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Constructive Dismissal: A Unilateral Variance of Fundamental Employment Terms

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While at work, it often feels that the employer holds all of the power. You may feel that they have the ability to push you into cutting your hours to avoid a lay-off, or even taking a pay cut because the company simply can't afford to keep you at your current wage. The truth is, that's not acceptable. It's not acceptable because you have an agreement that you will work and they will pay you.

As an employee, you have a duty to remain loyal to the company; don't bite the hand that feeds you. That said, how far must that loyalty extend? In *Pimenta v Boermans*, (2003) the Ontario Labour Relations Board states at paragraph 12[1]:

> An employee, in my view, is no more obligated to share in the misfortunes of her employer's business by accepting a fundamental change to her terms and conditions of employment than she would be legally entitled to a share in the profits of that business if and when it were to become successful. The relationship is one of employment, not partnership, and while some employees might prefer to accept changes that would otherwise amount to a constructive dismissal if the alternative is unemployment, they are under no obligation to do so.

So, when does an employment agreement come to an end? At paragraph 24 of *Wronko v Western Inventory Services Ltd. (2008)*[2] explains the employment contract as one that "continues as long as both parties agree". The truth of the matter is that the employment agreement can be terminated by either party, at any time.

Does that mean you can be fired anytime? Yes and no. Terminating an employee without cause or changing a fundamental term of the employment agreement is a breach, or repudiation, of

[1] *Pimenta v Boermans*, (2003) CanLII 26300 (ON LRB)
[2] *Wronko v Western Inventory Service Ltd.,* (2008) 90 OR (3d) 547

the contract which carries consequences both through legislation and common law. To put it plainly, Ellen Mole[3] states:

> Once a contract of employment has been formed, neither party has the right to unilaterally change a significant term of the contract, unless both parties agree to the change.

According to *Farquhar v Butler Brothers Supplies Ltd.* (1988)[4], these changes can be a present breach or an anticipatory breach, but be mindful of the findings of *Smith v Viking Helicopter Ltd. (1989).*[5] In *Smith,* the Ontario Court of Appeal held that "a damage action for constructive dismissal must be founded on conduct by the employer and not simply on the perception of that conduct by the employee".

So, what happens when your boss tells you he is cutting your hours, demoting you, or reducing your pay? What are your options? *Farquhar,*[6] at paragraph 92, says that you must decide in a reasonable time how you wish to proceed, and you may only have a few days, or maybe weeks, to think it over.

What do you need to consider?

1. Were changes made to the terms and conditions of employment without your consent?
2. Were those changes sufficient to amount to a constructive dismissal?

If the answers to both of these questions are yes, what are your options? Well, *Wronko*[7] outlines three options. First, you can agree to the new terms, carry on your employment, and go on with life. Second, you can reject the changes, inform your employer (in writing), and continue employment under the old terms. If your employer insists on altering the terms of your agreement (ie: reducing your hours or pay) and forces the changes on you, you can quit and sue for damages resulting from constructive dismissal. Third, you can reject the changes, inform your employer (in writing), and continue employment under the old terms. If you choose this option, your employer may terminate you with proper notice, and offer re-employment on the new terms. If your employer does not terminate your employment, but instead continues to employ you, they are deemed to have acquiesced to your position.

So, you have decided to quit your job and sue your employer. *Pollock v First Heritage Financial,* (2002) [8] explains at paragraph 32 that the burden of proof is on you to show that you were dismissed.

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[3] Mole, E. (2006), *Wrongful Dismissal Practice Manual, 2nd ed*., looseleaf (Markham, Ont: 2008 ONCA 327 (CanLII) LexisNexis Canada Inc., 2006), vol 1, at 3-1

[4] *Farquhar v Butler Brothers Supplies Ltd.,* (1988), 23 BCLR (2d) 89 (CA)

[5] *Smith v Viking Helicopter Ltd.* (1989), 24 CCEL 113

[6] *Farquhar v Butler Brothers Supplies Ltd.*(1988), 23 BCLR (2d) 89 (CA)

[7] Supra 1

[8] Pollock *v First Heritage Financial,* 2002 BCSC 782

How much are you entitled to? Well, the assessment of reasonable notice is an art and not a science. In the case of *Bardal v Globe & Mail Ltd.* (1960)[9], McRuer C.J.H.C. explains:

> The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment

Now that you have been terminated, what are your responsibilities and obligations? Do you need to mitigate your losses? How should you mitigate? Is starting your own business good enough? What if your employer offers to take you back? Laskin C.J., in the *Michaels v Red Deer College* (1976)[10] case, said at paragraph 9:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that **the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff**. The reference in the case law to a "duty" to mitigate should be understood in this sense. In short, **a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation**. [*emphasis added*]

Your need to mitigate is summed up in *Ceccol v Ontario Gymnastic Federation* (1999)[11] where the judge found that the terminated employee failed to mitigate because she could have found an alternative position within a reasonable time, had she looked.

Does mitigation include returning to that employer? The Supreme Court of Canada, in *Evans v Teamsters Local Union No. 31* (2008)[12], stated that an employee may be required to mitigate his/her damages by "taking **temporary** work with the dismissing employer." However, the critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation." This includes suffering a loss of dignity, or poor conditions of employment. *Antworth v Fabricville* (2009)[13] further establishes at paragraph 20 that the duty to return to your employer must be decided on a case by case evaluation of their particular circumstances. However, the case of *Duplessis v J. D. Irving* (1983) [14] found that "the plaintiff was not obliged to accept the offer because it was a significant step down in status and prestige, and the change to his employment had been made in a manner which was both arbitrary and highhanded."

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[9] *Bardal v Globe & Mail Ltd.* (1960) 24 DLR (2d) 140
[10] *Michaels v Red Deer College*, (1976) 2 SCR 324
[11] *Ceccol v Ontario Gymnastic Federation*, (1999) OJ No 304 (Gen Div)
[12] *Evans v Teamsters Local Union No. 31* (2008) SCJ No 20
[13] *Antworth v Fabricville*, (2009) NBQB 054
[14] *Duplessis v J. D. Irving*, (1983) 47 NBR (2d) 11 (NBCA)

What if it's time for a career change? In *Coutts v Brian Jessel Autosports Inc.* (2005)[15] the duty of mitigation required Mr. Coutts to act reasonably, diligently and in his own interest, in pursuing alternative employment; although his personal preferences and objectives were taken into consideration, they were not definitive. Ultimately, it was decided that the employee must act reasonably.

How about starting your own business? In the *Allan v Westinghouse Canada Inc.* (2000)[16] decision, Justice Whitten set out that you are unlikely to earn the income you earned at the time of termination, therefore self-employment should be a **last resort**. Furthermore, if your new business is different than the employment you left, it's going to require far more evidence to establish the hopelessness of salaried employment because of the availability of employment with your skill set. At the end of the day, "the road to self-employment is difficult to justify".

While this provides a brief overview, the law can be very complex, and many aspects are case specific. If you have an issue, call Cochrane Moore LLP for a free consultation.

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[15] *Coutts v Brian Jessel Autosports Inc.*, (2005) BCJ No 828
[16] *Allan v Westinghouse Canada Inc.*, (2000) OJ No 5054