

2010 CONSTRUCTIVE DISMISSAL LAW UPDATE

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The logo for the law firm Blakes, featuring the name in a stylized, cursive script font.

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I. Introduction and Overview of Constructive Dismissal

Constructive dismissal claims present practical and theoretical difficulties to employment law practitioners attempting to advise their clients. Whether advising employers or employees, the number of variables in each individual situation makes it challenging to conclusively advise whether or not any particular scenario amounts to a constructive dismissal.

This challenge is compounded by recent economic uncertainty, where many employers have been, and may continue to be, forced to implement changes to their workforces through restructuring and other measures to respond to the economic climate. In light of the continued importance and ever-evolving nature of the law surrounding constructive dismissal, it is particularly timely to review recent case law to identify developments in this area of law in order to understand how courts are currently addressing constructive dismissal claims.

The principles underlying constructive dismissal claims are well-established and generally not in dispute. The test is an objective one that turns on whether a reasonable person would consider the change imposed by the employer to fundamentally breach the employment contract. If the change amounts to a fundamental breach, the employee is given the right to either accept the change or treat the employment contract as being at an end within a reasonable amount of time: *Farquhar v. Butler Brothers Supplies Ltd.*(1988), 23 B.C.L.R. (2d) 89 (C.A.) at 92.

In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 34 the Supreme Court of Canada set out what has become the most commonly cited definition of constructive dismissal:

¹ Prepared with the assistance of Andrew Crabtree, Student-At-Law.

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

While the basic legal principles of constructive dismissal are easily understood, there is less certainty surrounding the manner in which courts construe specific employer-initiated changes. To understand judicial approaches to interpreting changes in the workplace and the corresponding legal effects on employment contracts, practitioners may attempt to distill trends in recent jurisprudence. Judicial approaches have changed over time, and continue to change, reflecting various economic and social trends. The ever-changing nature of judicial approaches to constructive dismissal cases is highlighted in the recent Nova Scotia Supreme Court decision in *MacKinnon v. Acadia University*, 2009 NSSC 269 at para. 63:

... the general approach of courts to the determination of when a change is fundamental has swung like a pendulum in concert with the economy between (a) a “subjective test”...that was protective of employee’s expectations that prevailed during the good economic times of the 1960s and 1970s and (b) the objective approach...persisting through most of the 1980s and early 1990s, that recognized an employer’s legitimate business interests, or at least business necessity, and a broad entitlement to implement job reassignments in good faith. Since *Farber v. Royal Trust*, the pendulum has swung back slightly...Legitimate business interests can justify a degree of change in the employee’s duties provided the degree of change is not fundamental to the employment contract.

While an illustrative explanation, the pendulum may not provide much guidance after all. As stated by Lambert J.A. in *Lesiuk v. British Columbia Forest Products Ltd.* (1986), 8 B.C.L.R. (2d) 297 (C.A.) at para. 31: “But up, down or sideways, a unilateral change is a unilateral change.” Unfortunately this leaves a degree of uncertainty for employers making changes to the workplace in terms of predicting the potential

ramifications of such changes. As a result of this uncertainty, it is imperative to understand recent case law in what are typically the most common categories of constructive dismissal cases – (a) changes in pay and/or benefits; (b) classic “demotion” (i.e. where the employer reassigns or changes an employee’s title, job duties or responsibilities in the workplace); and, (c) cases where workplace harassment amounts to a constructive dismissal.

A. Pay and Benefits

Pay and benefits are clearly central to the employment relationship, but it is clear that some reduction in remuneration will not constitute a constructive dismissal in the appropriate circumstances. The question inevitably becomes how much of a change is too much. The recent British Columbia Supreme Court case, *Pavlis v. HSBC Bank Canada*, 2009 BCSC 498 sets out a spectrum that identifies situations when a reduction in salary will be considered a fundamental change by reviewing past jurisprudence to attempt to identify how big a decrease in pay would give rise to such a claim. *Pavlis* is under appeal; however, to the extent that it gleans general trends from other case law, the B.C. Supreme Court decision provides relatively clear guidance as to the quantum of reduction that will or will not constitute a fundamental change.

The general rule outlined in *Pavlis* states that a reduction in salary of up to 9% to 10% will not amount to a fundamental breach, a reduction of 14 to 17% may amount to a fundamental breach if another significant or substantial unilateral change occurs, and any reduction beyond 20% will, on its own, be a fundamental change.² Other recent decisions confirm that changes to the terms of employment that result in significant salary reductions (and are not permitted by the employment contract) will constitute constructive dismissal. Unlike the *Pavlis* decision, these decisions do not expressly outline a specific figure to determine at what point the reduction will constitute a fundamental change, but these cases do provide support for the rule in *Pavlis*:

² *Pavlis*, para. 53

Case	Effect of change on total compensation	Holding
<i>Pavlis v HSBC Bank Canada</i> , 2009 BCSC 498	Maximum of 7%	No constructive dismissal
<i>Chapman v. Bank of Nova Scotia</i> 2008 ONCA 769, aff'g (2007), 58 C.C.E.L. (3d) 25 (Ont. S.C.J.)	Approximately 13%	No constructive dismissal
<i>Borsato v. Atwater Insurance Agency Ltd.</i> , 2008 BCSC 724	20%	Constructive dismissal
<i>Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd.</i> , 2010 BCSC 353	Approximately 22%	Constructive dismissal
<i>Khan v. Vernon Jubilee Hospital</i> , 2008 BCSC 1637	Average of 26% (over four years)	Constructive dismissal
<i>Evangelista v. Number 7 Sales Ltd.</i> , 2008 ONCA 599	Reduced commission rate from 30% to 18%, then to 9%	Constructive dismissal
<i>Churchill v. Stockgroup Media Inc.</i> , 2008 BCSC 578	Approximately 62%	Constructive dismissal
<i>Wronko v. Western Inventory Service Ltd.</i> , 2008 ONCA 327	2 years' salary	Constructive dismissal

1. Reduction in Salary

In *Pavlis*, the 43-year old plaintiff was an investment advisor for the defendant for approximately four years. The relationship between the parties began to deteriorate over time, partially because the plaintiff believed the defendant was not paying her adequate fees relating to her investment commissions.³ This was a significant dispute between the parties and escalated in frequency and emotional tone.⁴ The plaintiff eventually went on long-term disability leave.⁵

In contemplating a return to work, the plaintiff understood that she would receive no sales support upon her return.⁶ The plaintiff felt sales support would increase her

³ *Pavlis*, para. 9

⁴ *Pavlis*, para. 12

⁵ *Pavlis*, para. 13

⁶ *Pavlis*, para. 14

income and was provided for in her employment contract.⁷ The plaintiff was experiencing financial problems during this time and stopped paying amounts owing to the defendant bank on mortgages related to properties she owned.⁸ She argued that the defendant owed her more money than the outstanding amounts, based on the inadequate fee payments. During this time, the defendant stated that the plaintiff threatened to contact clients, the media, and securities regulators about perceived injustices.⁹ The defendant sent the plaintiff a letter cautioning her about such conduct.¹⁰ Ultimately, the defendant wrote the plaintiff indicating that the defendant viewed the plaintiff's actions as a resignation from employment and that the defendant accepted that resignation.¹¹ The defendant foreclosed on the plaintiff's properties and the plaintiff declared personal bankruptcy.¹²

