

# Constructive Dismissal And You: Unexpected Consequences Of Changes To The Employment Relationship



The law surrounding constructive dismissal is full of potential pitfalls, both for employers, who may inadvertently constructively dismiss an employee and expose themselves to significant liability for failing to provide adequate notice, and for employees, who are faced with the difficult decision of asserting that a constructive dismissal occurred, or accepting an unwelcome change to their employment contract. In order to successfully avoid these pitfalls, it is important for to have a basic understanding of the circumstances under which a constructive dismissal may occur.

At its core, constructive dismissal rests on assertion that employees are entitled to rely on the terms of their contract of employment remaining fixed, and that fundamental changes to the employment contract cannot be made without the employee's consent. A constructive dismissal occurs when an employer, through their conduct, shows that the employer no longer intends to be bound by the contract of employment.

## **What is a constructive dismissal?**

In the leading case of *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 SCR 500, the Supreme Court of Canada articulated a two-branch test to determine whether a constructive dismissal has occurred. First, a constructive dismissal can occur through a single unilateral act that breaches an essential term of the contract of employment. Secondly, it can also occur where the employer's conduct, taken as a whole, shows the employer no longer intends to be bound by the employment contract. Notably, a written employment contract is not required for this doctrine to apply, although the absence of a written contract can make determining whether a breach has occurred more challenging.

The first branch requires that the unilateral change must substantially alter an essential term of the employment contract. There are two stages to this analysis. First, it must be shown that there was a breach by way of a unilateral change by the employer. Secondly, it must be shown that a reasonable person in the employee's situation would feel that the breach was a substantial change to an essential term. This is a highly-fact driven exercise, and will depend on the exact circumstances of the change.

The second branch requires a finding that the employer has shown they no longer

intend to be bound by the employment contract. The key question is the employer's perceived intention; ie, whether a reasonable person in the same circumstances as the employee would view the employer as intending to no longer be bound by the contract. This does not require a single act, but can occur through the cumulative effect of past acts.

## **Examples of constructive dismissal**

A non-exhaustive list of conduct that Canadian courts have found to constitute constructive dismissal is found below. It is important to note that this conduct is only sometimes, but not always, sufficient to establish a constructive dismissal:

- Demoting an employee to a position of lower prestige and status;
- Failing to provide a promised promotion;
- Requiring an employee to perform a fundamentally different type of work or systematically removing an employee's duties;
- Changing the employee's work location, such as a transfer to another city, province or country;
- Changing the employee's hours of work;
- Changing the employee's work conditions, such as a transfer to a smaller office with reduced amenities and access to other employees;
- Engaging in abusive behaviour that renders continued employment intolerable, such as verbal abuse, foul language, unsubstantiated accusations, or threats of termination;
- Failing to prevent the harassment of an employee by co-employees;
- Breaching the employee's privacy, such as through unwarranted surveillance;
- Suspending an employee, either for discipline or for administrative reasons;
- Removing an employee's support infrastructure and preventing them from accessing information and meetings necessary for them to perform their duties;
- Demanding an employee resign;
- Laying an employee off temporarily, when a lay-off is not explicitly authorized by the employment contract or by past conduct;
- Placing an employee on probationary status without cause; and
- Changing an employee's remuneration significantly

## **When does a constructive dismissal kick in?**

Once an employee has been confronted with a unilateral change to the employment relationship, they must choose to accept the change, or reject it and refuse to go to work. Until the employee has indicated, by action or by word, that they do not accept the change, there is no constructive dismissal. An employee will typically be allowed a 'reasonable' period or time, typically two or three months, to decide whether they wish to accept the repudiation of the contract. In certain cases, a delay of six or even seven months has not found to constitute condonation. However, an employee is not entitled to wait forever before asserting constructive dismissal, and delaying too long will result in a court finding that an employee condoned the change to the employment relationship.

It is critically important for both employees and employers to understand that every case is fact-specific and what is a constructive dismissal in one case may not be one in another. Because of this, one of the challenges that confronts both employers contemplating a change to the employment relationship, and employees faced with a change, is that it often be unclear when the line has been crossed and grounds for asserting a constructive dismissal actually exist.

The consequences for both employees and employers in failing to correctly determine if a constructive dismissal has occurred can be significant. From the employer

perspective, for example, a good faith change to the work location of a long-term employee could result in paying up to 24-months salary for failing to provide adequate notice.

From the employee perspective, if the employee assert a constructive dismissal and the court finds that the employer did not actually dismiss them, the employee will be found to have resigned, and to have lost any entitlement to notice or wages in lieu of notice.

## **Conclusion**

Employers should consult with legal counsel before making significant changes to the employment relationship, to ensure that they are not inadvertently terminating an employee and exposing themselves to potentially significant claims for constructive dismissal.

Employees who believe that they have been subject to a constructive dismissal should seek legal advice as soon as possible to avoid inadvertently condoning a fundamental change to the employment relationship, and to determine if the change is sufficient to constitute constructive dismissal.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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