# How Long Can an Employee Dispute Compensation Changes?

In the recent Court of Appeal decision in *Kosteckyj v. Paramount Resources Ltd.* 2022 ABCA 230 (CanLII), the court considered the possibility that specific timelines could be imposed on employees for voicing dissatisfaction with unwelcome changes to the terms of their employment if they want to subsequently argue that they've been constructively dismissed.

**What Typically Triggers a Constructive Dismissal Claim?**

Constructive dismissal arguments often follow unilateral changes made to an employment agreement by the employer. When an employee alleges a constructive dismissal after a change, they're essentially saying that the change cuts so deeply to the core of the employment relationship that they've been forced to leave: "I'm quitting, but you made me! … and by the way, you have to now compensate me as if you'd fired me."

Alleging a constructive dismissal is a risky play for employees because it's a zero-sum game. If their argument fails, then they'll have quit their employment with little to show for it. For employers, the risk comes when making the decision to change the terms of an employment agreement. While many different kinds of changes can result in a constructive dismissal allegation, imposing a unilateral change that results in a reduction to an employee's compensation is the most likely to trigger a claim.

**What Constitutes a Constructive Dismissal?**

To prove a constructive dismissal an employee must show that their employer has breached their agreement by unilaterally changing a term of the agreement (whether express or implied) to the employee's detriment. If the employee consents or silently acquiesces to the change, then it will not be a breach, and it will not amount to a constructive dismissal.

Changes in an employment relationship are often necessary. Restructuring is a reality for many companies right now that find themselves coming out of the pandemic to a less lively marketplace. Making a decision that risks the loss of a valued employee is difficult enough. If reducing their compensation means the employer is incurring the risk of a constructive dismissal, when does that risk go away?

**Deadlines for Constructive Dismissal Claims?**

The answer to that question has always been dependent on a number of factors, but in *Kosteckyj v Paramount Resources Ltd*, Wakeling JA found that "a healthy, knowledgeable and informed person," (in this case, an engineer) should only have ten business days after being informed by their employer of a unilateral change in their compensation to voice their lack of consent to the change. Wakeling JA further opined that the average employee, who lacked that same level of sophistication, should have no more than fifteen business days to do the same when faced with a unilateral reduction to their pay.

Justice Wakeling's fellow panel members, Justices Pentelechuk and Ho concurred in the result, but sidestepped his ten business day finding, indicating that they, "prefer to avoid stating a specific time period, particularly in the absence of argument and submissions on this issue." Leaving the point open will undoubtedly encourage argument in the lower courts and in other jurisdictions for the standardization of a notice period in which an employee must state their lack of consent to a change to their employment terms. Constructive dismissal deadlines would bring some certainty to employers making changes and could result in less overall constructive dismissal litigation. In the current state of the law, an employer making a unilateral change to an employee's terms is essentially lighting a fuse without knowing its length. A standardized deadline would allow an employer to know more accurately whether or not that bomb is going to go off.

An objective reasonableness standard does, however, fail to consider the fact-specific circumstances an employee could have. Should an employee who is living paycheque to paycheque, and is fearful that they will immediately lose their job if they refuse to consent to a unilateral change, be held to the same standard? Simplification of the law on this issue could certainly streamline the administration of justice, but not necessarily result in the most just of outcomes.

In *Kosteckyj*, Pentelechuk JA and Ho JA did agree that a twenty-five-day period was reasonable for this specific employee to have made it clear that she did not consent to the change in her compensation. We can likely expect to see this case and point referenced in the argument sooner rather than later.

**Take-Aways for Employers**

While the certainty of a standard timeline in these circumstances would provide employers with the ability to know more quickly if a change is going to cause them a legal problem, that's not the case yet. Employers who need to make unilateral changes to an employee's pay or other terms of their employment should always consult with a lawyer to assess their risk before doing so. A pay reduction made with the intention of increasing savings in the short term could quickly backfire and result in litigation legal fees and sizable termination payments if not handled properly.

**Source:** Spring Law Matt Chapman