The plaintiff argued that she was constructively dismissed on four main grounds:

- (1) non-payment of fees relating to investment commissions;
- (2) insufficient short- and long-term disability payments based on the failure to pay all outstanding fees;
- (3) refusal to provide increased sales support; and
- (4) unauthorized recording of client communications that were intended to remain confidential.¹³

The central issue was whether the failure to pay full compensation, as agreed upon under the employment contract, amounted to constructive dismissal.¹⁴ The judge concluded it did not.¹⁵ Whether the failure to pay full compensation amounted to a

⁷ *Pavlis*, para. 75

⁸ *Pavlis*, para. 15

⁹ *Pavlis*, para. 16

¹⁰ *Pavlis*, para. 17

¹¹ *Pavlis*, para. 21

¹² *Pavlis*, para. 24

¹³ *Pavlis*, para. 33

¹⁴ *Pavlis*, para. 47

¹⁵ *Pavlis*, para. 87

fundamental breach depended on whether the unpaid amount comprised a significant or substantial part of the employee's remuneration.¹⁶

The Court held that even accepting the plaintiff's figures, the outstanding amount only equalled approximately a 2-7% reduction of her salary.¹⁷ This amount was not significant enough to constitute a fundamental breach based on the general rule enunciated by the Court as to the quantum of reduction that would amount to a fundamental breach.¹⁸

Of course, rarely will an issue come down solely to a reduction in salary. It is important to note that the judge examined each alleged breach individually, and also considered the cumulative effect of the alleged breaches. The judge concluded that even taken together, they did not constitute a fundamental breach of the employment contract.¹⁹

The earlier British Columbia Supreme Court case of *Borsato v. Atwater Insurance Agency Ltd.* 2008 BCSC 724 is an example of where a changing work environment did not permit a unilateral reduction in salary. In that case, the 54 year old plaintiff was a manager of one of the defendant's stores, and had worked for the company for a number of years prior to the defendant's purchase of the business.²⁰ In total she worked for the company for 16 years. The plaintiff reached an agreement with the previous owner to work 30 hours per week at a rate of \$26 per hour but she often worked more than 30 hours per week.²¹

The defendant became aware that the plaintiff was sometimes working four, instead of five, days per week.²² The plaintiff had not obtained approval for this

¹⁶ *Pavlis*, para. 52

¹⁷ *Pavlis*, para. 58

¹⁸ *Pavlis*, para. 61

¹⁹ *Pavlis*, para. 87

²⁰ *Borsato*, paras. 3-10

²¹ *Borsato*, paras. 8-9

²² *Borsato*, para. 16

change.²³ The plaintiff continued to complete 30 hours of work per week, whether she worked four or five days per week. Ultimately, the defendant accepted this arrangement and notified the plaintiff that her salary would be reduced by 20% to reflect this change and that the employer would recover the overpayment for prior months where she worked at this reduced capacity.²⁴

The plaintiff informed the defendant of her original arrangement to only work 30 hours per week and that she often worked additional hours to ensure her work was completed.²⁵ The plaintiff stated that working 30 hours in four days would be optimal, but would be open to working 30 hours over five days.²⁶ She asked the defendant to reinstate her full compensation.²⁷ After a subsequent meeting with the defendant, the plaintiff was directed to begin a stress leave.²⁸ She did not return to work.

The defendant argued the plaintiff's contract changed over time and while it was acceptable to work 30 hours per week initially, by the time the defendant purchased the business the plaintiff was working more than 30 hours.²⁹ Therefore, the term outlining 30 hours per week ceased to be a term of the contract and it was expected that the plaintiff would work more than 30 hours per week.³⁰

The judge did not accept that an employment contract could change over time solely based on one party's expectations.³¹ The judge also did not accept that the plaintiff had an obligation to outline the precise terms of her contract to the new owner if she expected to continue her employment on those terms.³² Further, the judge found

²³ *Borsato*, para. 18

²⁴ *Ibid.*

²⁵ *Borsato*, para. 21

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Borsato*, para. 22

²⁹ *Borsato*, para. 23

³⁰ *Ibid.*

³¹ *Borsato*, para. 25

³² *Ibid.*

there was no fresh consideration to increase the number of hours that the plaintiff was obligated to work.³³

The judge did not find that the plaintiff had unilaterally changed a fundamental term of the contract by altering her work arrangement.³⁴ The judge accepted the plaintiff's evidence that she always intended to work according to the original terms of her contract: 30 hours per week but working additional hours to get the job done.³⁵ Having dismissed the defendant's explanations, the judge had little trouble concluding that the defendant unilaterally changed a fundamental term by reducing the plaintiff's salary by 20%.³⁶ Accordingly, the judge found the reduction in salary constituted a constructive dismissal and awarded 16 months as a reasonable notice period.³⁷

In *Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd.*, 2010 BCSC 353, an employer unsuccessfully attempted to defend a constructive dismissal by explaining its actions as resulting from the state of the economy. The 51 year old plaintiff was employed with the defendant for 16 years, ultimately as shop manager.³⁸ The owner sold the dealership but all employees remained employed. Following this, the new owner effectively eliminated the plaintiff's position by removing most of his management duties and returning him to his previous position of auto technician.³⁹ The employer also modified the employee's wage, resulting in an \$18,000 reduction in wages compared to his previous position.⁴⁰ The new owner stated there would be no discussion regarding these changes.⁴¹ The plaintiff began work as a technician and was given rudimentary jobs, such as oil changes, which he had not done in 20 years.⁴²

³³ *Borsato*, para. 41

³⁴ *Borsato*, para. 49

³⁵ *Ibid.*

³⁶ *Borsato*, para. 47

³⁷ *Borsato*, paras. 54 & 60

³⁸ *Sifton*, para. 2

³⁹ *Sifton*, para. 16

⁴⁰ *Sifton*, para. 17

⁴¹ *Sifton*, para. 16

⁴² *Sifton*, para. 19

He did not complain about these changes, as it was apparently not in his nature to do so.⁴³

The defendant argued that due to the state of the economy, particularly in the auto industry, it was necessary to unilaterally change the plaintiff's position.⁴⁴ The judge rejected this argument and found that the significant reduction in income and demotion to a job the plaintiff had not held for 11 years constituted constructive dismissal.⁴⁵ The judge accepted the changes were a rational business decision, but noted that appropriate notice or pay in lieu is still necessary when eliminating positions in such circumstances.⁴⁶ The plaintiff was awarded a notice period of 14 months.⁴⁷

Similar principles are evident in other courts across the country. In *Evangelista v. Number 7 Sales Ltd.*, 2008 ONCA 599, the Ontario Court of Appeal considered the reduction in commissions of the 58 year old plaintiff, a car salesman who had worked for the defendant for 16 years. After some time, the defendant reduced the plaintiff's commission rate from 30 to 18%.⁴⁸ The plaintiff was "hurt" and "shocked" by the change, but accepted it.⁴⁹ Approximately one year later, the defendant sought to reduce his commission rate to 9%.⁵⁰ The defendant had no issue with the plaintiff's performance, but told him that he was making too much money in comparison to others in similar positions in the business.⁵¹ The plaintiff did not accept the reduction and the parties were unable to agree on an appropriate rate.⁵²

At trial, the judge concluded the plaintiff had been constructively dismissed and awarded a 15 month notice period, including 3 months for *Wallace* damages.⁵³ The

