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• Covid-19 and Constructive Dismissal •

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I recently had occasion to chat about constructive dismissal with a member of the family bar. One of the questions she asked caused my blood to run cold: should a family lawyer representing the spouse of a non-unionized employee whose wages are reduced argue that income should be imputed by the court if the employee accepts the reduction rather than allege that they have been constructively dismissed?

I am an employment and workplace law lawyer whose practice is largely focused on executive individual clients (exclusively non-unionized). That means that I have been involved in more agonizing discussions than I can count about what an employee can or, more importantly *should*, do when faced with unilateral changes to the terms of their employment being proposed by their employer. There is one common thread in all of those discussions: the decisions are *hard*. The decisions have become harder still in a world and labour market impacted by Covid-19.

What follows is what I believe family lawyers should understand about constructive dismissal and the decisions employees who may also be family law payors face.

What is constructive dismissal?

The Supreme Court of Canada has weighed in twice on what constitutes a constructive dismissal, first in *Farber v. Royal Trust Co.*[1] and again more recently in *Potter v. New Brunswick Legal Aid Services.*[2]

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As the Supreme Court clarified in *Potter*, there are two distinct and alternative ways in which a constructive dismissal may occur, and in either case the test is objective and will be considered from the perspective of a reasonable person:

1) Unilateral changes to the contract:
    a. did the employer breach the employment contract by unilaterally changing one or more of its terms? and
    b. if the employer did breach the contract by making the change, did the change substantially alter the contract's essential terms? or
2) Conduct-based repudiation: did the employer's conduct, even if not a breach of a specific employment term, demonstrate an intention to repudiate or no longer be bound by the employment contract?

This article will be focused on the first type: situations where the employer changes a fundamental term of employment, namely the employee's compensation.[3]

What options does an employee have?

An employee faced with a change to the essential terms of their employment has three options regarding how to respond. The Court of Appeal for Ontario in *Wronko v. Western Inventory Service Ltd.*[4] established that an employee can:

1. accept the change either expressly or implicitly by staying in the position and taking no steps to dispute the change.
2. reject the change, leave their employment and assert that they have been constructively dismissed (this does not have to happen instantly, but does have to occur within a reasonable period of time following the change to avoid implicit acceptance or condonation of the change. What period of time is reasonable depends on the circumstances); or
3. expressly reject the change and if the employer does not respond to the rejection the employer will have accepted the employee's rejection and the change does not become effective.

In some situations, where it is offered, the employee who does reject the change and pursues a constructive dismissal will face a second decision: whether it is viable to stay on and work in the reduced role or with the reduced compensation to mitigate or partially mitigate their losses. In short, an employee is not expected to accept continued employment following a constructive dismissal if the new employment would be humiliating or if the environment is hostile. Otherwise, refusing to work in the modified job if that option is offered following the assertion of constructive dismissal, could be a failure to mitigate and walking away from the ability to mitigate losses following a constructive dismissal can result in loss of entitlement to damages. For a very clear and concise discussion of this latter choice, see *Farwell v. Citair, Inc. (General Coach Canada)*[5] as well as the broader discussion of the duty to mitigate following a wrongful dismissal in *Evans v. Teamsters Local Union No. 31*.[6]

What will the constructively dismissed employee's entitlement be?

Damages for constructive dismissal are the same as for wrongful dismissal. Employee entitlements can arise from three places:

1. the statute — in Ontario, the Canada Labour Code for federally regulated em-

ployees and the Employment Standards Act, 2000 ("ESA") for most other employees — which sets out minimum standards for notice and severance which cannot be contracted out of;

2. contract, if the parties have entered a valid and enforceable contract which provides for termination entitlements and clearly ousts the common law, the contract terms will govern;

3. common law, which provides that it is an implied term of an employment contract that the employer will provide reasonable notice[7] of termination and the failure to do so renders the termination wrongful and a breach of contract. The damages which flow from that breach should, like in any breach of contract case, place the employee in the position they would have been in had the contact been performed (i.e., had reasonable notice been provided).

