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The phrase “constructive dismissal” describes situations where the employer has not directly fired the employee. Rather, the employer has failed to comply with the contract of employment in a major respect, unilaterally changed the terms of employment or expressed a settled intention to do either, thus forcing the employee to quit.

Constructive dismissal is sometimes called “disguised dismissal” or “quitting with cause” because it often occurs in situations where the employee is offered the alternative of leaving or of submitting to a unilateral and substantial alteration of a fundamental term or condition of his/her employment. Whether or not there has been a constructive dismissal is based on an objective view of the employer’s conduct and not merely on the employee’s perception of the situation. It is the employer’s failure to meet its contractual obligations that distinguishes a constructive dismissal from an ordinary resignation. The seriousness of the employer’s failure as well as the amount of deliberation
apparent in its actions are also important factors.

The employer’s action must be unilateral, which means that it must have been done without the consent of the employee. If it is not unilateral, the variation is not a constructive dismissal but merely an agreed change to the contract of employment. Generally, if the employee clearly indicates non-acceptance of the new conditions of employment to the employer, there has been a constructive dismissal only if the employee leaves within a reasonable (usually short) period of time. By not resigning, the employee indicates his/her acceptance of the new conditions of employment.

There have been rare and exceptional cases where courts have held that there has been a constructive dismissal even though the complainant remains in the employ of the employer. This includes, for example, cases where the employee continues to work under the new conditions in order to mitigate damages and either protests the new conditions explicitly or makes it clear that he or she still reserves the right to take legal action. In such cases the employee cannot be said to have condoned or accepted the change in working conditions. Furthermore, courts have held that an employee cannot be said to have condoned the change in working conditions if the employee formally commences legal proceedings in respect of the change while remaining in the employ of the employer. If the employee does not formally initiate proceedings but simply attempts to negotiate the matter while remaining at work, the employee cannot be said to have condoned the change as long as negotiations are ongoing.

For the purposes of determining whether or not a complaint has been filed within the 90-day time period as required by s.240(2), a constructive dismissal takes place at the time the employer changes the terms and conditions of employment. In order to be admissible, the complaint must be filed within 90 days of that time, unless the complainant qualifies for an extension of the time to file under s.240(3).

In cases of alleged unjust dismissal, if a doubt exists as to whether the complainant has been constructively dismissed the inspector shall proceed to assist the parties in reaching a settlement, and if no settlement is reached within a reasonable time, the complaint shall be referred to an adjudicator. This is consistent with paragraphs 6.3 and 7.2 of the Operations Program Directive 815-1 entitled Response to Complaints of Unjust Dismissal.

Complainants alleging constructive dismissal should be advised that they may wish to seek independent legal advice.

Case 1: Discontinuing Bonuses = Constructive Dismissal Even in Hard Times
A masonry foreman claimed constructive dismissal because he didn’t get bonuses for completing his last 2 projects the way he had in the past. Hey, times are tough, the employer countered. But the court found constructive dismissal anyway. Even though the written contract didn’t say anything about bonuses, bonus payments were a big part of the foreman’s compensation since at least 2005. And while tough times may warrant renegotiation, they don’t give employers the right to impose major pay changes unilaterally.

Case 2: Boss’s New Wife Poisons the Workplace
For 12 years, work was peaches and cream for the secretary of Dr. Blach’s medical clinic. But it all went sour when the doctor got remarried and brought his new wife to work in the office. The new Mrs. Blach bombarded the secretary with complaints and told her she was overpaid $15,000 as a result of an “error” that would be corrected. It got so tense that the secretary went on medical leave, never to return. The court agreed that the secretary was constructively dismissed as a result of a poisonous work environment and awarded her 9 months’ notice—$32,676—plus interest.
Step by Step

9 Ways to Commit Constructive Dismissal

Did the employee who just stormed out of your office quit? Or did you fire him? It may seem like a straightforward question, but the answer may surprise you. That’s because in Canada, your former and even current employees can claim that they’ve been “constructively dismissed.” The essence of the argument is that even if you never came out and told them they were fired, you made their job conditions so unfavourable that you practically forced them out the door. Lose a constructive dismissal lawsuit and you face the risk of damages including wages in lieu of notice and Wal-lace and other punitive damages if the court finds that you acted in bad faith.