⁴³ *Ibid.*

⁴⁴ *Sifton*, para. 40

⁴⁵ *Sifton*, paras. 39-44

⁴⁶ *Sifton*, para. 44

⁴⁷ *Sifton*, para. 57

⁴⁸ *Evangelista*, para. 4

⁴⁹ *Ibid.*

⁵⁰ *Evangelista*, para. 5

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Evangelista*, paras. 8, 11 & 17

judge found the unilateral action of changing the commission structure was a fundamental breach of the employment contract.⁵⁴

The Court of Appeal agreed that the plaintiff was constructively dismissed and agreed with the damages awarded. The Court of Appeal also noted that it was reasonable for the plaintiff not to work for the defendant in light of the “toxic work environment” that existed.⁵⁵

A related issue is whether changes in variable compensation amount to a constructive dismissal. By its very nature, variable compensation should fluctuate such that one would expect there to be a greater spectrum in which changes to remuneration would not constitute a fundamental breach. This was the case in *Chapman v. Bank of Nova Scotia*, 2008 ONCA 769. The plaintiff worked for the defendant for 36 years, ultimately as a senior vice-president. He argued that he was constructively dismissed due to reductions in his variable compensation between 2000 and 2003 (approximately 13% over the three years, although only 3.7% in 2003).⁵⁶ During this period, the compensation of other senior vice-presidents increased while the plaintiff’s decreased.⁵⁷ The trial judge concluded the plaintiff was not constructively dismissed, a ruling which was upheld on appeal.⁵⁸

The judge and the Court of Appeal both noted that the case turned essentially on a factual assessment; the law was not in dispute.⁵⁹ The Court of Appeal concluded the findings of fact and law were both reasonable and upheld the judge’s findings.⁶⁰

The key findings of the trial judge were that there was no express or implied term in the contract guaranteeing that the plaintiff’s variable compensation would not fluctuate or remain at a particular figure or that his salary would remain at a particular

⁵⁴ *Evangelista*, para. 10

⁵⁵ *Evangelista*, paras. 17-18

⁵⁶ *Chapman*, paras. 1 & 7

⁵⁷ *Chapman*, para. 8

⁵⁸ *Chapman*, paras. 10-11

⁵⁹ *Chapman*, para. 3

⁶⁰ *Chapman*, para. 11

compensation level relative to other senior vice-presidents.⁶¹ The judge pointed out that variable compensation, by its very nature, will fluctuate.⁶² Further, the plaintiff's bonus entitlement, which formed a large part of his variable compensation, was clearly determined by individual performance within the overall "bonus pool" for the year.⁶³ The pool itself would fluctuate annually depending on the defendant's performance and market conditions.⁶⁴ Finally, the plaintiff condoned these fluctuations as he renegotiated aspects of his compensation package during this time period and did not raise the issue.⁶⁵

2. Change in Benefits, Bonus or Termination Payments

Like reductions in salary, changes to benefits or bonus plans may result in a constructive dismissal. In *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, leave to appeal ref'd (2008) 391 N.R. 385 (note) (S.C.C.), the Ontario Court of Appeal addressed changes to benefits upon termination. The plaintiff worked for the defendant for 17 years and was Vice-President of National Accounts and Marketing during his final 4 years.⁶⁶ His employment contract provided that in the event he was terminated, he would receive payment of 2 years' salary.⁶⁷ During his tenure as vice-president, he received a new contract from the defendant's new president which only provided 30 weeks' pay upon termination.⁶⁸ The contract was to come into effect in 2 years' time. The plaintiff did not sign this contract and continued to object to the amended termination provision over the next 2 years.⁶⁹ The plaintiff received an agreement 2 years later which stated that the new contract was in effect and unless he accepted the

⁶¹ *Chapman*, para. 8

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Chapman*, para. 9

⁶⁶ *Wronko*, para. 1

⁶⁷ *Ibid.*

⁶⁸ *Wronko*, para. 2

⁶⁹ *Ibid.*

terms he would not have a position with the defendant.⁷⁰ The plaintiff replied the next day that he understood his employment was terminated and did not return to work.⁷¹

The Court of Appeal reversed the trial judge's dismissal of the plaintiff's claim.⁷² The trial judge had concluded that by giving the plaintiff 2 years' notice of its intention to amend a fundamental term of the plaintiff's contract, the defendant had satisfied its requirements and that the plaintiff had, in fact, terminated the employment relationship.⁷³

The Court of Appeal found the defendant's ultimatum to the plaintiff, to sign the amended contract or lose his position with the company, would lead a reasonable person to view it as a termination.⁷⁴ Further, the evidence supported the finding that the plaintiff had no intentions of resigning.⁷⁵

According to the Court of Appeal, when an employee is faced with a unilateral amendment to a fundamental term of an employment contract, he or she has three options:

- (1) accept the changes, either expressly or implicitly through acquiescence;
- (2) reject the changes and sue for damages if the employer believes the relationship is ongoing and subject to the new terms(s); or
- (3) notify the employer that they are rejecting the new term and allow the employer to terminate the employee. However if the employer allows the employee to keep working then the employee is entitled to insist on the employer fulfilling the terms of the original contract.⁷⁶

The employer clearly repudiated the contract by unilaterally amending a fundamental term of the contract. Given the plaintiff's clear and unequivocal refusal to

⁷⁰ *Wronko*, para. 3

⁷¹ *Ibid.*

⁷² *Wronko*, para. 49

⁷³ *Wronko*, para. 22

⁷⁴ *Wronko*, para. 26

⁷⁵ *Wronko*, para. 27

⁷⁶ *Wronko*, paras. 33-36

accept this amendment, the defendant permitted the plaintiff to continue working according to the terms of his original contract.⁷⁷ Based on this, the defendant could have terminated the plaintiff and offered new employment with different terms or accepted that there was no new agreement.⁷⁸ By failing to do this, the defendant's actions constituted constructive dismissal and the defendant was liable to the plaintiff for 2 years' salary less amounts earned by the plaintiff who had mitigated his damages.⁷⁹

In *Johnson v. Top-Co LP*, 2009 ABQB 731, the Alberta Court of Queen's Bench examined changes to the structure and payment of bonuses. The plaintiff worked for the defendant for 34 years, rising through the ranks and becoming part of senior management.⁸⁰ After the company was sold, the plaintiff was the production manager and signed a revised employment contract, resulting in a salary increase and payment for after-hours service calls.⁸¹ The contract also included a performance bonus plan.⁸² Prior to the sale, the plaintiff received a bonus of \$200,000 per year that was not profit or performance based.⁸³ The new bonus plan was based on a series of performance targets.⁸⁴

The plaintiff did not receive his first quarterly bonus cheque on the prescribed date and believed the defendant was not acting in good faith in interpreting when he should receive bonus payment for after-hours service calls.⁸⁵ The plaintiff argued the contract provided that 50% of his bonus payment was to be paid quarterly and the other 50% would be held back until year-end to determine if performance targets were met.⁸⁶

