

13 Constructive Dismissal Pitfalls to Avoid



Managing the liability risks of downsizing and corporate restructuring.

As an employer, you must be able to make tough decisions about pay, benefits, job responsibilities and other key terms of employment, especially during hard times. The problem is that what you regard as legitimate and necessary changes for the good of the business might drive employees to leave the organization and sue you for constructive dismissal. This exposes you to risk of liability for not only termination notice and unpaid employment standards benefits but also punitive and other damages that can run into 5- and even 6- or 7-figures. Here's a roadmap of constructive dismissal pitfalls and how to avoid them.

Constructive Dismissal, 101

Constructive dismissal means firing by deeds rather than words. Instead of saying "you're fired," you do something that changes the terms of employment in such an unfavourable way that the employee feels compelled to leave. It's the legal equivalent of a pink slip. Constructive dismissal comes in 2 basic varieties, according to the Canadian Supreme Court:

- A single act by the employer that violates an essential term of an employee's employment contract;
- A series of actions that, when added together, show that the employer no longer intends to abide by the employment contract.

What makes constructive dismissal so dangerous isn't just the potential for damages but also the fact that employers can commit it without intending or even realizing they're doing it. The risk is especially great during challenging times when organizations need to restructure.

12 Ways to Commit Constructive Dismissal

HR directors can do a lot to help their managing executives steer clear of danger by sensitizing them to constructive dismissal risks. What decision makers need most right now is guidance enabling them to determine whether the business changes they want to make cross the constructive dismissal line. That's easier

said than done because the law of constructive dismissal comes not from legislation and regulation but individual court and arbitration cases decided on the basis of their unique facts. But while all cases are different, the rulings form patterns and precedent that HR directors can use to help their organizations make legally sound decisions. Specifically, be attuned to the 12 forms of changes and conduct that are most likely to make a company liable for constructive dismissal.

1. Cuts in Base Pay

The most common and obvious way to commit constructive dismissal is to unilaterally cut an employee's base salary or wages. The deeper you cut an employee's employment income, the greater your liability risk. While there's no bright line, on the basis of case rulings:

- Cuts of 10% or less generally aren't enough to constitute constructive dismissal; and
- Cuts of 20% or more generally are enough to constitute constructive dismissal.

Keep in mind that the actual size of the cut is just one factor and that courts will look at the entire situation in judging whether an employer committed constructive dismissal. Thus, for example, an Ontario court ruled that a pharmacy that cut an employee's salary from \$40 to \$36 per hour (a 10% cut) was liable for constructive dismissal because it also moved her to a less desirable position [*Ontario Chemists Rx Inc. v. Ibrahim*, 2007 CanLII 48597 (ON LRB)].

2. Cuts in Bonuses and Commissions

Unilaterally cutting bonuses and commissions can be just as risky as cutting base pay, depending on the amount of the cut and how much of the employee's income comes from bonuses and commissions. For example, elimination of a bonus attributable to 5% of company annual revenues was constructive dismissal because it reduced an employee's overall compensation 25% [*MacLean v. CrossOff Inc.*, 2005 NSSC 185 (CanLII)]. By the same token, cutting an employee's bonus from 15% to 10% of salary as part of a corporate restructuring wasn't constructive dismissal because it reduced his net income loss by only \$4,500. The court ruled that the cut was too insignificant to amount to constructive dismissal [*Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA)].

3. Restructuring the Compensation Package

Although more subtle than a wage or bonus cut, unilaterally changing the structure of a compensation package if the result is substantially less favourable to the employee. One common example is converting salary to commissions, bonuses and other contingent payments that the employee isn't sure to receive. Examples of compensation restructurings that amounted to constructive dismissal:

- Switching from profit-based cash bonuses to shares of company shares [*Carabine v. Daam Galvanizing*, 2000 ABPC 56]; and
- Paying an employee commissions instead of a base salary as part of a demotion—even though the commission rate was 3% higher [*Farber v. Royal Trust Co.*, 1997 CanLII 387 (SCC), [1997] 1 SCR 846];

Courts look at the overall impact of the changes, including the amount and nature of the cuts made.

