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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

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Sweet deal for candy factory employee

Worker didn't have to leave job to support constructive dismissal claim: Court

| BY THOMAS GORSKY |

CAN AN employee stay on the job while claiming he was constructively dismissed? Yes, according to the Ontario Superior Court of Justice. In a recent decision, the court ruled an employee can pursue a constructive dismissal claim against his employer and at the same time remain in his position of employment. Although this ground breaking decision favoured an employee, it has the potential to help employees, depending on how the decision is applied by courts going forward.

Kerr Bros., a candy manufacturer in business for more than a century, had been suffering financial losses for nine years. Claiming tough measures were necessary to ensure its financial survival, Kerr Bros. implemented an across-the-board reduction in the remuneration of its workforce. One of the employees most significantly affected was Lorenzo Russo, a managerial employee with 37 years' service. Through a combination of reduction in his regular wages, pension and bonus, Russo's annual salary was to be reduced by about 50 per cent.

Historically, courts have stated that if a unilaterally imposed, negative change to a term or condition of employment strikes at the root of the employment relationship, an employee can make a claim for constructive dis-

missal. In such a case, it had been widely understood the employee had a choice to either resign from employment and pursue a constructive dismissal claim or remain in employment and accept the change.

Russo was not satisfied with being confined to these two options and instead retained legal counsel. His counsel wrote a letter declaring Russo to have been constructively dismissed. What made this situation unusual was that Russo continued to report to work and perform his usual duties of employment while suing his employer for constructive dismissal.

CONSTRUCTIVE DISMISSAL

The court's decision

In the course of his lawsuit, Russo brought a motion for summary judgment. Kerr Bros. conceded the reduction in Russo's remuneration was sufficient to constitute a constructive dismissal, but argued that by his continuing in employment, Russo had accepted the reduction and therefore lost his right to pursue a claim for constructive dismissal.

The court accepted Russo's position, finding an employee could remain on the job and bring a constructive dismissal claim against his employer. In order to pursue such a claim, the employee was obliged to make it clear

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Employee working during lawsuit could have benefits for employer

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the workplace changes were not being accepted. If the employer did nothing in response, it would then be exposed to a claim for damages reduced by the amount of earnings received by the employee during the period of reasonable notice.

Lessons learned

The decision in *Russo* has the potential to be a double-edged sword for employers.

On the one hand, the prevailing view in the past was that an employee was required to leave his job if he wished to pursue a constructive dismissal claim. This requirement almost certainly operated as a deterrent to the pursuit of such a claim. If the *Russo* decision is followed by other courts, this deterrent will no longer be a factor because an employee will have the option of staying in his job while at the same time suing his employer.

On the other hand, *Russo* may offer a silver lining to employers because it validates the suing employee remaining in his position of employment, a sce-

nario that could benefit some employers. In particular, where the workplace environment has not been poisoned to the point where continued employment is neither reasonable nor feasible, an employee who remains in his job enables the employer to obtain the benefit of the employee's ongoing service, while reducing the amount of the employee's claim (through mitigation earnings), should a claim be pursued. Should the employment relationship ultimately deteriorate, the employer retains the option to terminate employment with or without cause.

In addition, *Russo* does not affect the following legal and practical principles all of which continue to apply to the benefit of employers:

- The general rule that a reduction of remuneration of less than 10 per cent is not likely to trigger a constructive dismissal.
- A well-drafted employment agreement that contemplates a range of possible changes to an employee's terms and conditions of employment will reduce an employer's exposure to a constructive dismissal claim.
- Advance notice of a wage reduction, or

a reduction introduced incrementally over a longer time period (as opposed to a 50 per cent reduction at once), will help an employer avoid or reduce its potential liability for a constructive dismissal claim.

- Employers with strong two-way communication with their employees, and who share some of the benefits when times are good, are more likely to enlist the support of their employees when times are bad. Fostering this type of employment environment engenders employees who are likely to be more flexible in their acceptance of pay reductions, rather than resorting to litigation.

- There are often strategies available to proactively address a claim of constructive dismissal, but they must be pursued in a timely manner to avoid liability. An employer that receives a letter from an employee or her legal counsel, or a verbal complaint, claiming constructive dismissal, should contact legal counsel as soon as possible. 

For more information see:

- Russo v. Kerr Bros. Ltd.*, 2010 CarswellOnt 8373 (Ont. S.C.J.).