

# HR Legal Briefing: Is Requiring an Employee to Relocate Constructive Dismissal?



As an employer, you may think you have the right to restructure your business and shuffle employees to different geographic locations any way you see fit. In fact, you don't. If you do force employees to relocate you run the risk of what's known as constructive dismissal. Here's a quick briefing on the liability risks and how to manage them.

## **What Is Constructive Dismissal**

Constructive dismissal is a form of wrongful termination executed without a pink slip or "you're fired" statement. It occurs when the employer makes work so unbearable that it forces the employee to leave. If you've seen the movie *Office Space*, think of Milton Waddams, the character the bosses want to get rid of but in a tidy way. So instead of a messy termination meeting, they stop paying him, take away his benefits, move him to a basement office and, worst of all, strip him of his prized red stapler. Of course, the *Office Space* example is an extreme and grotesque—but awfully funny—dramatization of the concept.

## **The Legal Risks**

In real life, constructive dismissal is much more subtle; it's done not deliberately but inadvertently as a result of what the employer thinks are legitimate job changes that drive the employee out. To the employer, it looks like the employee resigned. All too often, the wake-up call comes after the fact when the court finds the employee was constructively dismissed and awards damages in the 4-, 5- or even 6-figure range.

## **Relocation as Constructive Dismissal**

The test is whether a person in the employee's position would "reasonably believe" that the employer has fundamentally changed the employment contract. While pay cuts, demotions and harassment are probably the most common forms, forcing an employee to move to a different geographic location may also constitute constructive dismissal. By the same token, relocation and transfer is also a normal and routine part of operation; if every relocation amounted to constructive dismissal, companies would be unable to reorganize and restructure their business.

## Key Question

How do you tell the difference between a legitimate transfer and an act of constructive dismissal?

Unfortunately, there's no single formula for determining when geographic relocation amounts to constructive dismissal. The good news is that thanks to decades of litigation, we know the factors HR managers must consider to assess their organization's liability risks when requiring its own employees to relocate.

## 6 Questions to Ask

While no single factor is determinative, the more of the following questions that you can answer YES, the lesser your constructive liability risks will likely be.

### 1. Do You Have a Contractual Right to Relocate the Employee? YES [ ] NO [ ]

Constructive dismissal occurs when an employer unilaterally changes a fundamental term of the employment contract, whether in one fell swoop or cumulatively via a series of less dramatic changes over time. Accordingly, employers *don't* commit constructive dismissal if the contract gives them the right to transfer an employee to a different location; the flip side, of course, is that constructive dismissal does occur if the contract bans relocation.

Employer Wins	Employer Loses
Not constructive dismissal to transfer manager from Ottawa to St. Clet, Québec, when contract expressly states that "due to the nature of our industry, relocation may be necessary if the circumstances warrant" [ <a href="#">Smith v. Viking Helicopter</a> , 1989 CanLII 4368 (ON CA)]	Constructive dismissal to transfer a customer service rep to a more distant branch office when her right to work in the original office was implied in the contract [ <a href="#">Marshall v. Newman, Oliver &amp; McCarten Insurance Brokers Ltd.</a> , 2004 CanLII 15915 (ON CA)]

### 2. Did the Employee Know Relocation Was a Possibility? YES [ ] NO [ ]

Even if the contract doesn't expressly address relocation, employers may be able to stave off liability by showing that the employee took the job knowing that relocation was a possibility.

Employer Wins	Employer Loses
Not constructive dismissal to relocate administrative assistant to new Fort McMurray operation when she knew before taking the job that her entire department was being transferred there and was hired for the very purpose of supporting the staff of that department [ <a href="#">Canadian Natural Resources Limited v Pavia</a> , 2015 ABQB 391 (CanLII)]	Constructive dismissal to force equity trader to relocate from Vancouver to San Francisco when her contract didn't contain an express or implied term allowing the firm to transfer her and she joined the firm with the expectation that she wouldn't be transferred [ <a href="#">Wilson v. UBS Securities Canada Inc. et al.</a> , 2005 BCSC 563 (CanLII)]

### 3. Does Transfer Position Offer Equivalent Employment Terms? YES [ ] NO [ ]

Consider not just the geography but other key terms of the post-transfer employment arrangement. Thus, relocation is more apt to be seen as constructive dismissal when it's accompanied by cuts in pay, benefits, rank, responsibilities and/or opportunity for advancement; conversely, relocation is easier to justify when the post-transfer terms of employment are at least equivalent to the original position.

