

Constructive Dismissal - A balance tool for employers and employees?

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Constructive dismissal is defined, for the purpose of unfair dismissal, as where the employee terminates the contract, with or without notice - in circumstances such that he is entitled to terminate it without notice by reasons of the employer's conduct. 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:

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.

Per Lambert J.A. in *Farquhar v. Butler Bros. Supplier Ltd.*¹

A constructive dismissal occurs when the employer commits either a present breach or an anticipatory breach of a fundamental term of a contract of employment, thereby giving the employee a right, but not an obligation, to treat the employment contract as being at an end".

Cessation of an employee's service may constitute either a constructive or an actual dismissal, depending upon the circumstances. Where an employee is forced to resign, he or she will be considered constructively dismissed and will be entitled to damages in lieu of reasonable notice.² In such cases, the key issue is often whether the employee's resignation was voluntary or whether the resignation was procured by duress or even an outright demand. In the latter instance, termination of the employee's work may be considered analogous to actual dismissal.

A disciplinary suspension, where unwarranted or improperly motivated,³ a forced leave of absence,⁴ as may a failure by the employer to reinstate an employee after he or she returns to work following a leave of absence⁵ may amount to a constructive dismissal.

Where the employee is partly to blame for the discontinuance of service, it is less likely to constitute a constructive dismissal. Thus, a disciplinary suspension, where warranted by an employee's misconduct, will generally not result in finding of fundamental breach.⁶ There must be objective evidence that the employer's course of conduct caused the employee to resign.⁷ Where the employee fails to demonstrate that his or her resignation was procured by the employer's conduct, the resignation will be considered voluntary.

A demand for an employee's resignation may be equivalent to a dismissal from employment.⁸ In *Thiessen*,⁹ McDonald J. of the Alberta Supreme Court observed that the substance, not the form, of the resignation must be considered in order to determine whether or not it was voluntary. Where the employer engages in a course of conduct which makes an individual continued employment intolerable, his or her resignation will not be considered voluntary and a conduct designed to humiliate and degrade an employee was considered to result in forced resignation.¹⁰

In the recent decision of Ontario Superior Court in *Re: Lemay v. Canada Post Corp.*(2003)¹¹ Mr. Lemay claims he was constructively dismissed by his employer and his main reason for resigning was that he alleges that Canada Post unilaterally increased his annual sales target from 10 million dollars per annum to 120 million dollars per annum for the fiscal year 2000-2001. The legal test to be applied to determine if an employee has been constructively dismissed was by Justice Gonthier of Supreme Court of Canada in *Farber v. Royal Trust Co.*¹²

Thus, it has been established in a number of 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 claim damages from the employer in lieu of notice. To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment.

The law is well settled that the factors to be considered by a court when determining the appropriate notice period are set out in *Bardal v. Globe and Mail Ltd.*¹³ stated as follows:

The reasonableness of the notice must be decided with reference to each particular case having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

In 1997, the Supreme Court of Canada, in *Wallace v. United Grain Growers Ltd*¹⁴ held that employers ought to be held to an obligation of good faith and fair dealings in the manner of dismissal and any breach of this obligation should be compensated by adding to the length of the employee's reasonable notice period. The *Wallace* decision has added yet another factor to the list of factors, which is commonly known as "Wallace" factor, has substantially increased notice periods and employers liability upon termination.

In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. The leading case on this question is an English decision, *In re Rubel Bronze and Metal Co. and Vos*,¹⁵ cited in its decision by Justice Gonthier in *Farber, supra*.¹⁶ In a constructive dismissal action, the onus is upon the plaintiff to prove damages and there is therefore a burden upon him to establish on a balance of probabilities, the quantum of loss. Laskin, C.J.C. for the Supreme Court of Canada in *Red Deer College v. Michaels et al* stated.¹⁷

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on the damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to have disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences.

Denault J. for the Federal Court Trial Division, in *Schechter*¹⁸ stated:

In the case at bar, care must be taken not to categorize too readily as a dismissal, whether justified or not, the circumstances associated with the plaintiff's departure. The court must not lose sight of the fact that it was first and foremost a resignation, and was presumably made in free and voluntary circumstances. Clearly if the plaintiff wishes to obtain the damages claimed, it is for him to establish that there was harassment, arrogance - in short all the circumstances which led him to regard his departure as a forced resignation, amounting to a disguised dismissal.

Final Word

The test for constructive dismissal is an objective one. The Court must be satisfied that the employer has fundamentally breached the terms of the employment contract. Actions for constructive dismissal must be founded on conduct by the employer and not on the perception that conduct by the employee.¹⁹

1 (1988), 23 B.C.L.R. (2d) 89 (B.C.C.A.) at p. 92

2 Rajput v. Menu Foods Ltd. [1984] O.J. No. 2290

3 Biccum v. Fanny's Fabrics (Sask.) Ltd. (1996), 24 C.C.E.L. (2d) 286 (Sask. O.B.)

4 Card Estate v. John A. Robertson Mechanical Contractors (1985) Ltd., (1989), 26 C.C.E.L. 294 (Ont. H.C.J.)

5 Bishop v. Carleton Co-operative Ltd. (1996), 21 C.C.E.L. (2d) 1 (N.B.C.A.)

6 Kellas v. CIP Inc. (1990), 32 C.C.E.L. 196 (B.C.S.C.), at p. 215

7 Jervis v. Raytheon Canada Ltd. (1990), 35 C.C.E.L. 73 (Ont. Ct. (Gen. Div.)), aff'd 26 C.C.E.L. (2d) 101 (C.A.)

8 Thiessen v. Leduc, [1975] 4 W.W.R. 387 (Alta. S.C.), at p. 397.

9 Ibid

10 Vautour v. Miramichi Air Services Ltd. (1978), 26 N.B.R. (2d) 391 (Co. Ct.)

11 [2003] O.J. No. 3052 (Ont. S.C.)

12 [1997] 1 S.C.R. 846

13 (1960), 24 D.L.R. (2d) 140 at p. 145

14 (1997), 152 D.L.R. (4th) 1

15 [1918] 1 K.B. 315,

16 See, for example, *Stewart v. MacMillan Bloedel Ltd.* (1992), 42 C.C.E.L. 225 (B.C.C.A.), aff'g (1991)

17 (1975), 57 D.L.R. (3d) 386 (S.C.C.) at pp. 391

18 *Schechter v. Canada* (1986), 8 F.T.R. 144 (T.D.)

19 Justice Nash of the Alberta Court of Queen's Bench in *Zifkin v. Ava Insurance Canada*, [1996] A.J. No. 56. See, for example *Bowen v. Ritchie Bros. Auctioneers Ltd.* [1999] O.J. No. 4102