The simplest way to avoid a constructive dismissal claim: Refrain from doing things that makes the employment relationship so unfavourable that the employee feels compelled to leave. But what exactly are you supposed to refrain from? The best way to answer this question is to look at cases where employers were found liable for constructive dismissal. Here are some typical cases illustrating the common mistakes that get employers into trouble.

What The Law Says
What employer conduct can give rise to a “constructive dismissal” claim? There’s no simple answer to this question. Typically, it’s when an employer unilaterally changes an essential term of an employee’s employment agreement, such as to the employee’s:

• Salary, bonus structure or other remuneration;
• Job responsibilities;
• Status in the company; and
• Work location.

But it can also include engaging in or allowing others to engage in abuse, harassment or other forms of misconduct towards the employee.

Patterns of Constructive Dismissal: Lessons from Cases
Here are nine forms of conduct that have been found to constitute constructive dismissal:

1. Unilaterally changing an essential term of an employee’s employment agreement, such as to the employee’s
2. Engaging in or allowing others to engage in abuse, harassment or other forms of misconduct towards the employee.
3. Terminating an employee’s employment without just cause.
4. Failing to provide adequate notice or pay in lieu of notice.
5. Failing to provide proper termination benefits.
6. Failing to provide proper severance packages.
7. Failing to provide proper termination notices.
8. Failing to provide proper termination notices.
9. Failing to provide proper termination notices.
dismissal. Some of these examples are obvious; others may surprise you.

1. Demoting the Employee

Although employees can be demoted for poor performance, misconduct or even as part of a corporate restructuring, demotion can also be used as a tactic to harass, retaliate against or otherwise victimize an employee. Most constructive dismissal cases involving demotions fall somewhere in the middle; that leaves it up to a court or arbitrator to decide if the demotion was a constructive dismissal.

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. He resigned and sued for constructive dismissal. Demoting the employee to such a lowly position was constructive dismissal, the BC court ruled [Dynes v. Jonah Apparel Group Ltd].

2. Forcing an Employee to Accept a Promotion

A promotion can also be a form of constructive dismissal if it’s forced on an employee. An employee may also argue that the new position is actually a demotion disguised as a promotion.

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].

3. Cutting the Employee’s Pay

Reducing an employee’s pay—for example, by reducing base salary, lowering commission percentage or cancelling a bonus—can constitute constructive dismissal.

Example: In 1995, a store manager earned $92,000, including $33,000 in base salary, a personal bonus and a bonus tied to the profitability of the store. The employer decided to merge salaries with personal bonuses. To make up for the lost bonus opportunity, the store adjusted the manager’s base salary to $64,000. The manager claimed that this was really a pay cut and resigned. The BC court ruled that the manager had been constructively dismissed. The store bonus was a fundamental term of the employment contract and eliminating it resulted in a significant salary reduction [Wood v. Ouen De Bathe Ltd. (c.o.b. Canadian Tire)].

4. Changing the Employee’s Work Hours

Unilaterally making substantial changes to an employee’s hours may constitute constructive dismissal. Merely increasing or decreasing by an hour or so probably won’t put you in jeopardy. But reducing an employee from full- to part-time status is more problematic; and so, surprisingly, is “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].

5. Suspending the Employee

Suspending an employee is justifiable only if you have a contractual right to do so and you follow the suspension procedure set out in your company’s policies and procedures. And, of course, the employee must commit an offence that justifies suspension.