Employer Wins	Employer Loses
<p>Not constructive dismissal to transfer branch manager from Red Deer to Sedgwick, Alberta, more than 2 hours away from his home and family when he'd remain a branch manager entitled to the same terms and benefits in the new location [<a href="#">Brown v. Pronghorn Controls Ltd.</a>, 2011 ABCA 328 (CanLII)]</p>	<p>Constructive dismissal to transfer HR director from Mississauga head office to satellite Vancouver office where he'd have to work harder with a smaller staff, submit to direct head office control and perform new "undefined" duties [<a href="#">Reynolds v. Innopac Inc.</a>, 1998 CanLII 3558 (ON CA)]</p>

**4. Will You Pay the Employee's Moving Expenses? YES [ ] NO [ ]**

Offering to pay an employee's moving expenses is evidence that the relocation was fair and acceptable to the employee. This helps to neutralize constructive dismissal complaints by making it harder for employees to claim that they had reasonable grounds to believe that the relocation was an attempt by the employer to repudiate or alter the employment contract. For example, offering to pay all relocation expenses was evidence that transferring a manager from Ottawa to Québec was not constructive dismissal in the [Smith v. Viking Helicopter](#) case cited above.

**5. Did You Offer the Employee Alternatives? YES [ ] NO [ ]**

Another way to take the wind out of an employee's constructive dismissal sails is by offering alternatives. Thus, for example, the fact that a Manitoba manager whose position was being eliminated was offered 2 relocation options at identical salary, one in Manitoba the other in Alberta, and rejected both was evidence that he quit and wasn't constructively dismissed [[Filipchuk v. Cargill Ltd.](#), 1996 CanLII 10480 (AB QB)].

**6. Did the Relocation Serve a Legitimate Business Purpose? YES [ ] NO [ ]**

Relocation is constructive dismissal when it's the product of spite, vindictiveness, hostility, intent to harass or other bad faith motives. Conversely, demonstrating that relocation was made in good faith for a reasonable and legitimate business purpose may be vital to your defence. Example: Transfer to an equivalent position was a normal part of business for an international company and there was no evidence of any hostility or animosity toward the employee [[Owens Illinois Canada Inc. c. Boivin](#), 1988 CanLII 1195 (QC CA)].

**3 Ways to Protect Yourself**

The employment is your primary line of defence against constructive dismissal claims. After all, requiring an employee to relocate *can't be* constructive dismissal if it's expressly provided for in the contract.

**1. Get Express Contract Transfer Rights**

The contracts you sign with employees for whom transfer is a possibility should include specific language expressly stating that the prospect of geographical

relocation is a term of employment and that you have the right to relocate the employee for reasonable and legitimate business purposes.

## **2. Negotiate Transfer**

If it's too late for Option 1 (because the contract is already in place and doesn't include express relocation provisions), consider negotiating and securing the employee's agreement to the transfer. The employee should get "consideration," i.e., something of value in exchange, for accepting the relocation. After the deal is made, you'll need to amend the employment contract or execute a new one to incorporate the agreement. ([Click here](#) for a Model Relocation Agreement you can adapt.)

## **3. Compel Employee to Accept Transfer**

If Option 1 is unavailable and negotiation is unsuccessful or unadvisable, consider requiring the employee to accept the relocation. The risk of taking a hard line is that the employee will refuse, leave the organization and sue you for constructive dismissal. While you may lose a valuable employee, you can at least insulate yourself from constructive dismissal liability by:

- Ensuring the transfer position provides for at least equivalent employment terms;
- Offering to pay the employee's moving expenses; and/or
- If possible, offering the employee different relocation alternatives.