⁷⁷ *Wronko*, para. 39

⁷⁸ *Wronko*, para. 40

⁷⁹ *Wronko*, paras. 40 & 43

⁸⁰ *Johnson*, para. 2

⁸¹ *Johnson*, paras. 5-6

⁸² *Johnson*, para. 6

⁸³ *Johnson*, para. 3

⁸⁴ *Johnson*, para. 6

⁸⁵ *Johnson*, paras. 9-10

⁸⁶ *Johnson*, para. 32

The plaintiff met with the president on two occasions to discuss these issues.⁸⁷ The first meeting created significant tension and hostility between the two parties.⁸⁸ Afterwards, the president prepared a memorandum and delivered it to the plaintiff's office setting out an interim performance plan that related to achieving bonus payments.⁸⁹ Shortly after the start of the second meeting, the plaintiff abruptly resigned due to some comments made by the president.⁹⁰

The judge agreed that the plaintiff was constructively dismissed since the defendant had fundamentally altered key provisions of the plaintiff's pay structure.⁹¹ The judge agreed with the plaintiff's interpretation of the contract relating to bonus payments and found the defendant's interim performance plan was unilaterally imposed without any discussion or mutual agreement.⁹² This plan contradicted the bonus payment plan set out in the revised employment contract.⁹³ Further, the memorandum added additional performance targets that were not included in the revised contract. The judge also found comments made by the president undermined the fundamental trust relationship essential to any employment relationship.⁹⁴ The plaintiff received a 20-month notice period, which was reduced by six months due to a failure to mitigate.⁹⁵

As demonstrated by the foregoing, there are few instances where changes relate solely to changes in compensation. However, it does appear relatively certain that where changes to compensation are sufficiently significant constructive dismissal may be found. A 20% reduction appears to be a threshold that if met, will certainly mean a constructive dismissal exists. That said, anything below 20% could amount to a constructive dismissal where other changes have occurred.

⁸⁷ *Johnson*, paras. 14-18

⁸⁸ *Johnson*, paras. 14-15

⁸⁹ *Johnson*, para. 17

⁹⁰ *Johnson*, para. 18

⁹¹ *Johnson*, para. 51

⁹² *Johnson*, para. 43

⁹³ *Johnson*, para. 42

⁹⁴ *Johnson*, para. 49

⁹⁵ *Johnson*, paras. 55 & 69

B. Demotion

One area that can be predicted more readily in the area of constructive dismissal is that of demotion where an employee has their duties reduced or changed (as opposed to, for example, a lateral transfer). It is well-established that employers retain the right to change an employee's job duties and requirements. However, this right is not unqualified. Provided the employment contract does not expressly provide for such a right, questions involving changes to job duties are highly contextual and inevitably require employers to tread a fine line in ensuring any proposed changes do not fundamentally change the nature of the employee's position and lead to a fundamental breach of the employment contract.

1. Contract Permitting Removal and Reassignment of Duties

The Ontario Superior Court of Justice decision in *Crouch v. Securitas Canada*, 2008 CarwellOnt 46 (S.C.J.) makes it clear that changes that are permissible in an employment contract will not amount to a fundamental breach. However, in the context of an unwritten agreement, the manner in which this case was analysed by the judge does suggest that employers have some flexibility insofar as providing their employees with reasonable alternatives in the face of work shortages. In *Crouch*, the 55 year old plaintiff was a security guard and worked for the defendant for 18 years. The defendant provided on-site security services to various businesses. The business where the plaintiff worked cancelled its contract with the defendant. The defendant assigned the plaintiff to another site that involved different hours, pay and responsibilities. The evidence was that this was the only position available. The plaintiff did not like this new position because it involved searching employees' bags and car trunks, which he found uncomfortable.⁹⁶ The defendant refused his transfer request as there were no positions available, and unionized staff had priority. The plaintiff did not return to work.

⁹⁶ *Crouch*, paras. 30-31

The judge noted that the plaintiff had signed a pre-employment contract which acknowledged that his duties and pay could change depending on the site location and that he would be available for a flexible work schedule. The judge found the new position was different than his previous position, but a reasonable alternative. While the duties were slightly different, all of the duties were ones that would be ordinarily expected of a security guard. The plaintiff did not meet his onus by presenting any authorities to demonstrate that the job offered by the defendant was not a reasonable alternative position – the job duties were considered to be the same and the wage differential was only 11%. There was no fundamental change to the employment contract.⁹⁷

The Court was similarly sympathetic to the employer in a recent British Columbia case involving a company reorganization following an acquisition. In *Roberston v. West Fraser Timber*, 2009 BCSC 602, the 61 year old plaintiff worked for the defendant and predecessor company for almost 30 years. Over time, his duties evolved to include managerial and supervisory responsibilities. The defendant acquired the company as of January 1, 2005.⁹⁸ The plaintiff was aware that, following the acquisition, his department would no longer exist.⁹⁹ During meetings with representatives of the defendant, the plaintiff indicated that he was planning to retire in 3 to 5 years and would be willing to consider other jobs, including short-term ones, but he did not want to relocate.¹⁰⁰

Following the acquisition, the plaintiff's salary and benefits did not change and he continued to work on similar projects. He also did not receive a new job title. However, he no longer received corporate financial information (which stopped prior to January 2005) and was no longer in charge of preparing a budget for the department.¹⁰¹

⁹⁷ *Crouch*, para. 75

⁹⁸ *Robertson*, para. 37

⁹⁹ *Robertson*, para. 33

¹⁰⁰ *Robertson*, para. 35

¹⁰¹ *Robertson*, para. 37

Further, two employees no longer reported to the plaintiff.¹⁰² Despite these changes, the plaintiff did not complain.¹⁰³

The plaintiff received a small salary increase and a management bonus cheque in 2006.¹⁰⁴ Upon receiving the cheque, the plaintiff was told this was likely the last bonus because the program was being phased out and he was no longer considered management, but that he would receive a Christmas bonus.¹⁰⁵ The plaintiff received a Christmas bonus in 2007 and was angry that he did not receive a management bonus, despite being told such program was being eliminated, and that he was not part of the management team.¹⁰⁶ The defendant informed the plaintiff that if he wanted to be a part of the management team he would have to travel to Quesnel, where management headquarters were located.¹⁰⁷ The plaintiff wrote the defendant and informed them his last day of work would be three days later.¹⁰⁸

The plaintiff argued the defendant unilaterally made fundamental and substantial changes to the employment arrangement he had with the predecessor company.¹⁰⁹ The plaintiff submitted that the reorganization amounted to a repudiation as a result of the following occurrences:

- (1) the elimination of the plaintiff's management position;
- (2) the removal of most or all of his management functions;
- (3) the failure to reassign the plaintiff in a timely manner to a management position of equal stature or function;
- (4) the assignment of the plaintiff to a lower category of management without any notice;

¹⁰² *Robertson*, para. 38

¹⁰³ *Robertson*, para. 43

¹⁰⁴ *Robertson*, para. 52

¹⁰⁵ *Ibid.*

¹⁰⁶ *Robertson*, para. 61

¹⁰⁷ *Robertson*, para. 68

¹⁰⁸ *Robertson*, para. 70

¹⁰⁹ *Robertson*, para. 82

- (5) the removal of the plaintiff from the management bonus scheme; and
- (6) the failure to communicate reasonably, honestly and fairly on matters associated with the plaintiff's employment.¹¹⁰

The judge found that the plaintiff's employment contract permitted the defendant to unilaterally assign him to different or new duties, without a corresponding increase in salary or position level. The contract also allowed the defendant to remove responsibilities, including supervisory responsibilities, as it saw fit.¹¹¹ The judge found that most of the plaintiff's complaints stemmed from his personal feelings about what the defendant should or should not have done, and also related to his loss of status when his management duties were removed.¹¹²

