

## QUITTING TIME WHEN A CHANGE AMOUNTS TO CONSTRUCTIVE DISMISSAL

One of the most difficult areas of employment law to advise clients in is constructive dismissal. Although the law itself is well settled, the application of the law is entirely dependent on the factual matrix. Provision of advice on the likelihood of success of a claim is often difficult until discovery has been concluded and a full understanding of the evidence is possible. The twin issues of whether there has been a fundamental change to a contract of employment and whether the employee is required to mitigate by remaining in the new position is determined only with reference to all of the facts in any particular case. The employee is faced with the difficult situation that if he claims constructive dismissal he must quit his job and hope that he is able to establish a substantial change to a fundamental term of the contract of employment. The further issue the employee faces is whether to satisfy the requirement to mitigate his damages he must remain in the new position. The answer to both of these questions will depend on the particular facts and the specifics of the employment relationship. The focus of the analysis is the impact of the change on the employee but courts do balance this against the right of the employer to make changes for legitimate business purposes. Given this balance and the fact driven outcome, this is an area that has very little certainty.

All sorts of changes to an employment contract can be considered in the constructive dismissal context and can result in a determination that there has been a fundamental change to a contract of employment. Some examples include the following:

- Change in remuneration
- Reduction in hours
- Proposals to reduce compensation
- Elimination of benefits
- Suspension without pay
- Change in job duties
- Demotions
- Changes in reporting structure
- Transfers
- Employer Conduct
- Failure to accommodate return to work

The question in determining whether a change is constructive dismissal is whether, objectively, the unilateral imposition of change, if not accepted by the employee, is a fundamental breach or one going to the root of the employment contract, and, if so, whether the change or breach was accepted expressly or impliedly by the employee.

For the purposes of this paper I will focus on the delicate balance between the right of the employer to make changes to job duties for legitimate business purposes versus the

employees right to certainty under the terms of contract. With the economic climate that businesses have faced over the last couple of years, there have been many reorganizations/in the work place. Whether or not those changes will constitute a constructive dismissal is a difficult and potentially costly question for both employees and employers.

Not all changes in job duties will constitute constructive dismissal. An employer has a right to a degree of latitude in reorganizing the workplace. Such reorganization will not always constitute a fundamental breach of the employment contract. Whether in fact it does turns on a close analysis of the factual matrix. A review of the case law indicates that important to the assessment in particular in this area is the conduct of the parties and the motivations of both the employer and the employee. Whether or not the changes will constitute a fundamental change depend on the nature and extent of the changes and the impact on the employee. Although not explicitly stated in the cases, it goes without saying that the bona fides of the employer in making the changes are likely to be a consideration as well.

The law relating to constructive dismissal was settled by the Supreme Court of Canada in the case of *Farber v. Royal Trust* [1997] 1 S.C.R. 846. The following oft quoted passage from the reasons of Gonthier J. continues to be cited by nearly every court that considers a claim of constructive dismissal:

...where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment - a change that violates the contract's terms - the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed.

The decision in *Farber* points out that each constructive dismissal case must be decided on its own facts since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been unilaterally changed by the employer.

Esson J.A. set out the approach to determining whether a constructive dismissal has taken place in *Reber v. Lloyd's Ban Internation, Canada* (1985) 61 B.C.L.R 361:

In each case, it is a question of what are the terms of the contract, whether there has been a breach, and, if there has been a breach, whether it amounts to a fundamental breach.

The fact that an employee is demoted or offered a new position when his position is no longer there does not of itself constitute a constructive dismissal. The first question is whether there is a unilateral variation being imposed. If yes, then the second question is whether the imposed variation is fundamental. If the unilateral variation is fundamental then the employee has three options - he may treat the contract as at an end, he may accept the new position and carry on in a new contractual relationship with the employer,

or he may not accept the variation and insist on the original terms. The position of the employee following the imposition of a unilateral variation of the contract of employment that is fundamental was described by Cachione J. in *Langley v. G.H. Woods and Wyant Inc.* (1998), 164 N.S.R. (2d) 54 (S.C.) as follows:

Employment law finds its roots in the law of contract. Once an employment contract has been formed, neither party to the contract has the right to unilaterally change a significant term of a contract unless both parties agree to the change. An employee who is faced with a fundamental change in the employment contract has a choice. The employee's choices were expressed as follows in the case of *Hill v. Peter Gorman Limited* (1957) 9 D.L.R. (2d) 124 at page 132:

“He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat his persistence as a breach of contract and sue the employer for damages, or while refusing to accept it, he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation then the employee is entitled to insist on its original terms.”

