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Day 3

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DENTONS' EMPLOYMENT AND LABOUR FALL WEBINAR SERIES

EMERGING WORKPLACE AND HUMAN RESOURCES ISSUES

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COVID-19 impact on severance periods



- Matthew Curtis, Partner, Toronto

Impact of COVID-19 on Notice Periods starting point

- Four factors identified in *Bardal v. Globe & Mail*

1. Length of service;
2. Characteristics of the job;
3. Employee's age; and
4. Availability of similar employment

- *Holland v Hostopia. Com Inc., 2015 ONCA 762*

“Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment.”

Michela v St. Thomas of Villanova Catholic School, 2015 ONCA 801

“An employer's financial circumstances are not relevant to the determination of reasonable notice in a particular case: they justify neither a reduction in the notice period in bad times nor an increase when times are good.”

COVID-19 and impacted job search efforts

Marazzato v Dell Canada Inc., 2021 ONSC 248

- 59-year-old top executive for direct sales in Canada
- 14 years of service
- Dismissed March 4, 2020
- Plaintiff asked for 20 months of notice, Defendant said 16 months of notice
- Court awarded 18 months of notice
- Plaintiff asked the court to consider the economic downturn caused by the COVID pandemic while factoring the availability of similar employment.
- The court received no evidence of economic downturn due to COVID-19 pandemic.
- The pandemic did not favour a longer notice period because of the lack of evidence

COVID-19 and impacted job search efforts

Russell v The Brick Warehouse, 2021 ONSC 4822

- 57-year-old employee
- 36 years of service
- Dismissed July 21, 2020
- Plaintiff asked to extend the notice period to 24 months, and then have an additional 6 months added due to extraordinary circumstances and the COVID-19 pandemic
- In total, the employee asked for 30 months of notice
- Defendant submitted 18 months of notice
- Court awarded 24 months of notice

COVID-19 and impacted job search efforts

Russell v The Brick Warehouse continued

- Unlike in *Dell Canada Inc*, there was evidence that demonstrated COVID-19 had likely negatively affected the plaintiff's ability to secure employment
 - “This evidence arises from the fact that in the termination letter The Brick admitted that the economic downturn caused by COVID-19 was the reason why Russell, and several other employees, had been terminated in the first place” at para 34
- The court considered all the Bardal factors and favoured a notice period on the high end of the reasonable notice spectrum
- The court ruled that the enumerated “extraordinary” factors, including the COVID-19 pandemic, had already been considered and factored into the reasonable notice period
- The court did not find any extraordinary circumstances

COVID-19 evidence relating to job search

Case	Jurisdiction	Date of termination	COVID-19 evidence
<i>Kraft v Firepower Financial Corp.</i> , 2021 ONSC 4962	Ontario	March 2020	10-month job search and 70 job applications
<i>Hawes v Dell Canada Inc.</i> , 2021 BCSC 1149	British Columbia	March 25, 2020	Affidavit from Sales manager stating that clients have not been purchasing product since April 2020
<i>Kosteckyj v Paramount Resources Ltd.</i> , 2021 ABQB 225	Alberta	April 22, 2020	Employer's testimony that the employee was terminated, in part, due to the economic impact created by COVID-19

Date of termination

Yee v Hudson's Bay Company, 2021 ONSC 387

- 62-year-old Director of Product Development
- 11 years of service
- Dismissed August 28, 2019
- Plaintiff asked for 18 months of notice
- Defendant asked for 11 months of notice
- Court awarded 16 months notice
- Plaintiff was terminated before the COVID-19 pandemic began
- Court held that economic factors had to be considered inline with *Holland's* principal of determining notice by the circumstances existing at the time of termination
- Court ruled that termination occurred before COVID-19 and therefore COVID-19's negative effects on finding employment should not be factored into notice

Date of termination

Iriotakis v Peninsula Employment Services Limited, 2021 ONSC 998

- 56-year-old Business Development Manager
- Just under 28 months of service
- Dismissed March 25, 2020
- Plaintiff asked for at least six months of notice
- Defendant asked for two to three months of notice
- The court awarded three months of notice
- The court agreed that the pandemic may have had some influence on the plaintiff's job search
- At the time of termination any impact of COVID-19 on the economy was "highly speculative and uncertain"
- Court mentioned the dangers of applying hindsight
- The court weighed all factors, as any one of the factors "do not apply to the exclusion of others"

Date of termination

Kraft v Firepower Financial Corp., 2021 ONSC 4962

- 34-year-old salesperson in the investment banking field
- About five and a half years of service
- Dismissed March 10, 2020
- Plaintiff argued that COVID-19 had seriously impacted his job search
- Job search lasted 13 months and plaintiff applied to over 70 jobs
- Defendant argued that COVID-19 should not be considered because the plaintiff's termination was before the enactment of any initial pandemic emergency orders
- Defendant cited *Yee v Hudson's Bay Company*
- Plaintiff asked for 10 months notice
- Court awarded 10 months of notice