Example: A marketing executive was suspended without pay for failing to deliver advertising materials to a trade show on time. The Ontario court ruled that the employee had been constructively dismissed. Even though company policy laid out an intricate progressive discipline process, it didn’t say anything about and thus didn’t
authorize suspensions without pay [Carscallen v. FRI Corp.].

6. Undermining the Employee’s Authority
Undermining an employee’s authority, like humiliating him in front of colleagues or cutting him out of key decisions, can be a form of constructive dismissal if it makes it difficult or impossible for him to do his 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 a constructive dismissal [Larson v. Galvanic Applied Sciences Inc.].

7. Subjecting the Employee to a Poisonous Work Environment
Creating a poisonous work environment for the employee is grounds for constructive dismissal. Employers can also be liable for letting others—like supervisors or co-workers—harass the employee, even if they don’t participate in the conduct themselves.

Example: A parking garage employee claimed that his supervisor was rude and abusive and called him names. The Alberta court ruled that the employee had been constructively dismissed. The employee’s interaction with the manager went beyond a mere personality clash; it was, according to the court, a calculated pattern of behaviour that constituted a fundamental breach by the employer of a major implied term of the employment relationship that the employer would treat an employee with civility, decency, respect and dignity [Lloyd v. Imperial Parking].

8. Making It Hard for an Employee to Return after Leave
Employment laws let employees take leave for a variety of reasons
ranging from pregnancy to bereavement. Employers have to accommodate employees and let them return after the leave ends. That may involve letting employees reclaim their old position at the same rate of pay. If the employer doesn’t make accommodations and the employee can’t return, the employer may be liable for constructive dismissal.

**Example:** A senior administrative manager who had been an excellent employee had a nervous breakdown after a death in her family and had to go on sick leave. The manager’s condition got worse and she ended up in a psychiatric ward for several months. The employer wrote to inform her that her job no longer existed as her position had been abolished. The Alberta court ruled that the employer had constructively dismissed the manager [*McGarry v. Bosco Homes Edmonton*].

**9. Transferring Employee to a New Office**

Transferring an employee to a different worksite or office can give rise to a constructive dismissal complaint. Courts and arbitrators consider how the pay and terms of the new position compare to the previous one. If the post-transfer position is inferior and it was forced on the employee unilaterally, the employee has a strong claim for constructive dismissal.

**Example:** A VP of a packaging manufacturer worked in the head office located in Mississauga, Ontario. His job required frequent travel to plants in Eastern Canada and the U.S.

After the company was taken over, he was offered the same position for the new company. The catch: He’d have to move to Vancouver and give up his “parachute” benefits. After the two sides failed to reach agreement, the VP accepted another job. The Ontario court found that the VP had been constructively dismissed. Transferring an employee isn’t necessarily constructive dismissal. But in this case it was, the court explained. The VP had lived in the Mississauga area all his life, moving to the Pacific Coast meant he’d have to travel much more to do his job, and, adding insult to injury, he had to give up his parachute benefits. According to the court, the package offered to the VP was very meagre, compared to what he was being asked to give up as a result of the transfer [*Reynolds v. Innopac Inc.*].

**Conclusion**

Bottom line: Think twice before changing any aspect of an employee’s employment arrangement—whether it’s pay, responsibility, job qualification or position in the company. It doesn’t necessarily matter if you increase or decrease responsibility or title or merely restructure an employee’s pay. You could still be found liable for constructive dismissal.

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**At A Glance - 9 Grounds for Constructive Dismissal:**

1. Demoting the Employee
2. Forcing an Employee to Accept a Promotion
3. Cutting the Employee’s Pay
4. Changing the Employee’s Work Hours
5. Suspending the Employee
6. Undermining the Employee’s Authority
7. Subjecting the Employee to a Poisonous Work Environment
8. Making It Hard for an Employee to Return after Leave
9. Transferring Employee to a New Office
Class actions turn relatively minor individual wage claims into multimillion dollar liability risks. So it’s easy to see why employers are so spooked out about them. The one saving grace is how hard it is for employees to get their cases “certified,” i.e., approved by the court as a class action. But this hasn’t discouraged employees from trying. So far, most would-be class action wage cases have focused on overtime. But last year, a lawsuit in Ontario opened a new front in the battle: constructive dismissal.