It does not matter whether or not the employer intended to repudiate a contract of employment. Constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Doing so amounts to a repudiation of the contract of employment whether or not the employer intended to continue the employment relationship. This in turn gives rise to the right of the employee to treat the contract as wrongly terminated and resign, with the consequent obligation on the employer's part to provide damages in lieu of reasonable notice.

In *Orth v. MacDonald Dettwiler & Associates Ltd.* (1986), 8 B.C.L.R. (2d) 1, the Court of Appeal further explained the nature of the breach required in order for the Plaintiff to establish that he or she has been constructively dismissed:

If an employee asserts he has been constructively dismissed, he must establish there has been conduct on the part of the employer which breaches an express or an implied term of the contract of employment, going to the very root of the contract. One term which, if not express, may be implied in a contract of employment is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract.

The above clearly illustrates that the test in determining whether the employer committed a fundamental breach of the employment contract is an objective one. The burden is on the employee to prove that the term or condition breached was both part of the

employment contract and fundamental to it. (*Islip v. Northmount Food Services Ltd.*, [1988] B.C.J. No. 1161 (C.A.)).

However, an employer is obviously entitled to dictate the manner in which work is done in the work place. An employer is entitled to respond to the financial or business realities that he faces and reorganize his work place to respond to those realities. That response and the accompanying reorganization may or may not constitute a constructive dismissal. The law recognizes that business reality may require changes to an employees function and that an employer must be able to respond to those business requirements without being found to have terminated the contract of employment. An employer can change the terms of a contract of employment and can do so lawfully. Drost J. in *Boucher v. Paul S. Pollock Enterprises Ltd.*, 2002 BCSC 1156 described two ways that this can be lawfully done:

There are two methods by which a change may lawfully be made with respect to the terms of an employment contract. One is by giving reasonable notice of the change. The other is by mutual agreement and...for that to occur one of the parties must be entitled to ask the other to consider a change without thereby repudiating the contract.

In my view, the above passage contemplates that in employment relationships, employers may be faced with a requirement to reorganize their work force in some way or other and that they are able to make those changes without facing the loss of the employee and a claim for damages by either providing the employee with adequate notice of the impending change, or by approaching the employee with a suggestion of change to feel out the waters so to speak. Doing either of these, will not result in a breach of the contract. This decision seems to balance the rights and interests of the employer and employee. The approach suggested allows employers to respond to their legitimate business needs but at the same time allows the employee a measure of control either in having adequate notice of the change or in making them a party to the decision as to the response to the legitimate business demands. As can be seen in other areas of employment law, this approach is a balance of the power in employment relationships and provides employers with a mechanism for change and provides employees with a protection from heavy handed action on the part of the employer.

The difficulty faced by employers and employees alike is application of that legal principal to the factual matrix of their specific employment relationship. The decision in *Farber* directs that the specific features of the employment contract must be taken into consideration. That leaves us without a codification of what is or is not allowed in terms of change and puts both employers and employees in the precarious situation of potentially having a court look back with hindsight to determine whether in fact an essential term of the contract of employment has been substantially changed. The murky waters for employees are further complicated by the issue of when they are required to stay with the employer despite the imposed changes to mitigate their damages.

For a change in the employment contract to constitute constructive dismissal it must be a significant and fundamental change, going to the root of the employment contract. The consequence of constructive dismissal is that the conduct of the employer is found to repudiate the contract. The following passage from an article entitled “Constructive Dismissal” was approved by Gonthier J. in *Farber*:

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer’s part to provide damages in lieu of reasonable notice.

The employee’s perception of the employer’s conduct is not determinative, rather the consideration is whether a reasonable person in the same situation as the employee would have concluded that an essential term of the employment contract had been substantially changed by the employer. (*Saint John Shipbuilding Ltd. V. Snyders* (1989) 100 N.B.R. (2d) 14 (C.A.)) As indicated above, the test is objective. But as can be seen from the decisions, the application of the test takes into consideration the subjective elements of the particular employment relationship.

