

Friday, November 25, 2022

Legal update on constructive dismissals, wrongful dismissals and tips on managing diversity and inclusion in your workplace

WEBINAR SERIES

LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Presenters



Andy Pushalik

Partner

D +1 416 862 3468

andy.pushalik@dentons.com



Claire Browne

Associate, Toronto

D +1 416 863 4757

claire.browne@dentons.com



Salim Visram

Associate, Vancouver

D +1 604 691 6468

salim.visram@dentons.com

The background of the slide features a close-up photograph of large, vibrant green leaves, likely from a tropical plant like a Philodendron. The leaves are densely packed and show prominent veins. A semi-transparent purple shape, resembling a stylized arrow pointing to the right, is overlaid on the left and center of the image. The text is placed within this purple area.

Constructive dismissal decisions you should know about

Salim Visram

What is constructive dismissal?

Potter v. New Brunswick Legal Aid Services Commission

- Occurs one of two ways:
 - Either a single, unilateral action by the employer which breaches an essential term of the employment contract; or
 - A pattern of behaviour which, when taken together, evinces an intention of the employer to no longer be bound by the terms of the employment contract.
- Constructive dismissal is a “fact driven exercise.” The nature of this determination itself does not change, however, facts of each case will be weighed and considered and individually.

Farkas v Island Lake Resort Group (2003) Inc.

Employer's Single Unilateral Act

Facts

- Plaintiff argued that by prohibiting him from being in the kitchen or speaking with his staff, the employer had made it impossible to perform his job.
- Employer argued that it had no intention of permanently changing the Plaintiff's job duties and that the measures were temporary and do not amount to a fundamental change to the employment contract.

Analysis

- In finding that this was not constructive dismissal, the Court specifically noted the temporary nature of the changes. The changes were not a unilateral change to the plaintiff's job duties, but rather an exercise of the employer's discretion to how he performed his services.
- Employer's demand that he refrain from communicating with his staff was a temporary change was taken in good faith to allow the employer time to develop a communication plan.

Parmar v Tribe Management Inc.

Administrative suspensions as cause for constructive dismissal

Facts

- Mandatory vaccination policy
 - Employee placed on an unpaid leave of absence December 1, 2021 and advised that the leave would continue until February 28, 2022 or when she got vaccinated. On January 25, 2022, she was advised that the leave would be extended indefinitely, but that she was welcome to return to work upon becoming vaccinated. Employee claimed constructive dismissal on January 26, 2022.

Analysis

- Overriding question when determining whether an administrative suspension amounts to constructive dismissal is whether the suspension was reasonable and justified.
- Court considered the totality of the circumstances including the wording of the mandatory vaccination policy, public health recommendations and what was known about the COVID-19 Pandemic at the time of the termination including the nature of the virus and the efficacy of vaccination in reducing the severity of symptoms and bad outcomes.

Benke v Loblaw Companies Limited

Repudiation of Employment Agreement by employee

Facts

- Employer's mandatory mask policy was adopted in response to a Bylaw passed by the City of Calgary.
- Policy required employees and customers to wear masks or face shields when within the store subject to exceptions.
- Employee was placed on indefinite leave without pay when he refused to adhere to the policy without medical justification.

Analysis

- In finding that he had not been constructively dismissed, the Court noted that imposing the policy was not a substantial change and did not breach the employment agreement. The employee's job duties did not change, rather he was required to adhere to legal requirements imposed by municipalities and the public health authority as well as the employer. His refusal to do so amounted to a repudiation of his employment agreement, and subsequently an implicit resignation.
- The unpaid leave was a substantial change to his employment, but it was not a breach of the agreement as the employee had voluntarily refused to perform his job duties prior to the unpaid leave.

Morey v C.A.T.