Example: A store manager earns \$92,000, including \$33,000 in base salary plus a personal bonus and a bonus tied to the store's profitability. The employer decides to merge salaries with personal bonuses. To make up for the lost bonus opportunity, the store adjusts the manager's base salary to \$64,000. The manager claims that this is really a pay cut and resigns. The BC court rules that the manager was constructively dismissed because the store bonus was a fundamental term of the employment contract [*Wood v. Owen De Bathe Ltd.*, 1999 BCCA 29 (CanLII)].

4. Benefits Cuts and Restructurings

Significant changes in benefits can also result in constructive dismissal, especially when combined with cuts in direct compensation. As with direct compensation, the most obvious form of an adverse change is a direct cut in benefits, such as eliminating or reducing contributions to pension, health and other employer-sponsored benefits plans. To determine constructive dismissal, courts look at the value of the benefits cut and the percentage by which it decreases the employee's earnings. For example, a BC court ruled that an employer's discontinuation of paying Medical Service Plan premiums, accompanied with a salary cut and elimination of a wellness bonus with an overall aggregate effect of reducing the employee's total compensation by 20% amounted to constructive dismissal [*Streight v. Dean*, 2002 BCSC 399 (CanLII)]. But not all cuts cross the line:

Example: A SK employer failed to make \$1,218 in pension contributions for an employee. This represented 3% of her salary. The court dismissed the employee's constructive dismissal claim, ruling that this wasn't significant enough to amount to a fundamental breach of the employment contract [*Hlewka v. Moosomin Education*, 2007 SKPC 144 (CanLII)].

Example: As a result of hard economic times, an Alberta employer suspended matching contributions to an RRSP plan and cut vacation benefits from 6 to 8 weeks. Two employees claimed constructive dismissal. The cuts represented between 6% and 8% of the employees' total compensation, not enough to make the employer liable for constructive dismissal [*Hamilton & Olsen Surveys Ltd. v. Otto*, 1993 ABCA 233 (CanLII)].

5. Demotion

Demoting an employee can be constructive dismissal, especially when it's not the result of poor performance or justifiable discipline. Demotion is especially problematic when it's intended or likely to result in humiliation or loss of respect. For example, an Ontario court ruled that permanently reassigning an employee's payroll duties was constructive dismissal noting that she was stripped of her title, made to report to an employee of equivalent rank and told that her job was going to be outsourced and that the company "didn't have any plans for her" [*Robinson v. H. J. Heinz Company of Canada LP*, 2018 ONSC 3424 (CanLII)]. Demotion that's part of a broader restructuring is likely to depend on the other changes and job conditions.

Example: As part of its modernization strategy, a clothing business demoted a

supervisor to order marking clerk. Although he lost his managerial responsibility, his salary remained the same. But later, he was further demoted to a position where all he did was sew on garment buttons. Demoting the employee to such a lowly position was constructive dismissal, the court ruled [*Dynes v. Jonah Apparel Group Ltd.*, 1997 CanLII 4268 (BC SC)].

6. Promotion

Believe it or not, promotion can also constitute constructive dismissal if it's forced on an employee. An employee may also argue that the new position is actually a demotion in disguise.

Example: As part of a reorganization, an airline employee was promoted to Shift Manager. Instead of a fixed salary, he was to receive performance-based compensation. When the employee turned down the new position, his supervisor gave him a letter accepting his "resignation." The employee said he hadn't resigned, but he was escorted out of the building. The BC court ruled that he had been constructively dismissed [*Parks v. Vancouver International Airport Authority*, 2005 BCSC 1883 (CanLII)].

7. Changes to Job Responsibilities

Unilaterally restructuring an employee's job may constitute constructive dismissal, even if it results in neither a pay cut nor demotion. The most common example is a reduction in job responsibilities. Thus, for example, moving an employee with of over 25 years of service as a dock supervisor to a newly created position carrying less responsibility resulted in a finding of constructive dismissal and damages award of \$81,000 [*Morgan v. Vitran Express Canada Inc.*, 2015 ONCA 293 (CanLII)]. By the same token, adding job responsibilities can also cross the line, as an Ontario company learned by repeatedly saddling its IT administrator with new project responsibilities without a commensurate raise in salary [*Damaso v. PSI Peripheral Solutions Inc.*, 2013 ONSC 6923 (CanLII)]

8. Changes to Work Hours

Merely increasing or decreasing work hours by an hour or so probably won't put you in jeopardy. But unilaterally reducing an employee from full- to part-time status is more problematic; and so may be "upgrading" an employee from part-time to full-time.