The importance of the factual matrix was highlighted in the decision of the New Brunswick Court of Appeal in *Canadian Pacific v. Dick* 2000 NBCA 10 where despite finding that changes that had been imposed in the employment relationship constituted constructive dismissal it was the impact of those changes that had to be considered. Drapeau, J.A. at paragraph 5 states as follows:

The notion that the present case presents unique features percolates as one reviews the trial judge’s findings of fact. While my conclusion that Mr. Dick was constructively dismissed is largely the by product of Canadian Pacific’s mid-December 1988 decision to aggressively downsize the department under his management, the impact of that decision can only be accurately gauged by viewing it through the prism of Mr. Dick’s employment history, personality and health problems.

And at paragraph 39:

In the case at bar, any consideration of Canadian Pacific’s possible liability for constructive dismissal must take into account the cumulative effect of the various actions it undertook over the course of the last few years of Mr. Dick’s employment and which, certainly from his perspective, made his job intolerable. Canadian Pacific’s mid December 1988 decision to cut deeply into his departments staff looks large when viewed against the backdrop of Mr. Dick’s longstanding pent-up frustration with other actions by his employer, and the

fragility of his mental health, the latter being a fact well-known to his employer from as early as the spring of 1988.

This is a recurring theme in constructive dismissal cases and again highlights the difficulties in advising both employers and employees on the consequences of making changes to duties. There is arguably an unfairness in viewing those changes through the benefit of the hindsight and perhaps more time should be spent focusing on the immediacy of the situation faced by both the employer and the employee at the time when the changes were made and less time judging actions based on the knowledge of hindsight.

The objective nature of the test was highlighted in the Ontario Judgment of *Shah v. Xerox Canada Ltd.* [1998] O.J. No. 4349, affirmed by the Ontario Court of Appeal at [2000] O.J. No. 849 where Cullity J. stated as follows:

...The test, I believe, is objective: it is whether the conduct of the manager was such that a reasonable person in the circumstances should not be expected to persevere in the employment. As the particular circumstances are crucial, each case must be decided on its own facts. The test should not be lightly applied...If the employer's conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable, there will, in my view, be constructive dismissal whether or not the employee purports to resign.

In applying the above principles to assessing whether constructive dismissal has resulted from a change in employment duties the following questions emerge as significant:

1. What are the terms of the employment contract itself?
2. What are the changes to the employment contract?
3. How has the change to the terms of employment been implemented, that is was notice of the change given? Was the employee involved in the sense that the employer discussed the proposed changes with them and gave them an opportunity to provide feedback to the proposed changes?
4. Viewed objectively, are the changes fundamental in the sense that the employment contract no longer remains as it was?
5. Taking into consideration the subjective factors of the particular employment relationship, is the new position intolerable?

Use of the above questions as a guide in assessing any change in employment will ensure that the relevant factors are all considered when providing advice to either an employee or employer regarding the consequences of proposed changes to duties.

### The Duty to Mitigate

The onus of proving that the employee failed to mitigate his losses rests with the employer and the employer must show not only that the employee failed to take steps to

mitigate but also that if the plaintiff had taken those steps, he likely would have found equivalent employment.

The duty to mitigate in an employment law situation must be considered with the unique circumstances and nature of the employment contract in mind. The Supreme Court of Canada has stated that employment contracts are unique, marked by an inherent imbalance of bargaining power, making the wholesale, uncritical acceptance of principles from contract law inappropriate (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). The uniqueness of employment law contracts was explained by Professor Judy Fudge (The Limits of Good Faith in the Contract of Employment: From *Addis to Vorvis* to *Wallace* and Back Again? (2007), 32 *Queen's L.J.* 529 at p. 530) as follows:

Both the nature of the employment relationship, that is, the rights and duties that define it, and the nature of the commodity sold, which is the human capacity to work, create pressures that are hard to contain within the conceptual boundaries of contract. Historically, the employment contract emerged out of, and was infused with, master and servant law. Employment is an asymmetrical relationship in which the employee implicitly cedes authority to the employer. Inequality is not just a question of bargaining power; it is an essential institutional feature of employment that the employer has a unilateral and residual right of control and the employee has an open-ended duty of obedience. Moreover, concepts of contract law must accommodate the distinctive object of the exchange in employment – the capacity of human beings to labour. In a liberal society, human beings are to be treated with dignity and respect. The employee is both the subject and object of the employment contract, with the result that the employment relationship helps to define an individual employee's self worth.

