

CONSTRUCTIVE DISMISSAL – A PRIMER

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Introduction

Employment relationships may end in a variety of different ways: (i) the employer terminates the relationship for cause with no notice, (ii) the employer terminates the relationship without cause by giving notice or payment in lieu of notice, (iii) the employee terminates the relationship, (iv) the relationship comes to an end due to frustration, (v) the relationship comes to an end due to job abandonment, (vi) the relationship comes to an end following the completion of a fixed term contract, and (vii) constructive dismissal.

Constructive dismissal claims are premised on long standing principles of general contract law. Constructive dismissal occurs when the employer commits a “repudiatory” breach of the employment contract which either demonstrates that it no longer intends to observe the terms of the employment agreement or whose consequences deprive the employee of substantially all of the benefits the employee bargained for, thus allowing the employee to terminate the employment contract and recover damages.¹

In the modern leading constructive dismissal case of *Farber v. Royal Trust Co.*, the Supreme Court described constructive dismissal as follows:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee’s contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as “constructive dismissal”. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.²

This paper will serve as an introduction to the essentials of constructive dismissal as well as provide a brief discussion of some other important considerations when contemplating the commencement of a constructive dismissal claim.

Essential Considerations

There are three essential considerations in any successful constructive dismissal claim, namely:

1. What are the express and/or implied terms and/or conditions of the employment contract?
2. Has there been a breach of the express and/or implied terms and/or conditions of the employment contract?

¹ Ball, Stacey Employment Law in Canada, section 13.24

² *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para 24 (per Gonthier J.)

3. Assuming there is a breach, is the breach fundamental in nature so as to give rise to claim for constructive dismissal?

1. **What are the express and/or implied terms and/or conditions of the employment contract?**

This first consideration is focused on whether the employer's conduct indicates an intention to no longer be bound by one or more of the fundamental/essential terms and/or conditions of the employment contract, thereby repudiating it. An understanding of the fundamental/essential terms and/or conditions of the employment contract is therefore essential, as the constructive dismissal claim is premised on a change to one or more of these terms and/or conditions.

Employment contracts are made up of express and implied terms. The express terms of an employment contract will often include such things as remuneration, rank, hours of work etc. Express terms set out in any employment contract provide the courts with a clear expression of the pre-change state of the employment relationship. Assuming the change to the employment relationship giving rise to a constructive dismissal claim is a change to a fundamental/essential and express term set out in an employment contract, the task of making a constructive dismissal claim is more straightforward because it simplifies the before-and-after comparison required to make a successful constructive dismissal claim.

A constructive dismissal claim premised on a change to a fundamental/essential implied term in an employment contract is more complex because the pre-change state of the employment relationship is not as easy to prove. Implied terms often figure prominently in any constructive dismissal claim and will frequently be the focal point in any dispute. Terms can be implied by the court based on either a policy rationale or on the evidence of the parties' common intentions at the time of contracting, similar to traditional contract law. There is no exhaustive or generally applicable list of implied terms for employment contracts. The party asserting an implied term bears of the onus of proving such a term.³ Recently, in *Colwell v. Cornerstone Properties*, the Court found that covert camera surveillance of an employee breached an implied duty "that each party would treat the other in good faith and fairly" in the employment contract. In the result, the employer's breach of this implied term gave rise to a successful constructive dismissal claim.⁴ Similarly, in *Reynolds v. Innopac Inc.* the Ontario Court of Appeal held that requiring an executive to move to British Columbia was not a term contemplated at the time of contracting and therefore could not be implied term, so the employer's transfer of the executive, along with other factors, gave rise to a constructive dismissal claim which entitled the employee to damages.⁵

When litigating a constructive dismissal claim, it is important to keep in mind that express or implied terms may operate to not only restrict employer conduct and support a constructive dismissal claim but also to permit certain employer conduct that otherwise could be viewed as a constructive dismissal. There is no fundamental change if a

³ *Olympic Industries Inc. v. McNeill* (B.C.C.A.)

⁴ *Colwell v. Cornerstone Properties*, [2008] O.J. No. 5092 at para 36 (S.C.J)(Little J.)

