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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

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Constructive dismissal class action rejected

Constructive dismissal required assessment of each employee's circumstances: Ontario court

| BY LISA BOLTON
AND STEPHEN SHORE |

CONSTRUCTIVE dismissal requires an individual assessment of each employee's circumstances and can't be addressed in a class action, the Ontario Superior Court of Justice has ruled in denying an application by a group of insurance agents against Allstate Insurance.

In *Kafka v. Allstate Insurance Company of Canada*, the court considered, for the first time, whether the agents' constructive dismissal claim should be certified as a "class." The court found the law of constructive dismissal required an individualized assessment of each plaintiff's claim and this need for an individualized assessment was inconsistent with the purpose of Ontario's class action regime.

The class action regime — In a nutshell

The Class Proceedings Act was introduced in Ontario in 1992. The act allows two or more individuals with similar claims against one or more defendants to join together as a "class" to bring the claims in one legal proceeding. Before a claim is permitted to proceed as a "class action," the court must be satisfied there are issues in common among the proposed "class" which can be decided without requiring an individualized assessment of each claim. If an individualized assessment is required, each claimant must

bring his own individual claim.

The facts of *Allstate*

A claim for constructive dismissal was launched by agents formerly employed by the Allstate Insurance Company of Canada due to a number of business changes sought to be implemented by the company, including a new system of compensation. In the past, and until the change, agents were paid based wholly on commission, with no distinction between new sales and renewals from existing clients. With the changes, agents would be paid in part based on commissions from new sales and in part based on a performance-related bonus, which depended on a number of factors including location, market conditions and staff competency. On balance, agents with a history of generating new business were better positioned to earn greater income under the new model.

In the summer of 2007, Allstate Insurance gave its agents 24 months written notice that it would be making the changes. In response, a group of agents resigned their employment and sought to certify a class action against Allstate Insurance, alleging that it had made "unilateral and fundamental" changes to their employment contracts resulting in their constructive dismissal. The agents claimed for payment of notice and severance pay under the

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Constructive dismissal factors affect individuals differently

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Employment Standards Act, 2000 (ESA), as well as for punitive damages resulting from their alleged constructive dismissal. They did not claim reasonable notice under the common law.

The court's decision

The court denied the application to certify the agents as a class. It held that this claim for constructive dismissal required an individualized assessment of each plaintiff's claim, making it inconsistent with the purpose of Ontario's class action regime.

In reaching this conclusion, the Court made the following findings with respect to constructive dismissal and class actions:

•**Fundamental change:** Constructive dismissal requires an employee to show the employer has made a unilateral "fundamental change" to the employee's terms or conditions of employment. Whether or not a "change" rises to the level of a "fundamental change" depends on the impact of the change on the individual employee. This is a "contextual, relative and individual assessment" that requires an examination of the "individual and the unique circumstances of each plaintiff and each agent."

•**Reasonable notice:** An employer can unilaterally impose a fundamental change so long as the employer provides reasonable notice of the change. However, a determination of what length of time will suffice as reasonable notice requires consideration of inherently individual factors including age, length of service, character of employment, experience, training and qualifications (commonly known as the "Bardal" factors).

•**Mitigation:** An employee who suffers a loss as a result of the termination of employment has a duty to mitigate. This requires the employee to look for alternate employment and accept alternate employment where it is reasonable to do so — even in certain circumstances where the alternative employ-

ment is with the employer alleged to have wrongfully or constructively terminated the employment relationship. The ESA contains a similar concept that requires an employee to accept an offer of "reasonable alternative employment." If an employee rejects such an offer, the employee may lose his entitlement to termination and severance pay.

To this determination, a court must consider an employee's individual circumstances, the particulars of an offer of alternative employment and whether, on balance, the individual employee rejected an offer of "reasonable alternative employment" in the circumstances. This consideration requires an individualized assessment, not consistent with the purpose of the class action regime.

Lessons learned

The *Allstate* decision is currently under appeal. Until the court conclusively defines the boundaries of this type of employment-related class action lawsuit, employers should consider the following pro-active measures to minimize the risk of exposure to a successful constructive dismissal class action.

Build flexibility into the employment contract at the outset. Where possible, include provisions in the employment contract that give the employer discretion to make changes to key employment terms, including — but not limited to — compensation, work location or reporting arrangement. These provisions can be evidence the changes did not represent a fundamental alteration of the terms and conditions of employment, but instead were contemplated and agreed to by both employer and employee at the time the employment contract was formed.

Document the individualized nature of the employment relationship. Document any amendments to the terms or conditions of employment by way of a written amendment to the agreement. This is especially important for organizations that use template employment contracts at the time of hiring.

Go 'above and beyond' when providing reasonable notice of a fundamental

change. If the employer intends to modify business operations in a manner that may result in a "fundamental change" to the terms and conditions of employment, it should give advance notice equal to or greater than the period of reasonable notice to which an employee would be entitled upon termination of employment. This will reduce the risk of liability for constructive dismissal for failing to provide common law notice.

Ensure the employee accepts the change. When changes are made, confirm each employee has accepted the change as of the implementation date. If, after the proposed implementation date the employee is permitted to continue to work under the old terms, the employer may be found to have acquiesced to the employee's refusal to accept the new terms, in which case the old terms of employment may continue to apply.

For more information see:

■ *Kafka v. Allstate Insurance Co. of Canada*, 2011 ONSC 2305 (Ont. C.J.).



ABOUT THE AUTHORS

Lisa Bolton



Stephen Shore

Lisa Bolton and Stephen Shore are lawyers with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Lisa and Stephen can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 Hour) or by visiting www.sherrardkuzz.com.