The tough choices

This brings me to why my blood ran cold when asked earnestly by a family law lawyer to speak to whether courts should impute income where an employee has been constructively dismissed by virtue of their compensation being directly or indirectly reduced but chooses to accept the reduction rather than allege constructive dismissal: these decisions are *hard*. Most employees agonize over them.

One need not take my word for the fact that these choices are very difficult; the courts recognize this as well. The Court of Appeal for Ontario in *Potter* (para. 66), citing *Belton v. Liberty Insurance Co. of Canada*[8] at paras. 25-26 describes employees faced with unilateral changes to their employment terms as being placed in the "unenviable situation of having to decide whether to accept the change or to resign and bring an action for constructive dismissal… This life-altering decision must be made in circumstances in which the information available to the employee is limited and there is an imbalance of power between the employer and the employee".

First, many constructive dismissals are by nature a zero sum game: either the employee is correct and they have been constructively dismissed and are entitled to damages or they are wrong and have resigned and are entitled to nothing.

Second, there is no mathematical answer to whether an income reduction will be sufficient, on its own, to constitute a constructive dismissal. No lawyer can tell you with certainty, for example, that a reduction of 20 per cent would absolutely be a constructive dismissal whereas a reduction of 10 per cent is absolutely not. There is simply no bright line rule.

Third, in many cases, constructive dismissals, even those based on a material income reduction, arise out of complex sets of facts which indirectly result in income reduction, rather than a direct salary reduction. For example, situations where an employee has significant variable discretionary compensation which is drastically reduced, situations where an employee's ability to generate revenue (and therefore commissions or other direct drive compensation is removed or reduced), and situations where management takes steps to impede the employee's ability to successfully achieve results which would drive their compensation. This means there is a significant and sometimes quite difficult evidentiary burden for the employee alleging constructive dismissal as a result of indirect income reduction to meet.

Lastly, of course, there are the human factors. Leaving a job you've had for many years is often

not an easy decision for myriad personal and professional reasons.

How does Covid-19 factor in?

The world has been turned upside down in the last few months due to the impacts of the Covid-19 pandemic. This has meant that human resources departments, senior leadership and other employees have been scrambling to understand a vast amount of quickly evolving law and circumstances while trying to figure out how best to manage their workplaces.

The two areas in which constructive dismissal questions have been front and centre during the pandemic are temporary layoffs and wage reductions. In some cases employers have asked employees to agree to these measures, either to preserve the economic viability of the company or to insulate against job losses (though certainly it is open to the cynical lawyer to question in some cases whether motivations may also stem simply from a desire to maximize profit). In either case, employees are faced with making the choice to accept the layoff or income reduction or refuse it and take the position it constitutes a constructive dismissal if imposed unilaterally.

In many such situations, a constructive dismissal case seems an obviously viable choice, and perhaps one if not made would be open to attack or question by counsel for a payee who may be indirectly impacted by the decisions made. With respect to wage reductions, some are drastic and would clearly found a constructive dismissal claim if not accepted. With respect to temporary layoffs, the current common law makes it very clear that a temporary lay off that is not expressly or impliedly permitted by contract (*i.e.*, in a seasonal workplace or industry in which lay offs are common practice and could be found to be an implied term) is a constructive dismissal and an employee who is unlawfully laid off is entitled to damages for wrongful dismissal. This has been the clear and settled law since the Court of Appeal for Ontario's decision in *Stolze v. Addario*.[9]

That being said, the decisions around even the clearest constructive dismissal cases remain hard and have gotten harder in the face of a global pandemic.

Many employment lawyers — including myself — urged caution and the need for nuanced risk assessments regarding constructive dismissal claims in the early days of the pandemic. Measures such as temporary layoffs not expressly or impliedly contemplated by contract and compensation reductions which may have grounded solid constructive dismissal claims in pre-Covid days became harder to assess and, in some cases, riskier to pursue.