Date of termination

Kraft v Firepower Financial Corp continued

- The court acknowledged that:
 - Plaintiff was dismissed days before the Ontario government declared an emergency.
 - The danger of applying hindsight to reasonable notice, as articulated in *Iriotakis*
 - The uncertainty of the COVID-19 pandemic is one of many factors considered when assessing reasonable notice
- Court awarded 10 months of notice
- The average notice period was nine months.
- The additional month was added because there was evidence that COVID-19 negatively impacted ability to secure new employment
- A British Columbia case awarded an additional two weeks of notice based on the challenges posed by COVID-19, *Snider v Reotech Construction Ltd.*, 2021 BCPC 238

Findings based on case law

- Employees should be prepared to provide evidence as to how the COVID-19 pandemic negatively impacted their job search efforts
- A job search lasting over a year and many unsuccessful job applications may be considered as evidence of COVID-19 negatively impacting job search efforts
- The COVID-19 pandemic will likely not justify a longer notice period where the plaintiff was dismissed before the pandemic began
- Courts may accept that the COVID-19 pandemic should be one of many factors to be considered when assessing reasonable notice if the plaintiff was dismissed after March 2020
- While still unclear how notice periods will be affected where the court accepts that the COVID-19 pandemic impacted the plaintiff's ability to secure employment, the *Kraft* case suggests an additional month of notice may be reasonable

Vaccine exemptions for travelers

- Henry Chang, Partner, Toronto
- Jonathan Mor, Senior Associate, Toronto

Canada's travel restrictions

Canada's COVID-19 travel restrictions are implemented by two parallel Orders-in-Council:

- *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)* (the “Canada-US Order”)
- Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country Other than the United States) (the “International Order”)

These travel restrictions only apply to foreign nationals; they do not affect Canadian citizens or permanent residents of Canada.

Canada's travel restrictions cont'd:

- The **Canada-US Order** prohibits a foreign national from entering Canada from the United States if they seek to enter for an optional or discretionary purpose, such as tourism, recreation or entertainment.
- The **International Order** prohibits a foreign national from entering Canada from any country other than the United States, unless they:
 - Fall within one of the enumerated exemptions; and
 - Are not seeking entry for an optional or discretionary purpose (i.e., tourism, recreation, entertainment).

Canada's travel restrictions cont'd:

- The “optional or discretionary” standard was not necessarily intended as a very strict standard, although it was meant to prohibit the entry of visitors for pleasure (i.e., tourism, recreation or entertainment).
- The Canada Border Services Agency took this interpretation a step further, and applied the standard in a way that only permitted entry for “essential” purposes.
- The “essential” travel standard requires travelers to show that they will perform essential services in support of Canada's critical infrastructure.

Canada's travel restrictions cont'd:

Canada has since implemented exemptions to its travel restrictions for “fully vaccinated persons:”

- As of August 9, 2021, U.S. citizens and lawful permanent residents of the U.S. (residing in the U.S.) who qualify as “fully vaccinated” are exempted from the travel restrictions.
- As of September 7, 2021, all other foreign nationals who qualify as “fully vaccinated” are exempted from the travel restrictions.

“Fully vaccinated” foreign nationals are now permitted to enter Canada for “optional or discretionary” purposes, including:

- Travelling for tourism, recreation, or entertainment; and
- Travelling for business (with no requirement to support Canada's critical infrastructure).

Canada's testing and self-quarantine requirements

Canada's COVID-19 testing and self-quarantine requirements apply to all travelers, including:

1. Canadian citizens;
2. Permanent residents of Canada; and
3. Foreign nationals.

All testing and self-quarantine requirements are implemented via the *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)* (the "Quarantine Order").

Until recently air travellers were also subject to a mandatory hotel quarantine requirement. However, this requirement ended on August 9, 2021.

Canada's testing and self-quarantine requirements cont'd

Three COVID-19 travel requirements:

1. The **pre-arrival/pre-departure test requirement**, which requires travelers to present, prior to boarding a flight to Canada (if travelling by air) or prior to arriving in Canada (if travelling by land), evidence of a COVID-19 molecular test, indicating that they received either:
 - a) A negative result for a COVID-19 molecular test that was performed on a specimen collected no more than 72 hours before: (i) boarding a flight to Canada, or (ii) entering Canada by land; or
 - b) A positive result for a COVID-19 molecular test that was performed on a specimen collected at least 14 days and no more than 180 days before: (i) boarding a flight to Canada, or (ii) entering Canada by land.
2. The **post-arrival test requirement**, which requires travellers to undergo a COVID-19 test: (i) upon entering Canada, and (ii) on the eighth day following entry to Canada.
3. The **self-quarantine requirement**, which requires travelers to self-quarantine at a suitable location for a period of 14 days following entry to Canada.