Employer's pattern of conduct was not constructive dismissal

Facts

- C.A.T. Inc. purchased SLH Transport Inc. via asset purchase in May 2019. Plaintiff was employed as a truck driver for SLH for over 26 years.
- Plaintiff alleged constructive dismissal for potentially decreased compensation and further alleged that the employer failed to properly maintain their trucks which evinced an intention to no longer be bound by the employment contract.

Analysis

- Constructive dismissal may be found where the totality of the employer's conduct evinces an intention to no longer be bound by the employment contract. Burden rests with the employee to show that a reasonable person in the circumstances of the employee would have believed that the totality of the employer's conduct amounted to constructive dismissal.
- Plaintiff failed to lead satisfactory evidence of his allegations, and as such it was found that he had not been constructively dismissed.

Key takeaways

State of the Law on constructive dismissal in 2022

- Litigation of constructive dismissal claims requires assessment of the totality of the circumstances.
- Burden of proof to establish constructive dismissal rests with the employee,
 - First branch of the *Potter* requires a breach of a “material” term of the employment agreement.
 - Second branch of *Potter* requires an assessment of a course of conduct, from the perspective of a reasonable person in the position of the employee, which evinces an intention to no longer be bound by the employment contract.
- Employer may implement policies to organize the workforce, where these are reasonable and an employee refuses to comply, this may not amount to constructive dismissal.
- Administrative leaves of absence may be reasonable and justified considering totality of employer’s obligations including to provide a safe working environment.

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The latest on wrongful dismissal case law

Andy Pushalik

The state of wrongful dismissal case law for employers...



Pohl v. Hudson's Bay Company, 2022 ONSC 5230

- 28-year employee; 53-year-old manager with about 30 direct reports
- Judge awarded:
 - 24 months' notice
 - No failure to mitigate
 - \$45,000 in moral damages
 - \$10,000 in punitive damages due to employer's failure to pay employee's wages in lump sum within 7 days of termination and failed to provide employee with a "timely and accurate record of employment"

Pohl v. Hudson's Bay Company, 2022 ONSC 5230

Decision on Notice of Termination

- Employer offered employee 40 weeks' pay in lieu of notice at the time it terminated his employment – Judge noted that this did not fall within the range of reasonable notice: “[employer] did not provide a single case that indicated that 40 weeks was the appropriate amount of pay in lieu of notice in these circumstances.”
- Employer argued that there was a lot of retail manager or assistant manager opportunities available and provided a 907 job postings as evidence to support this point.
- Judge noted that:
 - There was no evidence regarding how the job postings were selected for inclusion, or why these jobs were considered comparable or reasonably appropriate in the circumstances.
 - Employee stated that about half of the 907 job postings were duplicates or prior postings; some of the postings were for jobs in geographic locations very far away from the employee's residence; some of the positions paid far less than the employee's former salary; some of the jobs did not match employee's skills (e.g. a barista for Starbucks).
 - Employee applied to 136 jobs.
 - COVID-19 pandemic impacted employee's job hunt.

Pohl v. Hudson's Bay Company, 2022 ONSC 5230

Decision on mitigation

- Employer argued that it offered employee “continued employment” as an associate lead and employee failed to mitigate by refusing to accept this job.
- Job offer required employee to “voluntary relinquish” current job and transition to associate lead position – Judge noted this amounted to a resignation.
- Job offer also contained “a sweeping reservation of rights clause” – Judge noted it allowed employer to essentially make any change to employee’s employment contract at any time without such change constituting a constructive dismissal.
- Employee was given two days to consider employer’s offer and employer did not recommend that employee retain legal counsel before deciding whether or not to accept it.
- Judge ruled offer of continued employment was unreasonable.
- Following his dismissal, employee was diagnosed with depression and delayed job hunt several months – Judge ruled this was not a failure to mitigate.