In 2007, Allstate insurance told its agents of plans to implement major changes to its business model over the next 2 years. Neighbourhood and locally managed offices would be consolidated into larger, central locations under corporate control; the compensation scheme would become more variable and based on individual incentives. 102 agents who resigned their positions claimed the changes amounted to constructive dismissal and filed a class action lawsuit. Allstate denied the claims and challenged the agents’ right to assert them as a class action. The Ontario Superior Court ruled that the claims had to be brought individually and not as a class action; so the employees appealed.

The Divisional Court upheld dismissal of the case as a class action. Not just any case can be brought as a class action. Among other things, the plaintiffs, or persons bringing the lawsuit, must persuade the judge that the claims have enough in common to warrant trying them together in a single proceeding. The lower court’s April 2011 ruling was that the Allstate agents’ failed to prove commonality in this case; and that ruling was correct, said the Divisional Court.

**Explanation:** To prove constructive dismissal, the court explained, employees must show that the employer made “unilateral and fundamental changes” to the terms of employment without giving employees reasonable notice. In essence, they must show the employer tore up the previous contract and substituted less favourable terms of its own making.

Is that, in fact, what Allstate had done? A trial would be necessary to answer that question, said the court. During that trial, the court would have to look at the effect of the changes on each individual agent. The court acknowledged that the changes were company-wide and applied to all agents. However, it reasoned, they affected each agent differently depending on their previous arrangement and where they worked. Because the issue of whether the change was “fundamental” to the employment relationship had to be dealt with case-by-case, the agents couldn’t bring their lawsuit collectively in a class action, the court concluded. The Divisional Court agreed and tossed out the appeal, leaving the agents’ 2 options: appeal again or give up on the class action and sue individually. [Kafka v. Allstate Insurance Co. of Canada, [2012 ONSC 1035 (CanLII), April 4, 2012].

**Impact On You**

It would be premature to celebrate Kafka as the death of the constructive dismissal class actions. For one thing, the case may not yet be over. If the Allstate agents still have the intestinal fortitude, there may yet be a Round 3.

More importantly, Kafka isn’t binding outside of Ontario. And even within Ontario, courts in other constructive dismissal cases could seize on differences in fact patterns to
find commonality and certify the case as a class action.

If you’re from BC, you have less cause for concern. The reasons for this are fairly complicated but stem from a 2008 BC case called *Macaraeg v. E Care Contact Centers*, [2008] B.C.J. No. 765, May 1, 2008 essentially finding that no ESA claim could be brought as a class action in BC. Although it’s not an absolute bar, Macaraeg would make constructive class actions in BC the longest of long shots.

**3 Ways To Protect Yourself**

The primary strategy for protecting your organization is to ensure that no employee is ever in a position to bring a constructive dismissal claim against you—class action or individual. There are 3 strategies you can use to meet this goal:

**1. Secure Employee Agreement to Changes**

At heart, constructive dismissal is a violation of the employment contract. The sin the employer commits is unilaterally changing the agreement with the employee. To the extent that employees know and agree that such changes will or can happen when they take the job, they’ll have a harder time winning a constructive dismissal lawsuit. So let employees know up front that certain aspects of the compensation package or other employment terms are subject to change and not guaranteed to continue.

**2. Provide Consideration for Take-Backs**

Getting employees to accept unfavourable changes to the terms of their employment is better than imposing changes unilaterally. But be careful. Employee acceptance, even if it’s put in writing, is generally not enough. Under contracts law, such concessions and changes are enforceable only if the employee receives consideration, i.e., something of value, like a bump in pay, extra time off or other benefit, in exchange. That’s why you should always try to provide a quid pro quo any time you take something back from an employee.