Canada's testing and self-quarantine requirements cont'd

Those who qualify as “fully vaccinated” persons are now exempt from the following COVID-19 travel requirements:

- The post-arrival test requirement (one test administered at the time of entry, and another on the eighth day after entry), although travellers can still be randomly selected to take the initial test upon entry.
- The self-quarantine requirement.

“Fully vaccinated” persons must still comply with the pre-arrival/pre-departure test requirement.

The meaning of “fully vaccinated”

Eligibility for the vaccination exemptions to Canada’s COVID-19 travel restrictions and requirements depends on whether a traveller qualifies as a “fully vaccinated person,” as defined in the Quarantine Order.

A traveller is deemed “fully vaccinated” if:

- They have completed a COVID-19 vaccine dosage regimen (i.e., received the number of doses prescribed for a particular vaccine);
- The regimen administered consisted of one (or a mix) of the COVID-19 vaccines approved by the Government of Canada; and
- The last dose (or only dose, in the case of a vaccine that only requires one) was administered at least 14 days before the day on which they entered Canada.

The meaning of “fully vaccinated” cont’d

COVID-19 vaccines currently approved by the Government of Canada include:

- Pfizer-BioNTech (Comirnaty, tozinameran, BNT162b2) **[two doses required]**
- Moderna (Spikevax, mRNA-1273) **[two doses required]**
- AstraZeneca/COVISHIELD (ChAdOx1-S, Vaxzevria, AZD1222) **[two doses required]**
- Janssen/Johnson & Johnson (Ad26.COV2.S) **[one dose required]**

The meaning of “fully vaccinated” cont’d

In order to qualify as “fully vaccinated:” a person must therefore have received one of the following, at least 14 days before entering Canada:

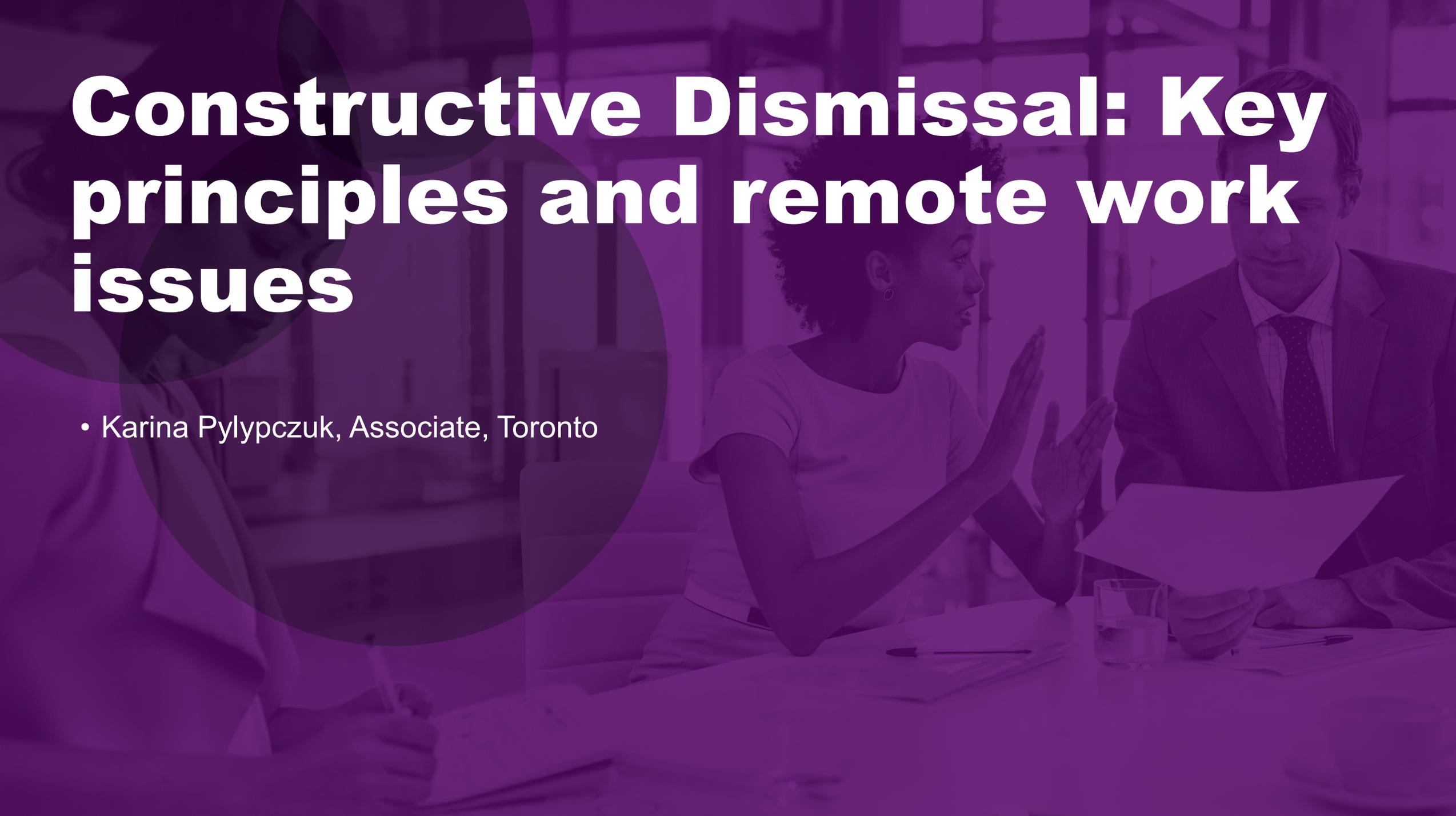
- At least two doses of any of the Government of Canada-accepted COVID-19 vaccines; or
- A mix of any of the Government of Canada-accepted COVID-19 vaccines; or
- At least one dose of the Janssen/Johnson & Johnson vaccine.