In respect of the plaintiff's bonus, the Court noted the length of time between the plaintiff's complaints (2005) and when he purported to treat the employment agreement as being at an end (2007).¹¹³ The plaintiff's removal from the management bonus program was not a repudiation of the employment contract based on what was communicated to the plaintiff and the plaintiff's actions following that. The plaintiff did not take any action after being told he would no longer receive a management bonus. Further, even if the plaintiff received the maximum amount under the management bonus plan, the difference between that and the plaintiff's Christmas bonus was less than 5% of his overall remuneration.¹¹⁴

Finally, the Court considered the cumulative effect of the issues raised by the plaintiff. The fact that the plaintiff worked for two years after the defendant acquired the business without clearly communicating to the defendant his concerns appears to have been a persuasive factor in finding a constructive dismissal had not occurred.¹¹⁵ The

¹¹⁰ *Ibid.*

¹¹¹ *Robertson*, para. 94

¹¹² *Robertson*, para. 93

¹¹³ *Robertson*, para. 101

¹¹⁴ *Robertson*, para. 104

¹¹⁵ *Robertson*, para. 109

plaintiff took much longer than is reasonable to determine whether he was going to continue working with the defendant or quit due to the changes imposed.

Good faith on the part of the employer was a key factor in *MacKinnon v. Acadia University*, 2009 NSSC 269, where the 48 year old plaintiff was the vice-president of the university and worked there for 19 years. She reported directly to the president and was responsible for a number of areas including recruitment. Her role in the university's administration was crucial and continually changed with different projects, assignments and responsibilities. In 2003, the university faced a serious enrolment crisis and the president responded by removing the plaintiff's responsibilities regarding enrolment and admissions.¹¹⁶ At the time, the plaintiff acknowledged her workload was extremely busy.¹¹⁷

Subsequently, the plaintiff wrote the president a letter outlining that the removal of this portfolio constituted constructive dismissal and demanded a response within one week. The president did not respond within that time frame because she was leaving for a trip and was advised by the Director of Human Resources that the deadline was not a "hard date".¹¹⁸ The plaintiff left her job when she did not receive a response by the date outlined in the letter.¹¹⁹

The judge examined whether the president's unilateral decision to remove the enrolment and admissions portfolio from the plaintiff constituted a fundamental change. There were no other changes made to the plaintiff's position. There was no written employment contract and the judge concluded the plaintiff's job description fluctuated in both a regular and unpredictable manner.¹²⁰ The judge acknowledged the unique nature of the university setting and the dynamic challenges facing universities across Canada during this period of time. The plaintiff argued the enrolment portfolio

¹¹⁶ *MacKinnon*, para. 15

¹¹⁷ *MacKinnon*, para. 96

¹¹⁸ *MacKinnon*, para. 49

¹¹⁹ *MacKinnon*, para. 51

¹²⁰ *MacKinnon*, paras. 83 & 89

compromised 40-50% of her time; the defendant estimated it should have assumed 15-20%. The judge concluded it comprised no more than 25%.¹²¹

The judge held that it was not an implied term of the plaintiff's contract that her job functions would not change. Flexibility of job functions is an implied term in a senior administrator's contract given their ability to affect the direction and success of the company.¹²² The judge found that the defendant would not be in breach of the employment contract by assigning the plaintiff to special projects or removing some portions of her duties to meet changing circumstances.¹²³ Furthermore, the removal of the enrolment portfolio was not a demotion.¹²⁴ The issue of enrolment was a critical one for the university.¹²⁵ The judge considered the decision to remove admissions from the plaintiff's portfolio to have been made in good faith. The judge also found that the president's decision to take over responsibility for this portfolio was made, in part, to protect the plaintiff's position as the Board of Governors was unhappy with the plaintiff's performance in the area.¹²⁶ To the allegation that this change would cause the plaintiff to lose face, the judge believed this would be temporary, at worst.¹²⁷ It was implicit that the plaintiff's job responsibilities would change and the removal of this portfolio, done in good faith by the university, was not a fundamental change to her contract.

As demonstrated by the foregoing, employers have some degree of latitude insofar as making changes to job duties, even when such changes amount to a form of demotion. Practitioners should be alive to the possibility that an argument exists that implied contractual terms permit such action. Practically speaking, it may be that an argument that an employment contract permitted an impugned change to be made would be rendered more persuasive where an employee is being overly exacting with respect to accepting altered job duties.

¹²¹ *MacKinnon*, para. 97

¹²² *MacKinnon*, para. 92

¹²³ *MacKinnon*, para. 100

¹²⁴ *MacKinnon*, para. 103

¹²⁵ *MacKinnon*, para. 101

¹²⁶ *MacKinnon*, para. 102

¹²⁷ *MacKinnon*, para. 104

2. Non-Equivalent Job Functions

In *Taner v. Great Canadian Gaming Corp.*, 2008 BCSC 129, the 36 year old plaintiff worked for the defendant for six months as Vice-President, Marketing. Due to cost reduction measures, the defendant eliminated this position and offered the plaintiff two options: alternative employment as Director of Marketing or termination.¹²⁸ Her salary would remain the same for six months but then be reduced by 42%, although benefits would remain the same except that her bonus would be based on the reduced salary.¹²⁹ The plaintiff offered to become a consultant for a fixed monthly salary in addition to benefits and a lump sum payment of six months' salary.¹³⁰ The defendant offered a slightly higher fixed salary without any benefits or lump sum payment, but gave it the sole right to dictate her duties.¹³¹ The plaintiff rejected this offer.¹³²

With little analysis, the judge concluded that the plaintiff was constructively dismissed.¹³³ The key issue focused on the reasonableness of the plaintiff's refusal to accept the defendant's offer or counter-offer. The defendant argued its initial offer froze the plaintiff's salary during the notice period and its counter-offer included a salary that was very similar to that tendered by the plaintiff. In both scenarios, the plaintiff argued the effects on her professional reputation were significant and it was reasonable to reject both offers. The judge agreed and found the job responsibilities were substantially different in both offers and thus it was reasonable to reject them. The judge awarded a 10-month notice period finding that while the plaintiff was recruited and left a well-paying job in the U.S., she was already searching for new job opportunities prior to receiving an offer from the defendant.

A similar result occurred in *McKee v. Reid's Heritage Homes Ltd.* (2008), 78 C.C.E.L. (3d) 163 (Ont. S.C.J.), aff'd by 2009 ONCA 916. In this case, the 64 year old

¹²⁸ *Taner*, paras. 12-13

¹²⁹ *Taner*, paras. 13-14

¹³⁰ *Taner*, para. 15

¹³¹ *Taner*, para. 16

¹³² *Ibid.*

¹³³ *Taner*, para. 19

plaintiff was employed by the defendant for 18 years as a real estate agent, selling homes in a number of the defendant's developments. The plaintiff worked through a personal company that contracted with the defendant. The plaintiff was an extremely successful salesperson and hired a number of sub-agents to meet demand, whom she supervised and split commissions with.

After the death of the defendant's principal, the plaintiff was informed that she would have to become an agent employee and would not be able to sell through sub-agents, or supervise them, and would be confined to a single sales location. As a result of these changes, her income would be cut by approximately 50%.