The first reason for that is that the job market has contracted and continues to contract meaning that for some employees even a successful constructive dismissal claim may not make them whole if they experience a prolonged period of unemployment. For any employer, and certainly including, if not especially, payors in family law matters, that practical risk is significant. No one yet knows the extent of the economic impact of this pandemic but for most people there is very little doubt that the current circumstances have made a search for a new job harder, and thus the risk of leaving an existing position greater. I would argue that the circumstances would also militate in favour of terminated or constructively dismissed employees who are entitled to common law notice receiving longer notice period (and greater corresponding damages), but that issue has yet to be judicially considered and is certainly not guaranteed to insulate an employee from uncompensated losses over a prolonged period of unemployment if they leave their job.

Second, the law can change. We have already seen those changes implemented for employees whose employment is governed by statute (or for those employees who may be governed by contract or common law but who sought remedies from the Ministry of Labour to enforce constructive dismissal claims under the ESA). On May 29, 2020, O. Reg 228/20 was passed and, among other things it:

- retroactively deemed employees whose hours or wages were reduced not to have been constructively dismissed under the ESA;
- retroactively reclassified layoffs during the Covid-19 period (March 1, 2020 to six weeks after the government ends the state of emergency) as emergency leaves rather than layoffs;
- effectively removed the temporary layoff time limits under the ESA after which deemed terminations would otherwise have occurred;
- automatically dismissed all claims brought to the Ministry of Labour alleging constructive dismissal due to a temporary reduction in hours or wages.

It is important to understand that the common law which provides that a temporary layoff not permitted by contract is a constructive dismissal and which provides us guidance regarding when wage cuts will constitute constructive dismissal is not ousted by virtue of the changes to the ESA. It is, however, judge-made law and it is not beyond the realm of possibility that judges will look at these cases in a Covid context and determine that the circumstances mean that the contract has not been repudiated by virtue of extraordinary measures taken in extraordinary times. It is also not beyond the realm of possibility that the Ontario government will take steps — retroactively if O. Reg 238/20 is any indication — to change or attempt to expressly oust existing common law regarding constructive dismissal in the name of economic stability or protection of business interests.

Finally, given what may be the temporary nature of Covid-related layoffs or other employment changes, employees who allege constructive dismissal successfully may have their damages severely limited by a duty to mitigate those damages if reasonable to do so by accepting a return to the workplace or ongoing employment at the reduced income rate.

I would like to be extremely clear that nothing I have written herein should be interpreted to suggest that there are not many valid and appropriately advanced constructive dismissal claims arising every day. Covid-19 has not changed that. What it has done, and what I believe it is vital employment lawyers and family law lawyers alike recognize that it has done is make difficult decisions harder and risky choices riskier still.

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1. [1996] S.C.J. No. 118, [1997] 1 S.C.R. 846.
2. [2015] S.C.J. No. 10, 2015 SCC 10.
3. For the second type, decisions have focused on conduct by the employer which, taken cumulatively, renders employment intolerable. See, for example, *Shah v. Xerox Canada Ltd.* [2000] O.J. No. 849, 131 O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.*, [1998] M.J. No. 199, 159 D.L.R. (4th) 18 (C.A.).

4. 2008 ONCA 479.
5. [2014] O.J. No. 1071, 2014 ONCA 177.
6. [2008] S.C.J. No. 20, 2008 SCC 20, [2008] 1 S.C.R. 661.
7. Reasonable notice is determined by looking at many factors, including the employee's length of service, age, character of employment, and availability of similar employment (having regard to the experience, training and qualifications of the employee). These are often referred to as "Bardal Factors" and they can be found in the eponymous case of *Bardal v. Globe & Mail Ltd.* [1960] O.J. No. 149 (H.C.).
8. [2004] O.J. No. 3358, 72 O.R. (3d) 81 (C.A.).
9. [1997] O.J. No. 4754, 1997 CanLII 764 (Ont. C.A.).