⁵ *Reynolds v. Innopac Inc.* (1998), 34 C.C.E.L. (2d) 131 at paras 17-19 and para 47.

contract of employment expressly or impliedly anticipates the employer conduct which but for the existence of the express or implied term would give rise to a successful constructive dismissal claim. For example, in *Ferdinand and Usz v. Global Driver Services Inc.*, the Court found that there was an implied term that the employer could unilaterally re-assign bus routes of its employees. As a result, the employee's claim of constructive dismissal arising from a route reassignment failed.⁶

An employer can also be found to have repudiated an employment contract without changing a specific term of the contract on a singular date. In other words, the conduct of an employer over a sustained period of time may cumulatively result in the repudiation of the employment contract giving rise to a successful constructive dismissal claim. For example, in *Shah v. Xerox*, the Ontario Court of Appeal noted that constructive dismissal may be found when "the employer's conduct amounts not just to a change in a specific term of the employment contract but to repudiation of the entire employment relationship."⁷ In the case of *Shah*, the employer had engaged in prolonged and unjustified criticism of the employee by way of critical performance reviews and unjustified warning letters which resulted in the employee suffering emotional distress. The employee eventually resigned and commenced a constructive dismissal claim wherein the Court ultimately awarded him damages.

2. Has there been a breach?

In context of a constructive dismissal claim, an employer's breach of a term and/or condition of the employment contract must be unilateral. In other words, for a breach to exist, there must be an absence of consent on the part of the employee to any change in the terms and/or conditions implemented by the employer. An employees' express or tacit consent to a fundamental change will be fatal to a constructive dismissal claim.

In the context of a constructive dismissal claim employers frequently argue that the employee has, by their conduct, agreed to or condoned the changes to their employment and therefore waived any right to claim constructive dismissal. The existence of an employee's consent to a fundamental change will always be determined on a case by case basis. This factual assessment can become particularly difficult when the duty to mitigate is considered. For example, in *Cayen v. Woodward's Store*, the British Columbia Court of Appeal considered whether an employee transfer (which the employee alleged was a demotion) amounted to a constructive dismissal, the Court noted:

In my judgment, a very heavy burden would rest upon the employer to show that there was a real waiver... the employer cannot have it both ways, that is mitigation and waiver, and it will be rare indeed when an employer will succeed on a plea of waiver after an employee has mitigated his or her damages after accepting a new position. It would be different, of course, if the employee continues in the new employment after the expiration of a reasonable period roughly equivalent to what the law would impose by way of reasonable notice.⁸

⁶ *Ferdinand and Usz v. Global Driver Services Inc.*, [1998] O.J. No. 4225

⁷ *Shah v. Xerox Canada Ltd.*, [2000] O.J. No. 849 at para 8 (per the Court)

⁸ *Cayen v. Woodward's Stores Ltd.*, [1993] B.C.J. No. 83 at para 41 (C.A.)

The Ontario Court of Appeal has stated that “Allowing employees reasonable time to assess the new terms before they are forced to take an irrevocable legal position not only addresses their vulnerability, but also promotes stability and harmonious relations in the workplace”⁹ Put another way, an employee should not be punished by an imputation of consent on their behalf, when they have only been reasonably mitigating their damages or assessing a change. The assessment of what is a reasonable time period before an employee has waived their rights will always be contextual. In one case, as little as two months was found to be a waiver while in another 6 months was still mitigation.¹⁰ If an employee continues in changed employment but expressly protests, a waiver will rarely be found to exist unless a considerable amount of time has past.¹¹

It is important to keep in mind that an employer’s unilateral change to a fundamental/essential term and/or condition of employment can be lawful if the employee is given reasonable notice of the termination of the employment relationship coupled with an offer of re-engagement with changed terms.¹²

3. Is the breach a fundamental one?

The test for whether an employment term is a “fundamental term” is not a subjective test. An employee’s personal distress as to the gravity of the change is not determinative as to whether the change will ultimately viewed as a “fundamental change”. The Supreme Court in *Farber v. Royal Trust Co.* stated that the court must consider whether “a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were ... substantially changed”¹³ The contextual objective test set by the Supreme Court was applied by the Ontario Court of Appeal in *Smith v. Viking Helicopter Ltd.* In this case, the Court of Appeal found the trial judge to be in error for “concentrating on the state of mind of the respondent in this case to the virtual exclusion of a consideration of the company’s announced policy.”¹⁴

Examples of changes to employment terms and/or conditions that could give rise to a successful constructive dismissal claim include changes to the essential duties of the employee, wages and benefits and location of work (assuming each are terms of the contract).

⁹ *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. No. 3358 at para 26. (per Juriansz J.A.)

¹⁰ See *Schellenberg v. Marzen Artistic Aluminium Ltd.*, [1986] B.C.J. No. 1190 and *Garcia v. Newmar Windows Manufacturing* (1996), 25 C.C.E.L. (2d) 114 (Ont. Ct. (Gen. Div))

¹¹ *Tilbe v. Richmond Realty Ltd.*, [1995] B.C.J. No. 954

¹² see for example the discussion in *Michaud v. R.B.C. Dominion Securities Inc.* [2001] B.C.J. No. 711

¹³ *Farber v. Royal Trust Co.* at para 26.