**3. Notify Employees of Changes as Far in Advance as Possible**

Notifying employees in advance of unfavourable changes to their employment can also minimize the risk of liability for constructive dismissal. The more notice employees get, the less they can claim they were waylaid by the change. “A fundamental change that is accompanied by reasonable notice is not constructive dismissal,” according to one court [Fellowes-Strike v. Co-operators Group Ltd., [1998] O.J. No. 1714, April 16, 1998].

Be mindful that giving notice of a pay change doesn’t automatically enable you to avoid liability especially if the employee expressly objects to the change. For example, an employer notified an employee of a cut in severance from two years’ to 30 weeks, the minimum required by law. An Ontario court ruled that the employer couldn’t unilaterally change such a pivotal contract term even with advance notice, noting that the employee had continuously objected to the change and thus the employer was bound by the terms of the original agreement. The employer appealed but the Supreme Court of Canada refused to hear the case [Wronko v. Western Inventory Service Ltd., [2008] S.C.C.A. 294, Oct. 9, 2008].

**Conclusion**

For the time being, the constructive dismissal class action is not a big threat. But that can change. When and if it does, we’ll let you know. In the meantime, you need to concentrate on managing the risks of those old fashioned constructive dismissal lawsuits filed by individual employees. Although not as ruinous as a class action, individual constructive dismissal claims are still costly and damaging to morale and reputation. More importantly, unlike the class action, the individual constructive dismissal claim happens all the time. The good news is that by preventing individual constructive dismissal claims, you also prevent employees from filing them collectively in a class action.
Ask the Expert

Can Promotion Be Grounds for Constructive Dismissal?

Situation:
As part of a staff reorganization, an airport promotes Ira Zein from superintendent to shift manager. But Ira is less than thrilled. From now on, he’ll be expected to manage and supervise 30 more employees. He’s also going to have to work some weekends because the position requires 24/7 coverage. Despite the additional responsibilities, Ira’s base salary will remain the same. And instead of a fixed bonus, his bonus will be a maximum of 15% of his gross salary based on his performance. Ira, who doesn’t have a written employment contract, opts out but is told that the promotion isn’t optional. He says he refuses to accept the promotion. So the airport accepts his “resignation” and escorts him out of the building.

Question:
Was Ira constructively dismissed?

A. No, he voluntarily resigned.
B. Yes, because the airport needed his consent to reorganize his position.
C. No, because he doesn’t have a written contract barring the employer from unilaterally changing the terms of his employment.

D. Yes, because the terms of his employment were fundamentally changed without his consent.

**Answer**

D. Ira was constructively dismissed because the airport altered his fundamental employment terms without his consent.

**Explanation**

This scenario, which is based on a BC case, illustrates that forcing unfavourable changes on employees may trigger constructive dismissal even if you disguise the changes as a promotion. The court agreed that the airport had crossed the line and awarded the superintendent over $22,000 in damages. The airport made fundamental changes to the terms of the superintendent’s employment, including his compensation structure, duties and the days and hours he worked. And it made the changes unilaterally. The superintendent didn’t have a written employment contract allowing the airport to do this. So the airport needed his consent. Thus, the court concluded that the superintendent had been constructively dismissed even though the changes to his job were cast as a promotion.

**Why Wrong Answers Are Wrong**

A. Is wrong because Ira didn’t resign. He never gave notice or submitted a resignation letter. He simply refused to accept a promotion that was being forced upon him and was then escorted out of the building. This wasn’t clear or unequivocal enough to constitute a resignation, said the court.

B. Is wrong because although the airport needed Ira’s consent to any fundamental changes to the terms of his employment, it didn’t need his consent to reorganize. Employers must be free to reorganize and restructure to meet the demands of their business. But in doing so, they must negotiate new terms of employment with employees who are fundamentally affected by the reorganization or give them adequate notice. The airport did neither.