Procedural requirements for the vaccination exemptions

To benefit from the exemptions to Canada's COVID-19 travel restrictions and testing/self-quarantine requirements, "fully vaccinated" persons must do the following:

1. Complete the ArriveCAN questionnaire within 72 hours of travel to Canada, which includes:
 - a) Uploading proof of vaccination; and
 - b) Responding to the vaccination questions.
2. Have no symptoms of COVID-19.
3. Present proof of vaccination prior to boarding (if travelling by air) and/or upon arrival in Canada (if travelling by land).
4. Comply with the pre-departure/pre-arrival test requirement.
5. Undergo a COVID-19 test upon entering Canada (part of the post-arrival test requirement), if randomly selected.

Constructive Dismissal: Key principles and remote work issues



- Karina Pylypczuk, Associate, Toronto

Key principles of constructive dismissal

- **Constructive dismissal**
 - Where an employer has not expressly terminated an individual's employment, but the conduct of the employer demonstrates an intention to not be bound by the employment contract and thus the individual claims that they have been "constructively dismissed"
- **Two contexts where constructive dismissal may arise:**
 - Where an employer breaches a fundamental term of the employment contract; or
 - Where an employer's conduct demonstrates an intention to no longer be bound by the employment contract.

Key principles of constructive dismissal

Today's presentation will focus on the first scenario: **a breach of a fundamental term of the employment contract**

- How will a court determine whether a breach has occurred?
 - **Step one:** Identify the term of employment at issue which can be:
 - Express : written in the employment contract or a policy; or
 - Implied : through past practice or communications by the employer.
 - **Step two:** Determine whether the employer has made a unilateral change to the term of employment
 - **Step three:** If a unilateral change has been made, determine whether the change **substantially** altered the term and whether the term was **fundamental** to the employment relationship

Key principles of constructive dismissal

- **The employee must address the change:**
 - The employee always has the option of accepting the change;
 - In order to rely on a claim of constructive dismissal, the employee must respond and object to the unilateral change.
 - If they do not, they risk being held to have condoned the change.
- **What happens next?**
 - The employee can try to negotiate with the employer to revise the change;
 - If the negotiations are ultimately unsuccessful, the employee can still claim constructive dismissal.
 - The employee can end their employment and pursue a constructive dismissal claim; or
 - The employee can continue working under the new conditions while still claiming constructive dismissal
 - An employee would do so in order to mitigate their damages

Remote work and constructive dismissal

Return to in-office work issues

- As a result of the pandemic, many employees have been working remotely for the last 18 months
- Do employers have the right to require employees to come back to in-office work?
 - The general answer is yes
 - There are some additional considerations to bear in mind:
 - Employment contract – right to work remotely, employer’s right to change work location;
 - Remote work policy;
 - Communications to employees at the start of the pandemic and throughout;
 - How long does remote work continue after the public health restrictions are lifted.

Remote work and constructive dismissal

Compensation changes for remote working employees

- Some employers have been contemplating, or have announced, compensation changes for employees who will continue to work remotely on a permanent basis
- If you change an employee's compensation, is there a risk of constructive dismissal?
 - Compensation is considered a fundamental term of employment;
 - Focus would be on whether the breach is substantial;
 - No hard line rule
 - 2% decrease versus 20% decrease
- Remote work compensation for new hires.

Thank you



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