¹⁴ see also *Bowen v. Ritchie Bros. Auctioneers Ltd.*, [1999] O.J. No. 4102 (C.A.)

Other Considerations

(i) Employer's Intentions

An employer's good intentions and/or no specific intentions to repudiate a fundamental/essential term and/or condition of an employment contract are not sure-fire defences to a constructive dismissal claim. The existence of bad intentions, however, will almost always lead to an increase in the quantum of damages awarded to a plaintiff in the context of a claim for constructive dismissal. The Supreme Court in *Farber v. Royal Trust* put it this way:

... for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee.¹⁵

Similarly, the Ontario Court of Appeal in *Cox v. Royal Trust Corp. of Canada* held that:

While I totally agree with the trial judge that the defendant acted bona fide and with genuine concern both for the company and the plaintiff, I do not read Canadian *Bechtal Ltd. v. Mollenkopf*, C.C.E.L. 95, as saying that a properly motivated company cannot be liable for constructive dismissal. It is one of the factors, and an important one, but here does not override the very fundamental changes...¹⁶

Good intentions may only become relevant if the court implies a contractual term that allows an employer to "reasonably" re-organize the workplace. As one author has noted:

Today the courts appear to be more ready than before to imply a right to reassign duties where there are pressing business reasons for it, and where the court feels that management is acting "reasonably."¹⁷

(ii) Anticipatory Breaches

Anticipatory breaches allow a party to sue on the repudiation of a contract prior to the actual act of repudiation. When one party has made a "clear" or "absolute" announcement or indication that they intend to not be bound by the terms of the contract at a future date, the doctrine of anticipatory breach allows the innocent party to consider the contract repudiated at that moment.

In *Wronko v. Western Inventory Service Ltd.* the Ontario Court of Appeal held that a letter indicating a future unilateral change to express termination provisions in an employment contract was a repudiation of the contract based on anticipatory breach.¹⁸ At the time of the letter the employee could have considered the contract repudiated and sued for constructive dismissal.

¹⁵ *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para 27.

¹⁶ *Cox v. Royal Trust Corp. of Canada*, [1989] O.J. No. 675 at 5.

¹⁷ Ball, Stacey Employment Law in Canada, section 13-38

¹⁸ *Wronko v. Western Inventory Service Ltd.* (2008), 90 O.R. (3d) 547 at para 39 (C.A.)(per Winkler C.J.O.)

(iii) Mitigation

The duty to mitigate in a constructive dismissal case is the same as the duty to mitigate in a standard wrongful dismissal case.¹⁹ The Supreme Court, quoting from *Farquhar in Evans v. Teamsters Local Union No. 31*, noted that “the critical element is that an employee ‘not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation’”²⁰ The Court goes on to state that:

I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because these individuals have been constructively dismissed rather than wrongfully dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves.

The focus in any dispute about mitigation in the context of a constructive dismissal claim will be whether the employee’s refusal to work for the employer during the notice period would subject the employee to humiliation and/or degradation such that the employee can refuse the work rather than continue in an effort to mitigate their damages. Although the Supreme Court’s comments in *Evans* suggest that the test for whether an employee should return to an employer is an objective one, it still requires a contextual case by case analysis. For example, in *Loehle v. Purolator Courier Ltd.*²¹, the Ontario Superior Court determined that the employee alleging constructive dismissal had in fact been constructively dismissed but because returning to work for the employer would not have resulted in “hostility, embarrassment or humiliation”, the employee had an obligation to mitigate his damages by continuing to work for the former employer. By refusing to accept what was found to be an objectively reasonable work offer, the employee was denied damages.

Conclusion

In today’s ever changing and dynamic workplace environments, understanding the nuances of a constructive dismissal claim is essential to the practice of employment law. In order to establish a constructive dismissal claim, the plaintiff must be able to establish what the express and/or implied terms and/or conditions of the employment contract are, that one or more of those terms and/or conditions have been breached and that the breached terms and/or conditions form a fundamental part of the employment contract. An employer’s good intentions in making the impugned change will largely be irrelevant unless the court implies a term into the contract that the employer can “reasonably” alter the terms of employment. Anticipatory breaches and mitigation are two important considerations that will undoubtedly play a significant role in the litigation of any construction dismissal claim.

¹⁹ *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at para 27.

²⁰ *Ibid* at para 30.

²¹ *Loehle v. Purolator Courier Ltd.*, [2008] O.J. No. 2462