Mitigation, due to the unique nature of employment contracts, is a difficult concept to apply to the wrongfully dismissed employee and often more difficult to apply to the constructively dismissed employee. It has been often recognized by our courts that the constructively dismissed employee will more often be required to mitigate their damages by returning to work for the employer. The starting point to understanding the principle of mitigation as it applies to the constructively dismissed employee is to review the concepts of mitigation. Mitigation is a limiting principle in damages. The basis of it is described in Professor Waddams book *The Law of Damages*:

A plaintiff is not entitled to recover compensation for loss that could, by taking reasonable action, have been avoided. This rule rests partly on the principle of causation: losses that could reasonably have been avoided are caused by the plaintiff's inaction rather than by the defendant's wrong and partly on a policy of avoiding economic waste.

The duty to mitigate was explained in *Darbishire v. Warran* [1963] 1 W.L.R. 1067 (C.A.) by Pearson L.J. in the following terms:

...it is important to appreciate the true nature of the so-called “duty to mitigate the loss” or “duty to minimise the damage.” The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss.

In *Red Deer College v. Michaels* [1976] 2 S.C.R. 324 the Supreme Court of Canada explained how the principle of mitigation is to be applied in the employment context, approving the following statement from Rand J., dissenting in *Cemco Electrical Manufacturing C. v. Van Snellenberg*, [1947] S.C.R. 121:

The principle of mitigation is a necessary corollary of the basis of damages, namely, that they have arisen in a legal sense from a violation of a right. Underlying this is the assumption that a person must concern himself with his own interest if he would seek from the law the vindication of his civil engagements. In a contract of employment, the remuneration is either for work done or for the commitment to work. Upon a dismissal which is a repudiation of the obligation to accept the one or the other, as the remedy of specific performance is not available, the employee’s capacity to work is now released to him to be used as he sees fit. He may decide to waste it or he may demand that the employer makes good its full utility. In that event, he must act reasonably in seeking to employ it as he would or might have had the particular engagement not been made. It is the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim, and as he must prove his damages, it must appear that they arose from the breach of contract.

The issue of whether the constructively dismissed employee is required to mitigate his damages by remaining in the employ of the employer is equally fraught with difficulties and land mines. The Supreme Court of Canada decision in *Evans v. Teamsters Local Union No. 31* 2008 SCC 20 provides a thorough analysis of this issue. As indicated in this decision, determination of whether a dismissed employee is required to mitigate his damages by accepting work with his past employer is the same whether it is an explicit termination or a constructive dismissal that has brought about the end to the employment relationship.

The onus is on the employer to establish the failure to mitigate. In *Evans* Bastarache J. writing for the majority described the issues involved in assessing the requirement to mitigate by accepting work with the terminating employer as follows:

In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to

mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself...

...It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer.

I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualifications that this should only occur where there are no barriers to re employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989 the Ontario Court of Appeal held that a reasonable person should be expected to do so “where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious” (*Mifsud v. MacMillan Bathurst Inc.*, (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras 12 – 18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee “not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation” (*Farguhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee’s position would have accepted the employer’s offer (*Reibl v. Hughes*, [1980] w S.C.R. 880), it is extremely important that the non tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.

The court concluded that the issue of mitigation must be seen not just from the perspective of a reasonable person but from the perspective of a “reasonable person in the dismissed employee’s position.”, acknowledging that different employees will be differently effected by dismissal. The Court explicitly stated that employees are entitled to consideration being given to the reality of their own experience and reaction. Both objective and subjective factors are relevant in evaluating what a reasonable person in the position of the employee would do.

In *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 the Court of Appeal considered what alternate employment would be reasonable:

The duty to “act reasonably”, in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee’s position would take in his own interests – to maintain income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he is entitled.

In *Evans* it was also acknowledged that in accessing “work environment” the employees work environment in the community at large must be taken into consideration. That is, it is not simply the within the office environment that must be considered. The fact that the Plaintiff’s termination had been well publicized and the finding that it would be difficult for the employee to garner the respect of the community due to the dismissal were factors that were taken into consideration by the court in assessing the duty to mitigate by remaining in the employ of the dismissing employer.

The above demonstrates that when assessing mitigation, the courts will apply an objective reasonable person test and specifically a reasonable person in the shoes of the dismissed employee, and all of the facts relevant to the employee and the work place in assessing mitigation efforts. Just as the question of constructive dismissal is factually driven, the question of mitigation is fact driven. Although the burden is on the employer to show a failure to reasonably mitigate damages, there are many mine fields in the assessment of mitigation efforts and particular care must be taken to closely analyse the factual background to the work environment.