the court will objectively consider whether and to what extent the actions of the employer affect the core of the particular employment contract in question.

3. If There is a Constructive Dismissal, What is the Reasonable Notice Period?

The reasonable notice period for a constructively dismissed employee is the same as it is for any dismissed employee. The notice period depends upon the age, length of service, character of employment, the availability of similar employment and other factors such as inducement and bad faith.

A complicating feature of constructive dismissal cases is the determination of when the reasonable notice period begins. There are three potential triggers for the reasonable notice period:

(a) when notice is given of the changes;

(b) when the changes take effect; or

(c) when the employee actually resigns.

In some situations, it will be obvious when the reasonable notice period occurs. In others, less so, particularly where there has been some negotiation over what changes will be implemented and when. The trend in court decisions is to find that the constructive dismissal was triggered either by giving notice of the change or by effecting the change, rather than when the employee actually resigns, however, there is a line of authority which supports the later date.

From the employer's perspective, the earlier the reasonable notice period begins, the lower the potential liability. The least risky approach for the employer is to give reasonable notice of the actual change in employment, for instance, by giving six months' notice of the elimination of a bonus.

4. May the Employer Give Notice of a Change in the Employment?

The Supreme Court of Canada in *Farber* opened the door to permitting an employer to give reasonable notice of a change to the employment contract. However, a recent case from Ontario illustrates the challenges of doing so.

In *Wronko v. Western Inventory Service Ltd.*, the employer attempted to change the termination provisions of the employee's written contract. The employee refused to sign the amending agreement.

The employer responded by sending the Plaintiff a unsigned letter giving the employee 104 weeks notice that the termination clause in his contract would be changed. The employee responded some six months later confirming that he did not accept the change to his agreement, and that he considered his current signed employment contract to be valid and binding. There was no reply from the employer.

At the end of the 104 week period, the employer sent the employee an e-mail attaching the previous unsigned letter and the new termination provision. The email stated in part:

> "Please by advised that effective September 8, 2004, your 104 weeks notice is complete.
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> Effective September 9, 2004 the terms noted in the employment agreement…apply and are in full force and effect.
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> If you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you."

The letter concluded with a request that the employee sign and initial the employment agreement and return it.

The employee responded with a message that he understood the above comments to mean that if he does not accept the term of employment than his employment is therefore terminated. Receiving no reply, he emailed the employer the next day asking if he should come in that day. The employer replied that the employee had not been dismissed, but that the 104 weeks notice was complete and in the absence of the employee's signature on the new employment agreement the existing employment agreement remained but as amended with the new term by the company.

The employee sent an e-mail asking for clarification of what was meant by "we do not have a job for you", but no response was given. The employee sent a further email saying that it was clear to him from the message of September 13, 2004 that he was terminated if he refused to sign off on the new severance language and that the new position (i.e. that he was not terminated) was "unacceptable at this stage". He accepted his termination and asked for the severance package in his signed employment contract.

The Ontario Court of Appeal held that the employee's employment was terminated in the e-mail which stated that if the employee did not accept the change, "then we do not have a job for you". The Court also found that the purported notice of 104 weeks was not effective because it did not make clear to the employee that his employment would be terminated if he did not accept the change.

The Court emphasized the point articulated in *Hill v. Peter Gorman Ltd.* that

> "if the plaintiff made it clear…that he did not agree to the change… the proper course for [the employer] to pursue was to terminate the contract by proper notice and to offer employment on the new terms. Until it was so terminated, the plaintiff was entitled to insist on performance of the original contract."

Upon learning of the employee's opposition to the new contract and his continued opposition thereafter, the employer had two choices:

1. Advise the employee that his refusal to accept the new contract would result in his termination and that re-employment would be offered on the new terms, which would trigger the termination provision from the existing employment agreement.

2. Accept that there would be no new agreement and that the employee's employment would continue on the existing terms

Since the employer did not take the first course of action, the Court held that the employer must be taken to have acquiesced to the employee's position and accepted that the terms of the existing contract remained in effect, thus leaving the original termination pay provision in tact.