The defendant argued that the plaintiff was an independent contractor based on the original sales contract. However, the judge found this contract expired once the plaintiff had sold the initial development and found the plaintiff became an employee given the degree of control the defendant had over her employment.

The judge found the plaintiff was constructively dismissed given the "radical" change that was imposed on her conditions of employment, including: restricting her allocation of lot sales, eliminating her ability to hire sub-agents and making her an employee of relatively equal status with all other agents, including those she had previously hired and supervised.¹³⁴ The judge found the plaintiff's position changed over time from a position involving sales responsibilities to a position analogous to a senior executive in a large corporation. Since the initial contract had expired, the defendant could not rely on the 30-day termination provision and the judge awarded 18 months in lieu of notice. The judge rejected the defendant's argument that the plaintiff failed to mitigate her damages by not accepting the position since the relationship between the parties was "irreparably damaged" in light of the foregoing negotiations.

¹³⁴ *McKee*, para. 62

3. Changes to Working Conditions

A slightly more nuanced area is whether a change to an employee's working conditions amounts to a fundamental change that is impermissible under the terms of the employment contract. A review of recent case law in this area demonstrates that changes to working conditions are linked to whether remuneration has been altered by said changes.

One common situation in this respect is changes to the geographic location of employment – whether it be changes to sales territory or the location of employment. In *Churchill v. Stockgroup Media Inc.* 2008 BCSC 578, the Court concluded that amendments to the plaintiff's sales territory and placing her on probation constituted constructive dismissal.¹³⁵ The court found there was neither fresh consideration for amending her sales territory nor any justification for placing her on probation.¹³⁶

The 25 year old plaintiff was an advertising sales representative and worked for the defendant for three and a half years. In 2005, the defendant changed the plaintiff's compensation plan resulting in changes to both her salary and commission structure.¹³⁷ After complaining about the changes, the defendant amended the salary and commission structure. The plaintiff remained dissatisfied with the changes but agreed to them.¹³⁸ This plan included the right to change sales territory.¹³⁹ However, she actively voiced her concerns to the defendant. According to the plaintiff, the changes resulted in a loss of approximately \$60,000 in the year the changes were made.¹⁴⁰

The defendant further revised the compensation plan which increased the commission structure but also realigned her sales territory. The plaintiff's new territory

¹³⁵ *Churchill*, paras. 50 & 59.

¹³⁶ *Churchill*, paras. 48 & 59.

¹³⁷ *Churchill*, para. 5.

¹³⁸ *Ibid.*

¹³⁹ *Churchill*, para. 8.

¹⁴⁰ *Churchill*, para. 25.

did not include certain areas that were historically lucrative and generated high sales revenues.¹⁴¹ This would cause a further reduction in her income.

The plaintiff was very unhappy with this change, which was reflected in her attitude and performance.¹⁴² The plaintiff again voiced her concerns in a lengthy email. Shortly thereafter, the defendant gave the plaintiff written terms of probation, and 48 hours to accept the terms, which included expectations for performance improvement. The plaintiff immediately went on medical leave and did not return.¹⁴³ She argued the changes to her commission plan and sales territory amounted to constructive dismissal given the effects on her salary potential.¹⁴⁴

The judge found the defendant had the express right to change compensation and incentive plans, pursuant to the employment contract.¹⁴⁵ The defendant acted fairly in amending the plans and incorporated some of the plaintiff's concerns. However, constructive dismissal did occur when the plaintiff's sales territory was changed.¹⁴⁶ While the plaintiff agreed to the changes to her sales territory, she did so because she felt she had no choice but continued to voice her concerns. The lack of fresh consideration precluded this change from becoming a new term of her contract.¹⁴⁷ The judge accepted that an employer can place an employee under performance review; however, the reason behind the defendant's decision was primarily motivated by the plaintiff's reaction to the territory realignment and was not warranted in the circumstances.¹⁴⁸ The plaintiff was awarded four weeks' notice.¹⁴⁹

However, in *Haglund v. Clean Harbours Canada Inc.*, 2007 BCSC 1719, the Court concluded there was no fundamental change when the employer changed the

¹⁴¹ *Churchill*, para. 9.

¹⁴² *Churchill*, para. 10.

¹⁴³ *Ibid.*

¹⁴⁴ *Churchill*, para. 11.

¹⁴⁵ *Churchill*, para. 43.

¹⁴⁶ *Churchill*, para. 50.

¹⁴⁷ *Churchill*, para. 49.

¹⁴⁸ *Churchill*, para. 59.

¹⁴⁹ *Churchill*, para. 65.

plaintiff's sales territory and amended her sales target.¹⁵⁰ This conclusion was based largely on the fact that the court accepted that the revised target was reasonable in light of the changes to the sales territory and the defendant promised to review the target to ensure it was not "skewed".¹⁵¹

The 39 year old plaintiff commenced employment in 1995 and eventually became an account manger. For a number of years she was the sole sales representative in British Columbia. In 2003, a new representative was hired and assigned some of the plaintiff's sales territory. The plaintiff argued that she had been working to develop contacts in this territory which would accrue to the new representative without any compensation to her.¹⁵² The new territory assignment effectively left the plaintiff with a sparsely populated area of British Columbia.¹⁵³

She argued the defendant failed to sufficiently reduce sales targets in light of her new sales territory, which eliminated any potential for obtaining bonuses that she previously obtained on a regular basis. The plaintiff noted that 30% of her salary was performance based and depended on her sales results from her assigned territory.¹⁵⁴ The plaintiff argued these actions amounted to constructive dismissal and she left the company in July 2004.¹⁵⁵

The defendant argued that the sales territory and sales targets were not part of the plaintiff's employment contract and, even if they were, the changes were not fundamental.¹⁵⁶ The defendant was not required to set a sales target which the plaintiff was ensured of reaching.¹⁵⁷ The defendant maintained the target was reasonable, as the target took into account the new territorial divisions. Further, the defendant

¹⁵⁰ *Haglund*, para. 30.

¹⁵¹ *Haglund*, para. 29.

¹⁵² *Haglund*, para. 6.

¹⁵³ *Ibid.*

¹⁵⁴ *Haglund*, para. 12.

¹⁵⁵ *Haglund*, para. 9.

¹⁵⁶ *Haglund*, paras. 15-16.

¹⁵⁷ *Haglund*, para. 16.

promised to review the plaintiff's sales target following the reassignment and would address it if the 2004 figures were "really skewed".¹⁵⁸

The judge dismissed the plaintiff's claim and found the alteration to the target was not a fundamental change.¹⁵⁹ The target was not unreasonable or unattainable in light of the defendant's evidence.¹⁶⁰ Further, the judge accepted that the defendant was committed to reviewing the sales target on a going-forward basis to ensure the target was not "skewed".¹⁶¹ Given that the plaintiff was a valuable sales representative, the defendant had reason to review the target to ensure she remained with the company.¹⁶²

It may be that the issues of sales territories and remuneration are linked such that where the change in sales territory has a clear impact on remuneration, it will amount to a constructive dismissal. Nevertheless, the employer does retain a discretion in reassigning employees, and that discretion broadens to the extent that an employee's compensation is not tied to an employee's sales.