Example: A full-time manager returning from maternity leave requested a part-time bookkeeper position so she'd have time to care for her child. Her supervisor granted the request. But later that year, the bookkeeper position was changed to five days per week and the start of the workday was pushed back to 8 a.m. The bookkeeper objected and eventually left the company. The Ontario court ruled that changing the bookkeeper from part- to full-time was constructive dismissal [*Corey v. Dell Chemists (1975) Ltd.*, 2006 CanLII 19435 (ON SC)].

9. Suspensions

Wrongfully suspending an employee can constitute constructive dismissal. Thus, for example, suspending a marketing executive without pay for failing to deliver advertising materials to a trade show on time was constructive dismissal because

the company's progressive discipline policy didn't authorize suspensions without pay [*Carscallen v. Fri Corporation*, 2006 CanLII 31723 (ON CA)]. The Canadian Supreme Court has also ruled that even suspension **with pay** crosses the line if the company's disciplinary policy doesn't provide for it [*Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (CanLII), [2015] 1 SCR 500].¹⁰. Undermining an Employee's Authority

10. Constructive Dismissal

Undermining an employee's authority, like humiliating him in front of colleagues or cutting her out of key decisions, can be constructive dismissal especially if it makes it difficult or impossible for them to do their job.

Example: While out of town at a trade show, the company president learned that the CEO had fired six employees without consulting him. Frustrated and angry, the president took a paid leave of absence and never returned. He sued the company for constructive dismissal, claiming that the company had been gradually stripping away his responsibilities and that firing the six employees was the "straw that broke the camel's back." The Alberta court ruled that the CEO's failure to consult the president eroded and insulted the president's position and was constructive dismissal [*Larson v. Galvanic Applied Sciences Inc.*, 2005 ABQB 238 (CanLII)].

11. Subjecting an Employee to a Toxic Work Environment

Creating a toxic work environment for the employee is grounds for constructive dismissal. And so is allowing others—like supervisors or co-workers—to harass the employee, even if the employer doesn't actually participate in the conduct. Thus, for example, an Alberta court ruled that the name calling and abuse a parking garage employee endured from his supervisor went beyond a mere personality clash and constituted a deliberate calculated pattern and that the employer's toleration of conduct was a fundamental breach of its fundamental contract duty to treat employees with civility, decency, respect and dignity [*Lloyd v. Imperial Parking Ltd.*, 1996 CanLII 10543 (AB QB)].

12. Payroll Violations

Violations of contractual and/or employment standards requirements relating to payment of wages can give rise to a case for constructive dismissal. Examples:

- Unauthorized payroll deductions from wages [*Rothberger v. Concord Excavating & Contracting Ltd.*, 2015 BCSC 729 (CanLII)]; and
- Failure to pay salary on time [*Di Giuseppe v Hospice Richmond Hill*, 2015 CanLII 51505 (ON LRB)].

13. Taking Away an Employee's Right to Telecommute

Of particular relevance to these times, not following through on a promise to let an employee work from home may amount to constructive dismissal, particularly when it's coupled with pay cuts or other unfavourable changes. One recent example is the Ontario Court of Appeal ruling that an acquiring company committed constructive dismissal by not honouring the predecessor's contractual promise to let an employee work from home for 60% of her time and restructuring her bonus formula so as to cut the bonus from \$18,000 to \$6,000 [*Hagholm v.*

How to Protect Yourself

While the capacity to make sound evaluations of the constructive dismissal risks associated with the employment decisions your organization makes, keep in mind that you can take the issue completely off the table by securing employees' agreement to changes in the economic conditions of their employment. Just make sure those changes are:

- Expressed in writing;
- Clearly explained; and
- Supported by consideration, i.e., that the employee receives something of value in exchange for agreeing to the change.

And what if employees refuse to accept changes? Answer: Require them to put their resignation and reasons for it in writing. Although this won't prevent them from suing for constructive dismissal, getting employees to declare that they're leaving and why will protect you from surprise claims. Moreover, if the employee continues to work after tendering their resignation, you may be able to argue that they waived their constructive dismissal claims. The strategy may also help you bar the employee from raising complaints in the case that weren't stated in the resignation notice. [Click here](#) for a resignation procedure you can adapt.