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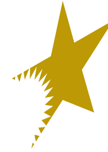

EXPECT THE BEST

Restructuring and Constructive Dismissal

by Christopher McClelland
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Christopher McClelland has joined the firm following his call to the Bar of Ontario in 2008, and is the newest member of our Labour and Employment Group.

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Faced with a shrinking economy and an uncertain economic future, one way a company may attempt to cut costs is by engaging in some form of restructuring. Often, this will involve a major reorganization of the company's workforce. In an effort to improve efficiency, an employer may terminate certain employees and then renegotiate the employment contracts of those that remain. In doing so, an employer must take care to ensure that these attempts to renegotiate do not inadvertently result in the constructive dismissal of the very employees the employer considers most valuable. This article will deal with strategies the employer can use to minimize the possibility of constructive dismissal claims when attempting to restructure its business.

Constructive Dismissal Generally

An employer cannot make a significant change to an employee's contract of employment without the employee's consent. If the employee refuses to accept the change and the employer tries to impose it anyway, the employee may treat the employer's actions as a constructive dismissal and sue for damages as if he or she had been terminated without cause or notice. This is especially relevant for a company trying to cut costs, as litigation of constructive dismissal claims is typically more expensive compared to ordinary cases of wrongful dismissal.

During a recession, employees are generally more concerned about job security, and an employer facing significant financial difficulties may be tempted to take advantage of this situation by pressuring employees to agree to a new employment contract. However, this is a risky strategy, as one of the unusual features of a constructive dismissal claim is that it is up to
the employee to decide whether the changes amount to a termination. In addition, the employee has an opportunity to try out the new terms for a reasonable time before deciding whether or not to treat the change as a constructive dismissal and bring a claim for damages. A better approach is to reduce the risk of such claims by taking steps to ensure that any restructuring changes do not result in the repudiation of any employment contracts, either at law or in the minds of the employees.

Restructuring Changes That May be Considered Constructive Dismissal

Only changes to the essential terms of the employment contract will allow the employee to reject the change and conclude that he or she has been dismissed. For example, a minor change to the way an employee's vacation pay is calculated will likely not be considered fundamental. However, most restructuring efforts involve changes that are much more significant. The following are specific types of changes which the courts have found to be constructive dismissal:

- Demotion, loss of seniority, or loss of status, profile and presitge
- Reduced renumeration or termination of a bonus
- A change in hours or the number of shifts worked

- A change in job responsibilities
- A decrease in the supervisory powers of the employee
- An increase in the amount of supervision above the employee

Because these are exactly the sort of changes a company attempting to restructure would be hoping to make, it will be very difficult to completely eliminate the possibility of constructive dismissal claims. The following sections will cover strategies for minimizing any such claims.

Avoiding Constructive Dismissal Claims During a Restructuring

One advantage of attempting to renegotiate employment contracts during a period of economic decline is that both the employer and the employee are motivated by the knowledge that an unsuccessful restructuring may hasten the employee's eventual termination or, at worst, result in the bankruptcy of the employer's business. As such, employees may be more receptive to changes to their employment contracts if they are aware that the purpose of the changes is to keep the business viable and allow for their continued employment. If the employer is able to secure the employee's consent to the changes in advance, the new agreement will bind both parties.

The Extent to Which Courts Will Consider The Employer's Economic Circumstances

In the event that an employee does bring a claim for constructive dismissal, Canadian courts are aware that the decision to restructure is often motivated by events over which the company does not have complete control. In the 1980s, courts began to focus on the legitimate business interests of companies attempting to renegotiate employment contracts. As long as the changes were made in good faith and did not constitute a disguised attempt to force the employee to resign, courts were willing to pay less attention to the subjective concerns of employees than they had previously.

The Supreme Court of Canada took a step away from this approach in the mid-1990s. The current objective approach asks whether a reasonable person in the same position as the employee would have considered the essential terms of the employment contract to have been substantially changed. If so, the employee has been constructively dismissed. The question of whether the changes were made as part of a reorganization motivated by bona fide business purposes is only one factor, and must be considered in light of the employee's position and the broader employment relationship.

In previous cases employers have also attempted to argue that they are entitled to restructure their organization in order to avoid a potential bankruptcy, and that the notice periods for employees the employer is required to terminate should be reduced to reflect this entitlement. Courts have generally rejected this argument, on the basis that the economic factors affecting the employer will likely affect their employees to the same degree, making it more difficult for these employees to gain another job within the industry. In addition, it is often difficult for an employer to adduce evidence about the overall economy that would allow the court to give the employer special treatment.

The Employee's Requirement to Mitigate

One way in which an employer's need to restructure may be relevant to a claim for constructive dismissal relates to mitigation. In certain circumstances, an employee who claims to have been constructively dismissed may be required to mitigate his or her damages by accepting the changes offered by the employer.

An employee who concludes that he or she has been constructively dismissed is required to take the steps in mitigation that a reasonable person would take. If the employee's working atmosphere has become one of hostility, embarrassment or humiliation, or if relations between the employee and the employer are acrimonious, the employee would not be expected to continue working for the employer. However, if the changes proposed by the employer are motivated by legitimate business needs and not by concerns about the employee's performance, it may be reasonable for the employee to remain with the employer during the notice period.

As such, the employer should always make it clear to the employee that his or her employment contract is being renegotiated as a result of the economic climate and the business interests of the employer, and not the employee's individual performance. If the employee responds by claiming that they are being constructively dismissed, the employer should immediately re-offer the employee a position based on the new terms, and emphasize that the employer values the employee and does not want to end the employment relationship.

Alternatively, if the plans to restructure do not require immediate changes, the employer may consider providing the employee with reasonable notice of a change to their employment contract. For example, if an employee would normally be entitled to 12 months notice of termination, the employer may provide the employee with 12 months working notice of the employer's intention to unilaterally alter the employment contract. At the end of the working notice period the employee's previous employment contract would be terminated, and the employee would be free to accept the new terms or end the employment relationship. ■