C. Is wrong because it turns the law inside out. An employee doesn’t need a written contract to prevent an employer from unilaterally changing the terms of his employment; the law already gives him that protection. An employee can give his employee a contractual right to make unilateral changes if he wants to do so. But Ira didn’t have a written contract at all—much less one that gave the airport the right to make unilateral changes. So the airport needed his consent to change the terms of his employment.

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**Case 3: Failure to Address Co-Worker Abuse Is Constructive Dismissal**

A childcare worker complained to her supervisor after allegedly witnessing child abuse by her co-workers. The supervisor didn’t take action, the abuse continued and co-workers start getting nasty to the childcare worker herself. As a result, the worker got stressed out and had to leave her position. The arbitrator ruled that the employer was liable for constructive dismissal.

**Case 4: Boss’s Slights Not Serious Enough for Constructive Dismissal**

A truck salesman was happy with his job until his manager left. The new manager, one of his former co-workers, allegedly played favourites, was abusive and even encouraged drinking in the workplace. But the court said no to his constructive dismissal suit. The salesman never went to management with his complaints. And while the gripes were legitimate, they weren’t serious enough to warrant constructive dismissal.
Harassment
When Is Harassment Grounds for Constructive Dismissal?

Providing a harassment-free workplace is an employer’s implied obligation under every employment contract. But while you can adopt non-harassment policies until the cows come home, just about every workplace has a few jerks who like to tease, badger, berate or bully their co-workers. Failing to reign in such behaviour leaves you at risk of constructive dismissal claims. There’s only so much harassment an employee can be expected to take. At what point does harassment by co-workers poison the work environment and give the employee grounds to claim constructive dismissal? Here are 2 cases addressing that tricky issue.

**HARASSMENT ≠ CONSTRUCTIVE DISMISSAL**

**Facts**

Over a three-year period, a night shift worker at a food processing plant is subjected to approximately 100 sexually inappropriate and offensive remarks by 4 co-workers. He complains repeatedly but the supervisor, who’s an entrenched and highly regarded employee, brushes his complaints aside, making only one half-hearted and ineffective attempt to reign in the harassers. When the shift worker takes medical leave, the matter finally comes to the attention of HR. But the internal investigation finds no harassment. The shift worker never returns from leave and sues the company for constructive dismissal.

**Decision**

The Ontario Superior Court of Justice rules the shift worker was constructively dismissed and awards him 12 months’ notice.

**Explanation**

No “reasonable” person in the shift worker’s position could be “expected to persevere in these employment conditions,” the court reasoned. The supervisor was a principal culprit. Not only did he fail to intervene to stop the harassment but actually found it amusing. He even threatened retaliation after learning of the shift worker’s intention to go over his head. But management also shared in the blame, the court continued. Its investigation was biased and incomplete—nobody bothered to interview any of the 4 co-workers who harassed the shift worker. The company did have a zero tolerance anti-harassment policy; but its failure to implement it effectively was constructive dismissal, the court concluded.

**HARASSMENT = CONSTRUCTIVE DISMISSAL**

**Facts**

An employee named Trevor is appalled to find the phrase “Trevor blows goats” scrawled on the wall of the grocery store where he works. He marches into his supervisor’s office and demands an investigation to determine which co-worker wrote the message. What happens next is unclear; Trevor hands in his keys and storms out, never to return. The graffiti incident is never investigated. The store claims Trevor quit; Trevor insists he was constructively dismissed as a result of the store’s failure to protect him from harassment.

**Decision**

The Nova Scotia Court of Appeal rules that Trevor quit and wasn’t constructively dismissed.

**Explanation**

Not stepping in to prevent harassment by co-workers is grounds for constructive dismissal, the court acknowledged. But the court didn’t believe that Trevor was forced out by a poisonous work environment the way shift worker was in Disotell. Trevor had quit once before over work hours and there was still bad blood. The court also noted that Trevor had raised the harassment argument late in the case, almost as an afterthought, and didn’t produce any evidence to show that it caused him any mental anguish. Moreover, under the store’s harassment policy, Trevor had the option to bring the matter to the attention of HR but never did. The court found that the store’s failure to investigate the graffiti incident, while unfortunate, wasn’t the real reason Trevor left.
Case Study:
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 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.

