



## Legal Corner

By  
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### *Constructive dismissal case: Decision good for employers*

Canadian courts have long recognized a principle under the common law called "constructive dismissal." Constructive dismissal means a unilateral and fundamental change in a term or condition of an employment contract without providing the employee with reasonable notice of the change. Where an employer is found to have constructively dismissed an employee, the employer is liable for a period of reasonable notice akin to that which is owed to an employee who is terminated without cause.

For employers, the difficulty is understanding what is considered a "fundamental change" in a term or condition of employment. To appropriately and effectively manage their workplaces, employers need to know whether contemplated action could result in constructive dismissal. Some changes are obviously fundamental, such as a hefty pay cut or demotion. However, other changes are not as clear, such as a moderate change in responsibilities or hours of work. Even the courts have had difficulty applying the law of constructive dismissal consistently because each case must be decided on its own facts. In the words of the Supreme Court of Canada:

"Each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed." (Farber vs. Royal Trust Co.)

The result is that over the last couple of decades employers have, for the most part, been left to guess whether their actions will trigger legal liability. Many employers have simply decided not to implement legitimate changes at all for fear of triggering liability.

It is this rigidity or guess work that has no place in the present business environment. To the greatest extent possible employers must have flexibility to manage their businesses in the interest of ongoing viability.

Recently, the Ontario Superior Court of Justice issued an award that should result in greater certainty in the law, as well as flexibility for employers (Vanelli vs. Sobeys Capital Inc.).

In this case a manager had worked for the company for more than 25 years and through successive sales of the business. The manager had always worked the day shift. For legitimate business purposes, the employer sought to implement a change to the hours of work of all of its managers, by requiring them all to rotate shifts including closing the operation one night a week and one weekend per month.

The manager refused the change outright. He would not even consider such a proposal even though the same request had been made of all the other managers. Ultimately, the manager took the position that he had been constructively dismissed and sued his employer for wrongful dismissal damages.

### **Change not 'fundamental'**

The court dismissed the claim on the basis that the proposed change to the hours of work was not "fundamental" to the employment agreement. The court was also critical of the manager's rigidity and found that he should have at the very least "tried . . . out (the new proposal): This is a case in which a senior employee was simply not prepared to be the least bit flexible on this issue. . . . Rigidity has a cost."

The court also said that it was "hard pressed to find any significant changes to (the manager's) workplace status or the terms of his employment. His title remained the same. His wages were identical. His seniority was preserved and his vacation entitlement remained constant." As for the manager's loss of work schedule flexibility, "while the changes . . . may have left him with a little less control, such changes were minor and ought not to be viewed as an unequivocal refusal by the employer to be bound by the contract. . . . The loss of flexibility may be a factor contributing to a potential constructive dismissal, but does not, in and of itself, determine the issue."

The court's decision in this case is significant because it signals a departure from the way in which courts have traditionally looked at this issue. Had this case been heard five

# *Real world business considerations*

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years ago, the opposite result would have been likely because a court would have assumed that a change in hours of work was “fundamental.”

However, this particular court got it right. It evaluated the facts within the context of real world business considerations, not legal principles alone.

The facts were placed in proper context and the manager's actions seen for what they were: inflexible.

In light of this case, prudent employers should still carefully weigh the necessity of unilateral changes to the terms of employment contracts.

However, employers should now be more confident in their right to make changes if they are necessary and do not go to the heart of the employment relationship.

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