This decision clarifies the risk to an employer of attempting to change an employee's employment conditions. The employer must be aware that even if it gives reasonable notice of the change, it must risk losing the employee.

5. Is the Employee Obliged to Take the New Position to Mitigate his Damages?

A duty on the part of an employee to mitigate a loss by accepting continued employment will arise in certain circumstances. If the employee should have accepted the new position, the court will deduct from any award of damages the amount the employee would have earned if he had accepted the new position.

Lambert J.A. outlined the circumstances in which the duty arises: *Farquhar* v. *Butler Bros. Supplies Ltd.*

> The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and the employee is over. One or the other or both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any relationship of employer and employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and if the position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for other work, even if it is roughly his old position before the constructive dismissal. Such circumstances may not arise frequently. Very often the relationship between the employer and the employee will have become so frayed that a reasonable person would not expect both sides to work together again in harmony. But sometimes it would be unreasonable for the employee to decline to continue in employment through the period equal to reasonable notice, while he looks for other work. That was so in *Lesiuk*, where the constructive dismissal, if any, was caused only by the hard times facing the employer. Indeed, in the *Lesiuk* case, the employer frequently expressed satisfaction with the employee, and the hope that the employment relationship

> would continue at no reduction in salary, but at different duties forced by the economic climate.
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> The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the other's interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given or where there is a constructive dismissal and an offer of a new working relationship.

In *Lesiuk* v. *British Columbia Forest Products Ltd.*, the Court held that the employee, a project engineer at the employer's mill should have mitigated his damages by remaining with the company as a plant engineer. Although there were significant changes to the employee's work and responsibilities which amounted to constructive dismissal, the court found that the employee should have remained in the employer's employ for a number of reasons:

(a) the employee's salary remained the same despite his job change;

(b) there was no animosity shown by the employer to the employee;

(c) the employee's position was not reduced so dramatically as to humiliate him; and

(d) the employee knew or ought to have known that job opportunities in the industry would be severely limited due to poor economic conditions.

In *Michaud*, K. Smith J. held that the employee failed to mitigate when he resigned. K. Smith J. cited the following factors:

(a) there was no evidence that had the employee worked out his notice he would have done so in an atmosphere of hostility, embarrassment or humiliation;

(b) relations were cordial;

(c) the employer was anxious to have the employee continue with the employer;

(d) there was no change in the salary during the notice period and there was a delay in the change to the overall compensation; and

(e) the offer of continued employment was made before litigation started.

The decision in *Michaud* was upheld by the Court of Appeal.

In a recent case before the Supreme Court of Canada (*Evans v. Teamsters Local Union No. 3)*, the Court held that an employee had failed to mitigate when he refused to stay with his employer.

In December 2002, following a heated campaign, a new employer executive was elected to office. Shortly thereafter, the employee received a letter from the employer advising him that, with the change in executive, his employment was being terminated. The termination letter was silent on the issue of notice or severance in lieu thereof. The employee had worked as a business agent in the employer's Whitehorse office for approximately 23 years. He retained legal counsel, who advised the employer that the employee was prepared to accept 24 months' notice of termination, which could be granted as a combination of 12 months' continued employment and 12 months' salary in lieu of notice. For several months thereafter, the negotiations between legal counsel continued as the employer continued to pay the employee his salary and benefits even though he was no longer working.

When the settlement negotiations broke down approximately five months later, counsel for the employer issued a letter demanding that the employee return to work or serve out the balance of a 24 month notice period. The letter further stated that, if he failed to return to work, the employee would be terminated for cause. Further communications from the employee's lawyer also sought to resolve the status of the employee's wife, who also worked in the Whitehorse office, and to secure a withdrawal of the notice of termination, both of which were rejected by the employer.

The majority of the Supreme Court held, first, that the principles for constructively dismissed employees are the same as for regularly dismissed employees. The Court also held that:

> it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract. It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer.

In assessing whether an employee should accept a position from the dismissing employer, the majority of the Court stated that an objective test will apply: "*whether a reasonable person would accept such an opportunity?*"

While the majority of the Court further held that such an analysis would be "multi-factored and contextual", the primary consideration should be that the employee "*not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation*".