Pohl v. Hudson's Bay Company, 2022 ONSC 5230

Decision on Punitive Damages / Moral Damages

- Judge decided to award moral damages due to four reasons:
 - Decision to walk employee out the door was unduly sensitive.
 - Offer of sales associate job was misleading and breach of good faith and fair dealing.
 - Employer failed to pay out wages owed to Employee in a lump sum in accordance with timelines set out by *Employment Standards Act, 2000*.
 - Employer had provided employee with bi-weekly severance payments but employee's lawyer had asked that the severance entitlements be paid as a lump sum.
 - Employer failed to issue ROE within required timelines.
- Punitive damages
 - Employer did not comply with *Employment Standards Act, 2000*.

Lake v. La Presse, 2022 ONCA 742

- Appeal of a summary judgment in a wrongful dismissal action.
- Motion judge awarded 6 months' notice to senior level employee but reduced notice period by 2 months due to employee's failure to mitigate and amounts already paid by employer over the notice period.
- On the motion employer argued that employee breached her duty to mitigate in the following ways:
 - she waited too long before beginning her job search;
 - she “aimed too high” in applying for vice-president roles and she should have been applying for less senior roles if she continued to remain unemployed; and
 - she waited too long before applying for any jobs and she applied to very few jobs.
- Motion judge inferred that if the employee had of expanded the parameters of her job search, searched earlier, and applied for more jobs her chances of finding new employment would have improved significantly.
- “If vice-president roles were available, more junior roles were available.”

Lake v. La Presse, 2022 ONCA 742

- On appeal, employee argued that judge erred by faulting her for not applying for positions that paid less than the position from which she was dismissed and otherwise “aimed too high” and focused her job search on roles that represented a promotion over her prior role.
- Court of Appeal noted that the obligation of a dismissed employee is to “seek comparable employment” – no obligation for employee to seek out less remunerative work.
- Evidence supported that the employee had applied to positions that matched her work experience and qualifications rather than focusing on job titles
- Motion judge also made an inference that was not supported by the evidence when ruling that there had to be junior roles available if there were senior roles available.

But...



Lessons for employers

- Refresh your employment contracts – time is on your side.
- Carefully consider your offer of a separation package.
- Know the rules for paying out employees' statutory termination entitlements.
- Be fair in drafting offers of continued employment.
- Mitigation
 - Recognize that courts will afford employees with “an appropriate amount of time to adjust to their situation and to plan for the future before fulfilling the duty to mitigate.”
 - Employees don't have to accept any job – they don't owe an obligation to their former employer to act in the employer's interest.
 - Be prepared to justify why you believe that a particular role is appropriate for an employee to apply.

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Diversity and inclusion considerations for your workplace

Claire Browne

Recap: Key terms



Diversity



Inclusion

Diverse, inclusive workplaces are...

- Creative
- Innovative
- Engaged
- Productive
- Trusting
- Profitable
- Better at problem-solving and decision making
- Higher morale amongst workforce
- Higher retention rates

Advancing diverse, inclusive workplaces

Effective communication in the workplace

- Strategies for effective communication in the workplace include:
 - Thinking about the **location** of the conversation
 - Thinking about the **timing** of the conversation
 - **Listening to understand** (vs. listening to “reply”)
 - Acknowledging areas of **agreement**
 - Not making **assumptions** about intent
 - Focusing on the **facts**

Advancing diverse, inclusive workplaces

Effective communication in the workplace

- Developing an understanding of your coworkers' **communication styles**
- Providing participants with the opportunity to **share feedback** and **contribute** to the conversation (without interruption)
- Thinking about the **tone** of the conversation (i.e. how you are delivering the message)
- Recognizing when it is time to **suggest returning to the conversation** at a different time

Advancing diverse, inclusive workplaces



Thank you



Andy Pushalik
Partner
D +1 416 862 3468
andy.pushalik@dentons.com



Claire Browne
Associate, Toronto
D +1 416 863 4757
claire.browne@dentons.com



Salim Visram
Associate, Vancouver
D +1 604 691 6468
salim.visram@dentons.com

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