The intricacies of constructive dismissal

Employer should have offered new position a second time to long-term employee

BY JENNIFER BROWN

Internal "restructuring" is often a means organizations use to adjust to market forces these days, but it can come with its own set of risks. Whether it's a pay cut, change in title, or demotion of duties, employees are watching for signals indicating they may have been constructively dismissed. "Employers who want to make changes but don't want to pay out big severance [packages] are going this route and hoping the person won't stay," says Hendrik Nieuwland, partner with Shields O'Donnell MacKillop LLP.

Constructive dismissal occurs when an employer makes a unilateral and fundamental change to a condition of an employment contract without providing reasonable notice.

Earlier this spring, a case involving a long-term employee and senior executive of a transportation company brought the question of constructive dismissal to light again. In *Farwell v. Citair Inc.* (General Coach Canada) the company learned the hard way the delicate dance required when making changes to an employee's role. It decided its 58-year-old vice president of operations with 38 years at the company, lacked the

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expertise it needed for its new product lines and offered VP Kenneth Farwell the position of purchasing manager — a job he had previously held — with his current position going to a subordinate with more expertise in new products the company needed to push forward to be competitive. Farwell would continue to receive the same salary he had as a VP, but in the purchasing manager role. The only difference in compensation might be a reduction in the bonus he had previously received.

Farwell viewed it as a demotion and turned down the purchasing manager job — one that would require him to report to someone who once reported to him. He also launched a lawsuit claiming he was constructively dismissed.

At trial, the judge agreed the legal test for constructive dismissal had been met but that didn't mean he was automatically entitled to a legal remedy. Farwell had a potential duty to mitigate his own losses by taking the position General Coach offered him through a period of "reasonable notice." This was based on established law that even for employees held to have been constructively terminated, they may, in some cases, be required to remain working as an aspect of their obligations to mitigate their losses.

Justice Johanne Morissette held Farwell didn't have an obligation to mitigate his damages to accept the purchasing manager's job as it would be "humiliating and embarrassing" for him to take the demotion. Based on Farwell's age and 38 years of experience, he was awarded payment of the equivalent of 24-months wages in lieu of notice.

General Coach appealed to the Ontario Court of Appeal on the basis the trial judge erred in applying a subjective test as to what was in Farwell's mind, rather than applying the legally required objective test. Essentially, the court said if an employee rejects the offer of continued employment and asserts a constructive dismissal claim, an employer must re-offer the new position offered to invoke an employee's duty to mitigate losses.

Thomas Gorsky, a lawyer with labour and employment boutique Sherrard Kuzz LLP, says there is a two-stage analysis in many constructive dismissals; the first being the question of whether a particular incident constitutes a constructive dismissal to begin with. It's also not just about the money. Employees may be able to argue they were constructively dismissed, even if they are paid the same amount of money, if their status in the company changes.

In many cases there is also a second stage in the analysis as to whether, given a person has been constructively dismissed, he or she still has an obligation to mitigate the loss by making

reasonable attempts to find employment, says Gorsky. "So sometimes when you have a constructive dismissal incident like this where there is a demotion, there can still be a consideration as to whether the employee should not just leave work and pursue a claim but should remain in employment and search for alternative employment during that process if they want to. But it would be part of the obligation to mitigate — to stay in the job — and earn income rather than simply departing."

Farwell left General Coach and the company felt he should have stayed in the job while he was looking for a new one. Gorsky says that thinking goes back to an Ontario Court of Appeal case called *Mifsud v. MacMillan Bathurst Inc.*, which held a reasonable person should continue in his job notwithstanding constructive dismissal. In that case, the Ontario Court of Appeal accepted the proposition that employees who are constructively terminated can

still have obligations to mitigate their loss by remaining in the job.

The Ontario Court of Appeal appears to have clarified that obligation further in *Farwell* by saying a company can't expect the employee to understand they have to stay in the job to mitigate their loss — the employer must extend the offer of continuing employment to them again and make it clear it's being extended even though they are claiming they have been constructively dismissed. If that happens, the employee may be obliged to mitigate his or her loss by staying in the job even though they are claiming to have been constructively dismissed.

So what is Gorsky's advice to employers? "It is such an intricate and confusing area with the double obligation," he says. "There is so much involved contextually — consider the degree to which you're asking for a change to be made in their job and you can make a case that it's reasonable for the employee to accept the change to begin with in terms of the constructive dismissal analysis, or, alternatively to remain in the workplace as part of the employee's mitigation obligation."

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Increasingly, employees are more sensitized to their rights and potential liabilities and are more likely to question actions taken by an employer than they used to. By the same token, Gorsky says most employers have become more aware that if they are doing something that constitutes a significant alteration to the employment relationship they can't automatically assume they can do it.

Ever since *Evans v. Teamsters Union Local No. 31* in 2008, there's been "a fairly steady diet of people thinking about how to make changes and avoid the constructive dismissal claims," says Craig Neuman, of Neuman Thompson in Edmonton. "If they can't convince a court the new job they are offering is close enough to the old job to circumvent liability entirely, at least they are thinking, 'How can we keep it down to a dull roar?' We are running into it with reasonable regularity."

Evans was a wrongful dismissal case, not a constructive dismissal case, but the Supreme Court of Canada held the mitigation principle applied to both express and constructive dismissals. Donald Norman Evans worked for the Teamsters and experienced a job change that led to a wrongful dismissal claim. They offered to have him come back and work for a period of time but he declined. The courts said he should have mitigated his loss. "We have spent quite a bit of time cautioning clients that if they want to use the approach then they have to be sensitive to the notion surrounding respectful communication with people and keeping channels open," says Neuman.

"What surprised me [in *Farwell*] was that the Court of Appeal suggested there is this formal requirement that if you propose the reassignment and the employee rejects it based on it being a constructive dismissal that there's this technical obligation to offer it again as mitigation — that part I found head scratching," says Neuman. "In light of this decision it reinforces the point that you need to keep that ball in the air — if the employee balks at an offer of permanent reassignment that they take advantage of the mitigation piece, but I'm not sure they needed to re-table it — it seemed pedantic."

With organizations continuing to experience limited growth, companies are making decisions to stay lean and that can increase constructive dismissal claims. Nieuwland says if an employee declines the offer of a new role they run the risk of having no damages. "The court will say yes, they were constructively dismissed but the environment being offered to you to mitigate wasn't embarrassing or humiliating and they were keeping you whole in terms of money and you should have taken the job to make sure you have no damages," he says.

His advice to employers is to always do what's right for the business. "If keeping the person is best for the business, then you offer the alternative position, but if doing that is not best for the business, I'm hesitant to recommend doing so just for positioning purposes in a constructive dismissal claim."

Over time, Nieuwland says it is likely there will be a continued level of constructive dismissal claims, perhaps driven in the near term by the aging workforce. "As workers get older and because of their age they may have a diminishment of skill set, and so companies look to realign these people and make changes to jobs. So they run the risk of constructive dismissal claims with an age discrimination claim tacked on." CL