Case 5: Temporary Commissions Cut ≠ Constructive Dismissal
A steel plate company asked some of its sales people to accept a temporary (4-month) cut in commissions after the economy went south. A veteran salesman with 15 years’ service who had just lost out on a promotion, felt like the company wanted to get rid of him and, in a pre-emptive strike, took a lower paying job with another firm. The court rejected his constructive dismissal claim. The commissions cut was a response to economic conditions and not limited to him; and there was no evidence of a “plot to get rid of him.”

Case 6: Constructively Dismissed Employee Wins $54,000 in Damages
After 17 years of employment, an employee’s position was eliminated without notice. The employer told the employee she could have another position for the same pay and benefits—but the description was very vague. The next day, after an awful night’s sleep, she came to work in jeans, claimed she was too sick to work, turned in her ID card and left without saying if she accepted the new position. She then sued for constructive dismissal. The company claimed the employee had resigned. The court disagreed. Even if she had quit, the court said she had just cause to do so. Either way, she was entitled to $54,000 damages in lieu of notice.
Wrongful Termination

Constructively Dismissed Employee Needn’t Stay at Job to ‘Mitigate Damages’

Wrongfully dismissed employees are entitled to damages for the economic losses they suffer as a result of losing their job. But they can’t just sit back, eat bon-bons and collect a cheque from their ex-employer for the rest of their life. They must “mitigate their damages,” i.e., go out and try to get a new job. If they don’t try hard enough to land a new position, the court will cut their damages. But must the employee accept any job? More precisely, does the duty to mitigate damages require employees to accept a position with the same employer that wrongfully dismissed them to begin with? A recent court case sheds light on this question. Although it comes from BC, the ruling is relevant in all parts of Canada.

What Happened
After 16 years of faithful service, a senior car dealership employee named Eric Sifton...
was constructively dismissed after being demoted from shop foreman to technician. The dealer offered to let him return to his old technician job but he refused and set out to find a new management job. Eight months later, he was still unemployed. The dealership claimed that Sifton’s refusal to accept the technician’s job was a failure to mitigate damages. The trial court disagreed and the dealership appealed.

What the Court Ruled
The BC Court of Appeal upheld the lower court’s decision that Sifton had mitigated his damages.

How the Court Justified Its Ruling
Mitigation of damages requires wrongfully dismissed employees to “take reasonable steps to obtain equivalent employment,” the Court explained. Sifton met this requirement, said the Court, citing 3 factors:

Remuneration: The technician position that Sifton turned down paid less than what he could have earned as a manager.

Working Conditions: Sifton had been constructively dismissed and the same oppressive conditions that forced him out still existed—the salary cut, the lower position and the toxic relationship with his boss.

Efforts to Find Work: Sifton made earnest efforts to find another management job. He checked the want ads, searched the internet, sought job counselling, networked with industry experts and even tried to make himself more employable by looking outside car dealerships and seeking a managerial position with organizations that have fleets of vehicles like BC Hydro and Telus.

So, the Court concluded that a “reasonable person” in Sifton’s position wouldn’t have accepted the dealer’s offer to return to his technician position and refused to cut his damages [Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd., [2010] B.C.J. No. 2388, Dec. 2, 2010].

A Worrisome Precedent on Mitigation
I believe that the Sifton case is a perfect illustration of the old saying among lawyers that “hard cases make bad law.” In other words, in going out of their way to help a sympathetic individual in a particular case, courts tend to establish precedents that lead to distorted results in subsequent decisions. Mr. Sifton is typical of the thousands of Canadian employees who are being dislocated by structural economic changes. As the dealership argued, the auto industry is in distress and Mr. Sifton’s old shop foreman position had become a dinosaur. In this sense, the question of whether a wrongfully dismissed employee like Mr. Sifton must accept a lower position to mitigate his damages assumes a greater significance—and poignancy.