In a somewhat more unusual factual situation, *Khan v. Vernon Jubilee Hospital*, 2009 BCSC 1637, the British Columbia Supreme Court concluded the defendant's actions undermined the plaintiff's ability to run a surgical practice in a manner that was represented to him during recruitment regarding viability and profitability.¹⁶³ These actions interfered to the extent of altering the fundamental nature of his employment.¹⁶⁴

The 60 year old plaintiff was a physician and relocated to Vernon to practice thoracic surgery at a hospital.¹⁶⁵ Subsequently, the hospital was notified by the health authority that the thoracic surgery program would relocate to Kelowna in one year. The plaintiff submitted he was constructively dismissed prior to receiving formal notice that

¹⁵⁸ *Haglund*, para. 28.

¹⁵⁹ *Haglund*, para. 30.

¹⁶⁰ *Ibid.*

¹⁶¹ *Haglund*, paras. 28-29.

¹⁶² *Haglund*, para. 29.

¹⁶³ *Khan*, para 57

¹⁶⁴ *Khan*, para 57

¹⁶⁵ *Khan*, para 3

the thoracic surgery program was relocating based on the defendant's systematic patterns of interference with his practice.¹⁶⁶ The defendant referred patients away from the plaintiff in order to follow the health authority's centralization plan. Further, the defendant temporarily suspended the plaintiff's surgical privileges due to competency concerns.¹⁶⁷ However, after pressure from other doctors, the suspension was lifted and a full apology was issued. The plaintiff argued that the defendant's actions interfered and undermined his practice and resulted in significant reductions in salary.¹⁶⁸

The judge concluded the plaintiff was not an independent contractor but that the parties were in an employment-like relationship because of the indefinite nature and permanency of the position, the high degree of the plaintiff's economic reliance and the exclusivity of the relationship.¹⁶⁹ The judge characterized the defendant's conduct as interfering with the plaintiff's practice and subjecting him to an unfair suspension and review, which was said to breach the principles of fairness, good faith and natural justice.¹⁷⁰ On the issue of damages, it had been represented to the plaintiff that he would earn approximately \$225,000 per year.¹⁷¹ Every year of employment the plaintiff's earnings fell short, ranging from a 12%-42% shortfall each year.¹⁷² Damages were awarded in taking into account these shortfalls.¹⁷³

A related issue is the extent to which an employee is required to travel for the purposes of his or her job. In *Antworth v. Fabricville Maritimes Inc.*, 2009 NBQB 54, the 50 year old plaintiff worked for the defendant for 21 years and supervised a number of stores in the Atlantic region.¹⁷⁴ The position required her to travel and visit each store once per month, totalling five days. The defendant increased the number of stores the plaintiff was responsible for, increasing her travel time to approximately nine days per

¹⁶⁶ *Khan*, para 6

¹⁶⁷ *Khan*, para 6

¹⁶⁸ *Khan*, para 6

¹⁶⁹ *Khan*, para 67

¹⁷⁰ *Khan*, para 69

¹⁷¹ *Khan*, para 76

¹⁷² *Ibid.*

¹⁷³ *Khan*, para 79

¹⁷⁴ *Antworth*, para 3

month. The defendant then made a change requiring the plaintiff to visit each store twice per month. This resulted in her travelling “22 out of 20 working days” and only allowed her to be at home just six days out of six weeks.¹⁷⁵

The plaintiff expressed her concerns regarding the increased travel time to her supervisors and was met with the response that it was a realistic work schedule.¹⁷⁶ The plaintiff advised her supervisors that the response did not address her concerns but the supervisors wrote that they considered the issue to be closed.¹⁷⁷

The judge found that the doubling of the plaintiff’s travel requirement constituted constructive dismissal.¹⁷⁸ The plaintiff tried to make her supervisors aware of the effect of such changes, but they would not discuss or accommodate them. The plaintiff was awarded 22 months’ notice.¹⁷⁹ The plaintiff was not obligated to accept the offer of an alternative position made by the defendant, as the judge concluded her pay would have been reduced in that new position (by approximately 50%), and the plaintiff would have lost status and prestige.¹⁸⁰ Further, the testimony indicated that the supervisors had considerable animosity toward the plaintiff.¹⁸¹

The above cases demonstrate the cautious approach employers must take when making changes to an employee’s working conditions. It appears that where the alterations will impact the employee’s earnings, a constructive dismissal is more likely to arise. However, when one examines the reasoning in these cases closely, the fundamental challenge of predicting when a change will amount to constructive dismissal becomes evident.

¹⁷⁵ *Antworth*, para. 10

¹⁷⁶ *Antworth*, paras 10 & 11

¹⁷⁷ *Antworth*, para 11

¹⁷⁸ *Antworth*, para 37

¹⁷⁹ *Antworth*, para 39

¹⁸⁰ *Antworth*, para 43

¹⁸¹ *Antworth*, para 43

4. Changes to Employment During Secondment

Another offshoot of the issue of changes to working conditions is when an employee departs for an employment-related purpose and the nature of their employment changes upon their return. In *Brannan v. Exxon Mobile Corp.*, 2009 NSCA 53, the plaintiff worked for the defendant for 20 years.¹⁸² He was seconded to an offshore energy company as president and general manger. The secondment resulted in a pay raise.

Before this appointment, he was an operations manager and it was anticipated that he would return to this position following the secondment. Over time, the plaintiff became concerned that his role during the secondment was being diminished as a representative of the defendant took a more active management role, requiring the plaintiff to report to the representative and discuss major decisions with him.¹⁸³

The plaintiff was advised his position changed to operations manager, which he perceived as less important given that many of his former responsibilities had been taken over.¹⁸⁴ The plaintiff asked to return to work with the defendant and sought an equivalent position (president and general manager).¹⁸⁵ The plaintiff was not immediately offered employment with the defendant and instantly issued his resignation. He commenced new employment four days later.

The trial judge dismissed the constructive dismissal claim.¹⁸⁶ While he found the changes to the plaintiff's authority during his secondment amounted to a constructive dismissal, these changes did not occur to his permanent position with the defendant.¹⁸⁷ Thus, the plaintiff was not constructively dismissed from this position, as there was no evidence indicating this position had changed. The judge rejected the plaintiff's

¹⁸² *Brannan*, para 2

¹⁸³ *Brannan*, para 9

¹⁸⁴ *Ibid.*

¹⁸⁵ *Brannan*, para 11

¹⁸⁶ *Brannan*, para 15

¹⁸⁷ *Brannan*, para 21

argument that he was entitled to an equivalent position of the secondment position with the defendant.¹⁸⁸ There was no express or implied agreement to that effect and he was not entitled to a post-secondment position higher than his pre-secondment position.¹⁸⁹

The Court of Appeal upheld this finding on slightly different grounds. The breach of secondment agreement (by diminishing the plaintiff's authority) did not fundamentally breach the underlying employment contract with the defendant.¹⁹⁰ That breach simply "repatriated" the plaintiff to the defendant.¹⁹¹ The Court of Appeal did conclude however that the judge erred by concluding the plaintiff was only entitled to his pre-secondment position upon his return.¹⁹² The judge should have incorporated the defendant's career planning process into the plaintiff's employment contract.¹⁹³ Since his secondment, the plaintiff was rated at a level 31, thus the Court of Appeal held that upon his termination he was entitled to a level 31 position.¹⁹⁴ While this would not entitle the plaintiff to an equivalent position as the one held during his secondment, it would entitle him to a more advanced position than his prior, permanent position. This advancement represented a natural progression pursuant to the defendant's planning process.

