Constructive Dismissal 101

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Agenda

1. Overview
2. Practical tips
3. Q&A
Constructive Dismissal
SCC in *Potter* (2015)

1) Single unilateral act that results in a breach to an essential express or implied term of employment; or

2) Series of acts that as a whole evidence the employer’s intention to no longer be bound by the employment contract
Constructive Dismissal - Category #1

1) Whether an express or implied contract term has been breached - *whether there has been a unilateral act by the employer;* and

2) If there has been a breach, whether the breach was sufficiently serious to constitute constructive dismissal – *whether a “reasonable person” in the same situation would view the employer’s act to be a substantial change to an essential term of employment.*

- Objective assessment
SCC in *Potter* (2015)

- Employer unilaterally placed employee on “administrative” leave (with full pay and full benefits) indefinitely without providing reasons to the employee
- Employee alleged the suspension was a constructive dismissal
SCC in *Potter* (2015)

- SCC – [reversing the lower courts]
  - Employer did not have express authority to suspend (i.e., no employee consent and authority didn’t arise from an express/implied term of the employment contract);
  - Implied term not to withhold work from an employee in bad faith or without justification;
  - Onus on employer in cases of administrative suspensions to prove employee consented or that it had authorization to impose the suspension;
  - Whether a particular suspension may be reasonable and justified will depend on a number of relevant factors – duration of the suspension, whether the employee was paid, whether employer demonstrated good faith/had legitimate business reasons.
Unilateral

- Imposed by the employer
- Not negotiated
- No accepted
- Not condoned by the employee
“Significantly Serious”

- Fundamental or significant change
- Minor or trivial changes will not trigger a constructive dismissal
Material Term or Condition of Employment

- **Express or implied**
- **Examples:**
  - Job status, position, title
  - Reporting lines
  - Duties and responsibilities - more or less
  - Compensation (reductions greater than 10%)
  - Geography
  - Being forced to take a disability leave
  - Working conditions including workload
  - Implied terms – eg., to be terminated on reasonable notice
Does a constructive dismissal end the employment relationship?

- Results in a fundamental breach of the employment contract
- Employee takes the position that the employer’s conduct resulted in an effective termination of employment
What are the employee’s options?

1. Accept or condone the change; or
2. Refuse to accept the change and sue the employer; or
3. Refuse to accept the change, and if permitted to continue working, can sue on the original terms of employment.
What are the employer’s options?

1. Impose change on “reasonable notice” and after the period of “reasonable notice” offer continued employment on new terms; old terms would continue for the “reasonable notice” period.

2. If the employee protests the change, ask the employee to leave and consider a termination package.

3. Provide “reasonable notice” of termination and continue employment on the older terms.

4. Fresh consideration for the change?
What is NOT a Constructive Dismissal?

- Requiring employees to work in exchange for pay
- Performance managing employees
- Relatively “minor” changes to terms and conditions of employment or other legitimate management changes
- *Potter* – reasonable and justified changes?
Constructive Dismissal by Poisoned Work Environment

- Implied term of employment contract that employee will be treated with civility, decency, respect and in accordance with the requirements set out in the OHRC
- Mistreatment of employee breaches term
- Harassment, bullying, discrimination can amount to constructive dismissal
- Normally must be ongoing course of conduct
- “Wal-Mart” case (2014, Ont CA)
Mitigation in Constructive Dismissal Cases

- At common law, dismissed employees have a duty to mitigate their damages
- Must take reasonable efforts to find comparable employment
- Not an onerous obligation
- Where there is successful mitigation, can substantially reduce (or altogether eliminate) employer’s liability
Mitigation in Constructive Dismissal Cases

- *Evans v. Teamsters* - SCC
- *Russo v. Kerr Bros Limited* – continue to work for the “reasonable notice” period in mitigation of his losses
- May not be appropriate where there is a poisoned workplace or where it would be humiliating or degrading for the employee to stay in a diminished capacity or where the working relationship is no longer viable
Trends in Cases

- Courts allowing employers more leeway in tougher economy pre-\textit{Potter}
- \textit{Potter} and beyond – certain limits on suspensions, unclear about the implications beyond suspensions but caution
- Employees expected to be flexible
- More employees will stay on job and sue
- Employers will get some work in return for their money and there will be a reduction in overall liability if employee stays
Minimizing Risk: Constructive Dismissal

- Draft contracts and policies for maximum flexibility
- Ask employees for input on cost-cutting or restructuring to get their “buy-in”
- Keep changes minor, especially pay cuts
- Try to get employee consent to changes
Minimizing Risk: Constructive Dismissal

- Provide advance written notice prior to imposing significant changes – may not be a complete defence
- If changes due to performance concerns, follow progressive discipline and document
- Ensure a respectful workplace through training, education and good management
- Respond promptly to complaints of harassment or bullying, and take action to address problems
Questions?

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