
CONSTRUCTIVE DISMISSAL: IMPLICATIONS FOR CHARITIES AND NOT-FOR-PROFITS

*By Barry W. Kwasniewski**

A. INTRODUCTION

Employees who resign from their positions are generally not entitled to receive any compensation from their employer. However, an important exception to this rule is where an employee resigns because their employer had decided to unilaterally and fundamentally change the conditions of employment. Should this occur, the employee will have been considered in law to have been “constructively dismissed”. This means that the employer, while not directly dismissing the employee, fundamentally changed the job and the employment contract effectively came to an end. Should this occur, the employee would be entitled to be paid compensation on the same basis as if he or she had been wrongfully dismissed. This bulletin will discuss the principles of constructive dismissal and will provide guidance on how charities and not-for-profits may reduce the risk of such claims.

B. WHAT IS CONSTRUCTIVE DISMISSAL?

In 1997, the Supreme Court of Canada decided what has become the leading decision on constructive dismissal, *Farber v. Royal Trust*.¹ In that decision, the court ruled that constructive dismissal occurs when an employer alters a fundamental term of the employment contract (whether it be written or oral), which affects the very core of the relationship, effectively repudiating the contract and thereby demonstrating intent to no longer be bound by its terms. This results in a fundamental breach of the contract, which gives the

*Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Kate Robertson, B.A. LL.B., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

¹ [1997] 1 S.C.R. 846.

employee justification for resignation and bringing an action for wrongful dismissal. The onus of proving a fundamental breach is on the employee.

The following have been found by the courts as fundamental breaches of the employment contract giving rise to a claim for constructive dismissal:

- a substantial change in remuneration or benefits;
- significant change in job duties;
- a geographical relocation;
- forced resignation;
- forced retirement;
- layoff;
- a substantial change in working conditions; and
- employer conduct which renders continued employment intolerable for the employee.

In constructive dismissal cases, the court must analyze whether the change to the employment contract was substantial or fundamental. Thus, the court must review the express and implied terms of the contract and determine whether the change was a proper exercise of the employer's rights, or a fundamental change to the employment contract. Although the *Farber* decision was decided in the context of the Quebec civil law, it has been accepted as the seminal decision on constructive dismissal for the common law provinces as well.

C. ANALYSIS

The difficulty employers face is determining when a change 'crosses the line' between the reasonable exercise of an employer's rights and a change that may result in a successful constructive dismissal claim. For example, in *Cadenhead v. Unicorn Abrasives of Canada Ltd.*,² modest changes were made to the employee's duties. The court concluded that the sales position the employee held was not abolished or altered and his salary and responsibilities remained unchanged throughout. The court endorsed the principle that an employer must be allowed some reasonable leeway in which to alter his employee's duties.³ In dismissing the claim, the court also found that there was not a unilateral and substantial change to the essential terms of the employment contract.

² [1984] O.J. No. 505. H.C.J

³ *Ibid* at para 31.

Similarly, in *Black v. Second Cup Ltd.*,⁴ an employee's responsibilities were reorganized without fundamentally altering the employment contract. The employer considered the employee's performance as vice-president was particularly skilled in one division (leasing) but fell short in another area (franchising). As a result, the employer chose to reorganize the employee's role as solely the vice-president of leasing, with no further involvement in franchising. There was very little reduction in his base salary. The employee's claim for constructive dismissal was dismissed.

While these two decisions demonstrate that employers have a degree of flexibility in employee management, there is no easily applicable objective test that can be applied to each specific fact situation.

D. RECOMMENDATIONS

To reduce the risk of constructive dismissal claims, employers need to obtain the employee's consent for any substantial changes in the conditions of employment. Should the employee refuse to agree to the changes, terminating the employee, with an appropriate termination package, may be the only viable option. Further, at the outset of the employment relationship, a written employment contract will reduce the risk of constructive dismissal claims. An employment contract⁵ may allow for changes in job duties and responsibilities, compensation, benefits and relocation. However, as prospective employees may be reluctant to enter into contracts that would allow the employer such latitude, the extent of such changes may well become a matter of negotiation between the employer and the prospective employee. Having these discussions with the employee at the outset of the relationship may avoid problems that may lie ahead in the event the employer later needs to make changes in the way it carries on its activities.

⁴ [1995] O.J. No. 75, Gen.Div.

⁵ Barry W. Kwasniewski, "Employment Contracts for Charities and Non-profit Organizations" in *Charity Law Bulletin* No. 159 (March 26, 2009), online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb159.pdf>.