

PUBLICATION

Employers Beware - Altering Employment Contracts and Constructive Dismissal Claims

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The relationship between an employer and an employee will evolve over time. For example, the needs of a business may change, work schedules may be altered, or an employee may take on additional or modified responsibilities.

However, it is critical to remember that the relationship between an employer and an employee is a contractual relationship, even if there is no written contract. Typically one party will not have the ability to alter a contract without the agreement of the other party. While an employer has the ability to manage their business, at a certain point an employer altering the employment contract will be treated by the Courts as a “constructive dismissal”. A constructive dismissal is essentially a change that is so significant that it is as if the employer had terminated its contract with the employee.

The Supreme Court of Canada in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, explained a constructive dismissal as follows: “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”. A constructive dismissal is treated like any other dismissal without cause and without notice and allows the employee to claim damages from the employer.

Not all changes to the employment contract will automatically qualify as a constructive dismissal. The change must be unilaterally imposed by the employer and must be fundamental to the employment contract. Whether or not a change is fundamental depends on the Court’s assessment of whether a reasonable person in the same position as the employee would have felt that the essential terms of the employment contract were being substantially changed. Types of changes that can be fundamental include reductions in compensation, demotions, mandatory relocation, or the creation of a ‘toxic’ work environment.

The line between an acceptable change and a change that constitutes a constructive dismissal is often unclear so employers need to tread cautiously when they are altering the terms of employment. However, there are a number of techniques an employer can use to manage their risk. For example an employer may:

- Ensure there is a written employment contract where the employee has agreed certain unilateral changes can be made by the employer;

- Obtain the agreement of the employee to make changes; or
- In some cases, consider dismissing the employee on a without-cause basis and immediately reoffering employment on varied terms.

Employers are encouraged to speak with an employment lawyer about possible changes to the terms of an employment contract before taking action, otherwise they may be exposing themselves to a constructive dismissal claim and significant damages.

If you have questions or would like further information, please contact the author, Chris Jones at 403.873.3729 or any member of our Litigation & Dispute Resolution Group.