Some factors discussed as potentially relevant to a court's application of the "reasonable person" test included:

- What is the history and nature of the relationship?
- Is the salary the same?
- Are the working conditions substantially the same and the work not demeaning?
- Are the personal relationships involved acrimonious or not?
- Has the employee commenced litigation?

- When was the offer of re-employment made? Prior to or following the employee's departure from the position?
- What was the reason for the termination? In this regard, the Court noted that that persons who are dismissed as a result of a change to their position (arising perhaps for legitimate business needs as opposed to concerns about performance) will be required to mitigate by returning to the dismissing employer more often than employees terminated for some other reason.

Overall, the Court found that the employee should have remained with the employer for the balance of the reasonable notice period.

A significant factor in the Court of Appeal's decision was the employee' apparent willingness to return to work on certain terms (those being a resolution of his wife's status and a withdrawal of the termination letter) as evidence that the employment relationship had not been so harmed that the employee could not return to work. At the Supreme Court of Canada, the majority rejected this argument, holding instead that one had to consider whether the terms sought by the dismissed employee were designed to mitigate some of the humiliation and embarrassment which would otherwise result from returning to work.

As a result of this decision, dismissed employees will have to consider more carefully any offers of re-employment received from their former employer. While this decision will be considered good news by employers, employers should not take from this decision an understanding that any offer made to a dismissed employee of continued employment with the dismissing employer will be grounds for a defence of failure to mitigate. As the Supreme Court noted, the analysis will be "multi-factored and contextual".

Indeed, these cases are rare and are the exception rather than the rule. They are the only cases of their kind. Indeed, in every case between the *Michaud* decision in 2001 and the *Evans* decision in 2008, the Courts across Canada have found, on the facts, that the employee was not required to remain employed.

6. Human Rights Considerations

There have been recent cases which have found that changes to employment conditions, even seemingly innocuous changes, may violate the *Human Rights Code*.

The most common example is where proposed shift changes interfere with an employee's parental obligations. In several cases, such changes have been found to discriminate against employees on the basis of family status.

Most recently, in *Hoyt v. CN Rail Ltd.*, the complainant was assigned different work to accommodate her pregnancy. The new job required her to work Saturdays when her husband was at work. Due to CN's delays providing the new work and schedule, Ms. Hoyt lost a place for her two-year-old at a "24/7" day care. Despite calls to various babysitters, Ms. Hoyt was unable to find coverage for three Saturdays she was scheduled to work the new job. She asked to work Monday to Friday instead. The Canadian Human Rights Tribunal ruled that "family status" included the specific parental duty to care for a child when child care was unavailable. CN had a

pool of qualified workers who could have been called out to cover the three Saturdays. Because CN had not called any evidence to show it could not have conveniently allowed Hoyt to work other days and scheduled other workers to cover the three Saturdays, the Tribunal held that CN had failed to reasonably accommodate her child-care obligations and awarded her pay for the three missed days.

As a consequence, it is important for employers to consider whether proposed changes may impact an employee's disability or family status.

HELPFUL HINTS FOR RESTRUCTURING

In carrying out job restructuring, the employer should consider the following.

1. Consider carefully the nature of the changes you are proposing to make and the positions of the affected employees.

2. In the case of job reclassification, consider the changes in the duties and attempt as much as possible to retain the "core" duties.

3. Give as much advance notice as possible of the changes.

4. Where it is not possible to give advance notice consider the possibility of providing salary protection for a reasonable period.

5. Try to secure the affected employee's agreement in advance of the changes.

6. If the economic climate is the reason for the restructuring, make sure the affected employee knows the reason.

7. In particular, let the employee know that the changes are not performance-related. Assure the employee he is a valued employee.

8. If the employee takes the position he has been constructively dismissed, re-offer the new position immediately. Assure the employee that he or she is valued and the employer wants to retain him or her as an employee.

9. Try to maintain cordial relationships with the affected employee.

Gwendoline Allison

Managing Flexibility in the Workplace While Avoiding Constructive Dismissals
T. 604.643.3166 / gca@cwilson.com

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