The Court in this case acknowledged that the auto industry was in recession but refused to “visit the consequences of such changed economic circumstances on the dismissed employee.” The Court’s reluctance to impart more woe on the victim is understandable and laudable. Ultimately, though, one might legitimately ask whether allowing employees who’ve been displaced by economic circumstances not of their making to hold out for previous positions that no longer exist within their industry is a realistic and sustainable policy.
Retirement

Constructive Dismissal, Mandatory Retirement & Notice

Wrongfully terminating an employee can make you liable for damages including wages in lieu of notice. Months of notice is determined on the basis of the circumstances of each situation. But what if the employee is fired when he’s approaching the company’s mandatory retirement age? Can the employee collect for months beyond the retirement date? Or does the mandatory retirement date serve as a cap for notice damages? Take a look at how one court handled this issue. Although it took place in BC, the case involves principles that apply in all parts of Canada, especially now that mandatory retirement is illegal.

The Case
What Happened: Eight months before his 65th birthday, a manager is forced to resign by the TV network after 39 years of service. The manager claims constructive termination and asks for 24 months’ notice. The network denies that it forced the manager to resign. The network also says that it requires employees to retire at age 65. So even if it is liable for constructive termination, it shouldn’t have to pay the manager any more than eight months’ damages.

What the Court Decided: The BC Supreme Court ruled that the manager had been constructively dismissed and was entitled to 24 months’ notice.

How the Court Justified Its Decision: The manager’s contract didn’t say anything about mandatory retirement at age 65. Although the network did implement a mandatory retirement policy for employees who reach 65, it did so only after the manager had started working there. The manager knew that the network had forced other employees to retire at 65; but the network never added mandatory retirement provisions to his contract and couldn’t prove that he had ever agreed to retire at age 65. So the court ruled that the manager wasn’t bound by the mandatory retirement policy. 24 months’ is on “the rough upper limit” for constructive termination, the court acknowledged. 

Analysis
This case deals with a situation that’s likely to arise often now that mandatory retirement has been abolished: the forcing out of an older employee without actually firing him. Because constructive termination complaints by older employees are bound to increase, this case is very instructive.

The lesson of the Johnson case is that older employees are generally in a strong position to command high notice damages. Reasons:• The older the employee, the less the prospects of mitigating damages by finding an equally good job;• Many older employees have put in years of faithful service working for the employer, and• Judges are apt to sympathize with older employees who’ve been forced to resign.

The same factors that put older employees who suffer constructive termination in a strong position to command high notice damages may also justify the award of punitive and Wallace damages. The manager in this case failed in his bid for Wallace damages. But the next employer who forces an older employee to resign may not be so lucky.

Case 7: Salary Cut of 13% Isn’t Constructive Dismissal

A bank vice president claimed that he’d been constructively dismissed because his pay declined by 13% over a three-year period. The court disagreed. The employee had a “banner year” in 2000 but under his contract, his compensation wasn’t specified in advance but subject to fluctuation. None of the single year decreases in the three years after 2000 were significant; they merely brought his compensation in line with other VPs. And the executive’s title and responsibilities remained the same throughout. So there was no constructive dismissal.
Although it bears watching, the risk of class action lawsuits for constructive dismissal is currently in the low to moderate range across Canada. But vulnerability to such suits is also affected by what jurisdiction you’re in, as illustrated by this map.

Infographic
Risk of Constructive Dismissal Class Actions

KEY:
- Most vulnerable because courts have left door open to ESA class actions
- Courts have okayed ESA class actions but not for constructive dismissal
- Courts haven’t decided on ESA class actions
- Courts have rejected ESA class actions
- Courts have rejected ESA class actions for constructive dismissals actions
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