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How to minimize the impact of workplace change

Ontario colleges struggle these days to meet the increasing programming demands of students within the financial limits currently imposed by the provincial government funding limitations. As a result, many administrative staff find themselves being asked to do more and take on additional roles and responsibilities.

Often the extra responsibilities are to be accomplished using the same or even fewer resources, and with no increase in pay or benefits. These types of amendments to the terms and conditions of one's employment often have a profound impact on the employee and require careful advice and consideration to effectively minimize the potentially negative impact of these changes.

Your employer can amend the terms and conditions of your employment within reason. However, once past a certain threshold, these modifications may amount to a *constructive dismissal*. Constructive dismissal is the legal term used to describe when fundamental changes to an employee's position are imposed by the employer. As set out by the Supreme Court in *Farber v. Royal Trust Co.*, the imposed change or changes must be considered a substantial departure from the employee's previous employment, such as unilateral amendments to the employee's responsibilities, status, geographical location, or compensation in order to meet the threshold required to establish a constructive dismissal.

The employer has two options when it substantially changes the terms and conditions of your employment. It can either:

I. Provide reasonable notice in writing of the changes and invite the employee to accept the changes once they take effect.

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II. Make the changes immediately, compensate you in lieu of reasonable notice, and perhaps offer you the new position. When facing changes of this nature, there are a number of options available to employees which are set out by Justice Gray in the 2010 *Russo v. Kerr Bros. Ltd.* decision.

- First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.
- Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal," as discussed in *Farber*, although this term was not in use when *Hill* was decided.
- Third, the employee may make it clear to the employer that he or she is rejecting the new term. As Mackay J.A. so aptly put it [in the Court of Appeal decision *Hill v. Peter Gorman Ltd.*, (1957) O.J. No. 188, 9 D.L.R. (2d) 124 (C.A.)]: "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."

That being said, if you would prefer to preserve the positive employment relationship while unilateral changes of this nature are taking place, a fourth option may be considered – the parties may implement a fixed-term trial period in the new role before making a decision to accept or not. A six-month or longer assessment period may allow the parties to decide whether or not the new position is appropriate in terms of your skill set, the employer's expectations, and to ensure that the new role is properly compensated and appropriately resourced. Any trial agreement should also contemplate reasonable notice and include appropriate exit provisions in the event that one of the parties perceives the trial period to have been unsuccessful.

If you are going to enter into negotiations of this nature, it is important that any agreement is explicit to ensure there is no misunderstanding between the parties. If you are perceived to have accepted a change and continued working, you may inadvertently forfeit your right to claim damages for constructive dismissal later. This principle is called "condonation" and occurs when one party has tolerated and accepted the conduct with which it later takes issue. Therefore, it is important to object to a relevant change in a timely manner and propose





a reasonable alternative where possible while maintaining your rejection.

Unfortunately, there are times when the employer's decision to change certain aspects of the employment contract may be motivated by a desire to pressure the employee to resign from their employment and thereby limit any entitlement to a termination package. Where this can be established, it may be considered to be bad faith conduct, and the concurrent toxicity in the workplace may render it impossible for the employee to remain

in their employment, even for a trial period. Evidence of dishonest or bad faith conduct may be associated with the employer's actions but is not a necessary requirement to establish a claim of constructive dismissal. Instead, the court will assess all of the circumstances surrounding the changes to the terms and conditions of employment, including the relationship between the employer and the employee, the length of employment, the manner in which the change was effected, as well as, any bad faith conduct.

For employees who believe they may have been or may soon be constructively dismissed, it is important to discuss your situation with an employment lawyer as soon as possible to assess the merits of your case, determine the legal steps you should take and consider any potential damages that you may be entitled to.

If you have questions regarding this or other employment law matters, please do not hesitate to contact Ella Forbes-Chilibeck or other experienced lawyers at Raven, Cameron, Ballantyne & Yazbeck, OCASA's recommended law firm. [C|A](#)

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