Constructive Dismissal and COVID-19

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It is well-established in Canadian law that a unilateral material or substantial reduction by an employer to an employee's compensation, evidencing an intention to no longer be bound by the terms of the employment contract, constitutes constructive dismissal, and entitles the employee to elect to treat the relationship as being at an end, in which case the employee is entitled to the damages which they suffered during the period of reasonable notice in the same fashion as if they had been terminated. This even is the case where an employer has a legitimate business reason to change the structure of the employee's remuneration. This may be the case even during a global pandemic.

The test for constructive dismissal was recently articulated by the Supreme Court of Canada in *Potter v. N.B. Legal Aid*:

> (a) First, the court must determine objectively whether a breach of the employment contract has occurred by ascertaining whether the employer has unilaterally changed the contract;
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> (b) Second, if a breach has occurred, the court must determine if the breach substantially changed an essential term of the employment contract.

A unilateral restructuring of the employee's compensation scheme, such that the employee has a reduced opportunity to earn income, including commission or material reductions in benefits have all been held to constitute a constructive dismissal as it reduces an employee's overall remuneration. The Court of Appeal has been clear that unilateral changes to compensation can only be imposed on reasonable notice, even when done for sound business reasons.

However, when a change is unilaterally imposed, the employee must 'elect' to treat the contract as at an end and allege constructive dismissal, or at the very least, advise the employer that they are not accepting the change, and consider it to be a breach. If they do not object, they are deemed to have condoned or accepted the change.

This is much the same under the *Employment Standards Act, 2000* ("ESA"). The ESA deems an employee to be terminated if they are constructively dismissed and the employee resigns in response within a reasonable period of time. A constructive dismissal is considered to occur when an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent.

However, employees must then take steps to mitigate their damages. In some situations, this may require that they stay with their current employer and sue for losses. Generally, an employee is not required to mitigate with their employer after termination or in the context of a constructive dismissal, unless it would be reasonable to do so. Factors to be considered in assessing reasonableness include whether the compensation is the same, whether the working relationships would be acrimonious, and whether working in the new position would be demeaning.

As a general rule, if the change is material enough, employers are not able to require the employee to stay with the employer in mitigation of their damages if to do so entails accepting a demotion (if to do so would be humiliating and demeaning acceptance is not required).

However, if the change being made is to compensation only but the position remains the same, the employee may be required to stay on if objectively reasonable, in mitigation of their damages. If the employer permitted the employee to stay in the role and maintain a claim for damages, and did not bar that approach, it may be required.

So how much represents a material change?

Clear statements of law exist that say 20% of a reduction is too much, but 10% or less is generally acceptable. Although, we have no clear guidance on what point greater than 10% but less than 20% as acceptable. "Safe" reductions should have an impact on total compensation of no more than 10%.

How does COVID-19 impact constructive dismissal? Well, what an objective person might conclude is reasonable, will be different during the period of COVID-19 than at other periods of time in which cases on constructive dismissal have been decided. Is a change to compensation made across a company different than the targeted reduction of a single person's earnings because a company decides he/she is overpaid? It seems likely yes. Such a reduction has none of the embarrassment factors nor can it really be said to 'evidence an intention to no longer be bound by the terms of the employment contract'. If the company was closed, or revenue is dramatically down, a change to compensation may mean none of those things. Therefore what objectively may have been a constructive dismissal outside of COVID-19 times, may not be a constructive dismissal now.

If employees accept the change and condone it, they may also lose their right of action to sue for the loss. However, if the employee objects to the change and keeps working in mitigation, they may preserve their right to sue for the lost compensation.

Now the regulations passed under the ESA in May of 2020 deemed layoffs (or reductions in work) which took place for reasons related to COVID-19 to place the person not on layoff but on Infectious Disease Emergency Leave. It also legislated that these actions were deemed not to amount to constructive dismissal. The current "COVID-19 Period" during which this applies is between January 25, 2020 and January 3, 2021. The enactment of this legislation however did not impact common law rights.

In the opinion of the writer, claims for lost compensation continue to be viable. If someone was without income/work entirely, that could be for all lost wages if there is no contractual right of layoff.

Where does that leave us during the COVID-19 period?

- you may have a constructive dismissal at common law even if not under the ESA
- changes to compensation of 10% or more may amount to constructive dismissal
- in the event of a constructive dismissal, the affected employee may be taken to have condoned the change with the passage of time
- if not condoned, the employee may be required to continue in employment with the same employer in mitigation of damages
- claims for lost income may be preserved