

Constructive dismissal risk during COVID-19

- Matthew Curtis, Partner (Toronto)
- Larysa Workewych, Associate (Toronto)



What is constructive dismissal?

- “Where an employer decides unilaterally to make substantial changes to the essential terms of an employee’s contract, and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee this is known as ‘constructive dismissal’. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet his obligations and is therefore terminating the contract.”
 - – Justice Gonthier, *Farber v. Royal Trust Co* [1997], Supreme Court of Canada

What is constructive dismissal?

- Constructive dismissal usually results from a unilateral change in the working conditions and/or environment of an employee
- Not every change to an employee's working conditions and/or environment will lead to a claim in constructive dismissal: changes must be fundamental to, or “go to the root” of the employment agreement, and the decision to make these changes must have been taken unilaterally by the employer
- The Courts in Ontario have found that in employment agreements there is an implied term that the employer will refrain from making substantial changes to the duties and role of an employee without agreement of the employee, such that those changes would result in a fundamental breach of contract

What is constructive dismissal?

- Examples of changes that can lead to a constructive dismissal claim:
 - Demotion
 - Changing or reassigning job duties / responsibilities
 - Changing reporting status
 - Reducing or changing hours of work
 - Substantially reducing salary or hourly wage
 - Loss or material reduction of a benefit or bonus plan
 - Geographic transfers
 - Imposing a suspension or lay-off (unsettled law in Ontario)

What is constructive dismissal?

- Liability for constructive dismissal is the same as for regular dismissal:
- Under employment / labour standards act
- Under contract / common law

Constructive dismissal and COVID-19

- In May 2020, the Ontario Government converted temporary layoffs to leaves of absences
- Employees that:
 - Do not perform the duties of their position
 - During any period from March 1, 2020 until 6 weeks after Ontario's state of emergency ends (i.e. the "COVID-19" period)
 - For reasons related to COVID-19
- are deemed to be on a job-protected infectious disease emergency leave

Constructive dismissal and COVID-19

- Legislation went further:
- Temporary reduction or elimination of hours is not a constructive dismissal
- Temporary reduction of wages is not a constructive dismissal
- Implications for termination/severance and complaints filed with the Ministry of Labour
- Applies to non-unionized employees and assignment employees (with necessary modifications)
- But what about common law claims?

Constructive dismissal and COVID-19

- September 3, 2020, Ontario Government extended the “COVID-19” period to January 2, 2021
- After January 2, 2021:
 - Employees will no longer be on deemed infectious disease emergency leave
 - ESA’s constructive dismissal rules are expected to resume, meaning a significant reduction or elimination of an employee’s hours of work or wages may constitute a constructive dismissal even if related to COVID-19
 - Regular rules around temporary layoffs will resume (the clock “re-sets”)
 - Will the Government extend the deemed infectious disease emergency leave again by Regulation?

Next steps: be proactive

- Plan ahead – build in the time you need to give advance notice before rolling out any changes
 - But remember, COVID-19 legislation is unpredictable
- Before implementing change, develop a proactive communications strategy
- An effective strategy has two objectives
 1. Reducing litigation risk
 2. Managing overall employee stress and anxiety that can lead to lower productivity
- Give sufficient advance notice
- Always communicate motive – if you are choosing to implement measures to save jobs, say that

Practical considerations

- If employee claims constructive dismissal, has to go through with it
- Employees are generally risk-averse:
 - Lose job – no income
 - All or nothing case
 - If lose, must pay own lawyer and organization's lawyer
 - Court may say the employee should have stayed to mitigate
- Impact of COVID-19 is still unknown

Thank you



Matthew Curtis
Partner, Toronto
+1 416 367 6767
matthew.curtis@dentons.com



Larysa Workewych
Associate, Toronto
+1 416 863 4613
larysa.workewych@dentons.com