Court Finds That Adding To A Person's Job Duties May Be Constructive Dismissal

When one hears "constructive dismissal", one typically thinks of situations such as reducing an employee's salary or benefits or taking away an employee's job responsibilities. In *Damaso v. PSI Peripheral Solutions Inc.* (PSI) 2013 ONSC 6923, the Ontario Superior Court of Justice expanded this list to include adding to an employee's workload.

Otoneil Damaso began his employment with PSI in 1999 as a Field Service Technician and Computer Technician. At that time, PSI's business focused on computerized high-speed envelope printing. Between 1999 and 2005, Damaso's position focused on servicing and repairing the printers.

In 2005, PSI's business changed and expanded to include an Automated Division which included new software for which Damaso was made responsible for supporting.

In early 2009, PSI made Damaso its IT Administrator and its "project champion" for yet another new company software system. In addition to these new responsibilities, Damaso continued to perform some software support work in the Automated Division.

In early 2010, Damaso asked PSI for a pay raise in light of his new functions for the company. He also raised concerns with his workload and tried to negotiate reductions to his responsibilities. Neither issue was resolved.

The issues came to a head in early 2011 when PSI advised Damaso that it would not be increasing his pay, that his workload was not excessive, and that his new job responsibilities were a natural extension to his original position with the company in 1999.

PSI later provided Damaso with 12 months' working notice of termination at his current salary. The notice set out several job responsibilities that Damaso was expected to perform, including information technology, software service administration, and ongoing support with automation customers. Damaso claimed that he had been constructively dismissed. The parties litigated the matter after Damaso had worked the full working notice period.

The Court agreed with Damaso, rejecting PSI's arguments that (among other things) Damaso had accepted the job duties and that he had fully mitigated his damages by working the full notice period. Although the Court acknowledged that employers are

“entitled to some flexibility in managing their businesses”, the Court noted that this flexibility is limited to modest increases in job duties without additional pay. In this case, the Court, among other findings, concluded that PSI had unreasonably added to Damaso’s job responsibilities without providing him with the proper means to fulfill them, and that Damaso cannot be taken to have mitigated his damages when he clearly did not accept the changes and when PSI had led him to believe that some clarification to his job and a pay raise were reasonably possible. The Court awarded Damaso damages equivalent to 12 months’ notice.

Critical to PSI’s failure in the case was that the employment contract between PSI and Damaso did not contemplate these kinds of changes. As the Court cited in the decision, the Supreme Court of Canada has already found that:

“…an employer can make any changes to an employee’s position ***that are allowed by the contract****, inter alia, as part of the employer’s managerial authority. Such changes to the employee’s position will not be changes to the employment contract, but rather application thereof.* ***The extent of the employer’s discretion to make changes will depend on what the parties agreed when they entered into the contract…****”*

Employers looking to avoid a potential PSI problem, therefore, are better to:

- check the language used in the employment contract or job description to see if a reasonable person would consider the potential new duties to form part of the original job; and
- update an employee’s employment contract when significant changes in responsibilities or other terms of employment occurs; and
- offer the employee some form of consideration for the changes to the employment (such as a pay raise).

Otherwise, the “one more thing” to the employee’s list may be a severance payout.

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