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WHAT IS CONSTRUCTIVE DISMISSAL?

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I am frequently consulted by people who feel they have been mistreated by their employer.

Many scholarly legal articles and judgments have been written on this subject. Essentially, the law views employment as a contract between the employee and the employer. In the vast majority of cases the terms of the contract are not written down. This means that the employee's duties are set out at hiring and may change over time as the business needs evolve and the methods of conducting business change.

The potential for constructive dismissal arises when the employer decides to change the duties of the employee. If the changes are significant such that it is in reality a new job, or if the change involves a loss of income or a demotion, then the law sees the change as an alteration of the contract of employment. When that alteration is such that the employee can no longer carry out the terms of the original contract, the employee then has options. The employee can accept the change or treat the change as a breach of contract and therefore allege that he or she has been constructively dismissed.

Such a decision by an employee is critical to one's livelihood. That decision should not be made without obtaining appropriate legal advice.

It is important to understand that constructive dismissal can only arise based upon conduct demonstrated by the employer. The Court of Appeal for Ontario has set out clearly that it is an objective test so that the perception by the employee is not what counts, but whether the change by the employer, namely, the employer's conduct, would be interpreted by most people, (but more importantly a Judge), to be a change of a significant term of the contract of employment.

There are cases which set out that a decision by an employer to alter the way it conducts business or merely moving the business to another location, does not necessarily result in breach of a fundamental term of the contract and therefore were not seen as constructive dismissal.

Where the employer can demonstrate that the changes were made in good faith for valid business purposes, the employee will have a difficult time proving constructive dismissal. However if it is apparent that the employer is manipulating the employee or is attempting to cause the employee to resign, then a court is more likely to see it as a constructive dismissal.

The case law however makes it clear that constructive dismissal is not easy to prove on the part of an employee. In addition, even if successful in demonstrating that a constructive dismissal has occurred, the employee has an obligation to do his or her best to mitigate or reduce the loss arising by reason of the constructive dismissal. For example, if an employer makes a radical change to the duties of an employee but does not alter the wage or income, the employee has the option (as set out above) to accept the change or treat the contract as at an end. If the employee treats the contract as at an end and seeks pay in lieu of notice, the employee faces the difficulty of demonstrating that he or she should not have had to accept the changes and stay on the job to reduce the loss arising from the breach of the contract.

The Supreme Court of Canada has in recent case law found that the employee had an obligation to stay on the job unless the working conditions were in some measure intolerable.

This duty to mitigate puts employees in a difficult position when attempting to decide whether to accept the changes and continue working or whether to leave the workplace and sue the employer for damages for the constructive dismissal.

A significant consideration is whether or not the employee has benefits. A resignation will of course end benefits. The employee may be able to include this loss in his or her claim but in the meantime goes without benefits. This can be a critical part of the decision making process

especially where the employee or a family member has an illness which requires expensive prescription medication.

In summary then, when an employee is wondering whether or not they have been constructively dismissed, there are a number of matters to consider. Among them are the following:

- (a) The essential terms of the contract of employment must be identified;
- (b) It must then be determined whether the employer has breached a term of that contract;
- (c) If there has been such a breach, is that breach sufficiently serious that it amounts to an intention on the part of the employer to no longer be bound by the original contract of employment?
- (d) If it is a serious breach, are the working conditions such that the employee should consider remaining on the job in an effort to reduce or eliminate damages?

These considerations are not simple and there are a number of factors that apply in each of the considerations. Deciding to resign and sue the employer is an important decision by an employee and should not be made without obtaining appropriate legal advice.