

Constructive Dismissal

When is change too much?



by Ella Forbes-Chilibeck

In our present economy, many employers are being pressed to make do with less - to find ways to cut costs while maintaining overall operations of their organization. Employees at all levels are being asked to accept significant unilateral changes to the terms and conditions of their employment in order to help meet corporate financial targets. Employees may be expected to take on additional roles and responsibilities, accept reductions in compensation packages, forgo bonus or profit sharing, work longer hours or perhaps relocate.

Often the unilateral changes are intended to be temporary; employers rely on the employees' need for ongoing employment and income to secure compliance with these cost cutting measures. However, as the recession continues and these 'stop-gap' measures in the workplace look like they are here to stay, employees are questioning the burden they are being asked to bear. Oftentimes the individual changes may not be particularly harsh, however the cumulative effect can have a profoundly negative impact on the employee. Employees may find themselves forced to accept unilateral changes, concerned that if they speak up against the changes, their name may be at the top of the list in the event of layoffs. They are left asking, "What happened to the job I was hired for?" feeling uncertain and powerless to enforce their original employment agreement.

What legal alternatives are available to these employees? How should an employee respond if their employer makes fundamental unilateral changes to their employment? As a general rule, employees who quit their employment are not entitled to compensation from their employer.

However the exception to this is where an employee alleges that their employer has unilaterally and fundamentally changed a fundamental term of their employment. The law classifies such situations as 'constructive dismissal' (*Farber v. Royal Trust Co.*, 1997 1 SCR 846), recognizing that when the employer dramatically alters an essential term of the employment agreement, the agreement is effectively at an end and the employee is entitled to the same notice period or compensation in lieu of notice as if they had been dismissed without cause.

Examples of some fundamental changes to the conditions of employment that may be classified as a constructive dismissal are: substantial reduction in pay; reduction or increase in hours of work; fundamental change in duties and responsibilities; a change in reporting relationship or job title; or a requirement that the employee relocate (provided this was never part of the employment contract). The duration and magnitude of the changes will most likely be a determining factor in deciding whether or not these changes warrant the employee being able to treat the employment relationship as being at an end. Minor incidental changes will generally not be enough to sustain a constructive dismissal claim, although the cumulative impact of a number of smaller changes may be. An employee may be wise to officially oppose the proposed change(s), but cooperate for a trial period to allow the parties to properly assess the impact of the change(s) and to maintain an ongoing relationship with the employer. The employee has an obligation to mitigate any losses, and probably will have a duty to stay on unless the changes are dramatic or

impact negatively on the health of the employee.

The burden is on the employee to prove that they have been constructively dismissed. The employee needs to prove that the employer made fundamental changes, that these changes were made unilaterally, without reasonable notice and that the changes are of a magnitude to substantially alter the employment relationship.

In these challenging times, employers need to maintain the ability to reorganize and to reallocate responsibilities. However, the law recognizes that whether or not there is a formal employment contract, the employment relationship is contractual in nature and imposes duties upon both the employer and the employee. The success of a constructive dismissal claim will largely depend on the facts of each particular situation. Therefore, employees are strongly encouraged to speak with a lawyer and obtain legal advice before they decide to walk away from their job and assert that they have been constructively dismissed.

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