Despite the plaintiff's entitlement to a level 31 position, the Court of Appeal found the plaintiff's demand for an equivalent position within four weeks of leaving the secondment was not reasonable.¹⁹⁵ There was no evidence indicating that the defendant was planning to place the plaintiff in a position below a level 31. In fact, the evidence indicated the defendant expected his career would continue to track upwards.¹⁹⁶ The failure to find a suitable position within the plaintiff's four-week window did not establish a fundamental breach of the contract since such positions were not

¹⁸⁸ *Brannan*, para 22

¹⁸⁹ *Brannan*, para 23

¹⁹⁰ *Brannan*, para 49

¹⁹¹ *Ibid.*

¹⁹² *Brannan*, para 61

¹⁹³ *Ibid.*

¹⁹⁴ *Brannan*, para 62

¹⁹⁵ *Brannan*, para 71

¹⁹⁶ *Brannan*, para 70

easily available and it would take some time to locate another, mutually agreeable position.¹⁹⁷

C. Physical and Psychological Issues

The above addresses situations in which an employer alters specific terms of an employment agreement; however, a constructive dismissal may also occur when the general duty of good faith owed by an employer to an employee is breached as a result of such occurrences as physical, sexual or psychological harassment or abuse.

Given the nature of the allegations, these cases generally turn on findings of fact. It is clear once an employee has established physical abuse or sexual harassment in the workplace, a repudiation of the employment contract has occurred. In *Pawlett v. Dominino Protection Services Ltd.*, 2009 ABCA 369, and *Piresferreira v. Ayotte* (2008), 72 C.C.E.L. (3d) 23 (Ont. S.C.J.) var'g on other grounds by 2010 ONCA 384, the employees' claims were quite similar:

- (1) both employees were found to have been physically assaulted by their supervisors;
- (2) the employees eventually went on leave due to the trauma of the incidents;
- (3) the defendants took no proactive action to ensure the safety of the workplace for employees; and
- (4) both employees suffered psychological and emotional effects as a result.

In *Pawlett*, the issues involved sexual contact and touching by her supervisor. The plaintiff was informed by the defendant that she would receive her unpaid salary (as a result of her leave), if she dropped her claims. The judge accepted the allegations of the plaintiff and found she had not been treated with the "civility, decency, respect and dignity to which she was entitled".¹⁹⁸ Given the psychological effects, an additional

¹⁹⁷ *Brannan*, para 71

¹⁹⁸ *Pawlett*, para. 10

three months' notice for *Wallace* damages were ordered. This finding was upheld on appeal.¹⁹⁹

In *Piresferreira*, the employee continued to be supervised by the supervisor, who received a minor discipline for the incident. Following the assault, the supervisor put in place an onerous performance improvement plan for the plaintiff requiring regular meetings with the supervisor. The supervisor also repeatedly yelled at the plaintiff, often in front of other employees. The defendant took no action to inquire into the safety of the plaintiff or the workplace generally.

The judge found that the plaintiff was no longer able to continue working for the defendant due to its failure to treat the plaintiff with "civility, decency, respect and dignity".²⁰⁰ Further, it failed to perform its undertaking to have all employees follow its human resource policy regarding harassment and workplace violence. The plaintiff was awarded a 12-month notice period as well as \$45,000 in *Wallace* damages.²⁰¹

More difficult questions are raised in cases involving claims of a psychological or emotional dimension, due to the evidentiary challenges raised by such claims, as well as the subjective nature of such issues. Courts must balance an employee's right to dignity and respect in the workplace while taking into account different managerial styles or potential for misunderstandings or misinterpretations of employer comments or actions.

In *Colwell v. Cornerstone Properties Inc.*, 2009 CanLII 66139 (Ont. S.C.J.), the plaintiff worked for the defendant for seven years and eventually discovered that a secret camera had been installed in the ceiling of her office.²⁰² She later learned it had been placed there personally by her immediate supervisor. She continued working for ten months and then sought medical assistance for stress and also met with her

¹⁹⁹ *Pawlett*, para 30

²⁰⁰ *Piresferreira*, para 219

²⁰¹ *Piresferreira*, para 256

²⁰² *Colwell*, paras 1 & 4

supervisor to discuss the camera. The supervisor justified the installation of the camera due to alleged thefts by maintenance staff. The plaintiff did not accept this explanation and emailed her supervisor offering to work an additional ten days to train a replacement employee in exchange for a letter of recommendation and a severance package. This proposal was rejected.²⁰³

The judge agreed that the plaintiff was constructively dismissed.²⁰⁴ The judge found there was an implied term in her contract requiring each party to treat the other in good faith and fairly.²⁰⁵ The plaintiff's privacy had been violated and all trust associated with the employment relationship had been "evaporated".²⁰⁶ As such, the plaintiff was "justified in leaving this poisoned atmosphere...". Given the circumstances surrounding her dismissal, the judge found that the plaintiff did not fail to mitigate her damages by not returning to employment with the defendant.²⁰⁷ The judge awarded seven months' salary but declined to award aggravated and punitive damages.²⁰⁸

A situation that presented a more difficult issue occurred in *Cooke v. HTS Engineering Ltd.* 2009 CarswellOnt 8326 (S.C.J.). The 42 year old plaintiff worked as a sales assistant for the defendant for less than two years. There were a few incidents with her two supervisors whereby the plaintiff's performance on particular matter was called into question, resulting in the plaintiff crying or being visibly upset.²⁰⁹ Ultimately, one day the supervisors stated that her job performance would need to improve. The plaintiff replied that she did not think that she was the "right person for the job". The discussion ended prematurely as the supervisors had a client meeting; the meeting never resumed as the plaintiff did not return from lunch and went on sick leave.²¹⁰

²⁰³ *Colwell*, para 11

²⁰⁴ *Colwell*, para 37

²⁰⁵ *Colwell*, para 36

²⁰⁶ *Colwell*, para 35

²⁰⁷ *Colwell*, para 42

²⁰⁸ *Colwell*, paras 43 & 48

²⁰⁹ *Cooke*, para 18

²¹⁰ *Cooke*, para 21

A week later the plaintiff went to the office and informed the supervisors that she would be off work for another two weeks. The supervisors had previously hired a temporary assistant as they did not know the plaintiff's expected return date. They had cleared her desk of her belongings, which the plaintiff collected.²¹¹

The plaintiff subsequently wrote the defendant and alleged that she suffered mental abuse, bullying and verbal sexual abuse by one of the supervisors, resulting in constructive dismissal.²¹² In respect of sexual harassment, she stated that she unwillingly engaged in sexual banter with one supervisor because she felt it was necessary to meet his expectations. She did not initiate any of the conversations. In respect of mental abuse and bullying, she stated that when she did not perform tasks as requested she would be called different demeaning names, including "idiot" and "pathetic".²¹³

The defendant argued that the plaintiff initiated, or consented, to the conduct. Further, if she was being harassed, she had a duty to report it to the defendant, which she failed to do.

The judge concluded the sexual conversations were welcomed and did not constitute sexual harassment.²¹⁴ However, the judge accepted that there was bullying and psychological harassment in the workplace.²¹⁵ A reasonable person would not be expected to persevere in a situation analogous to the plaintiff's.²¹⁶ The supervisor repeatedly made comments which demeaned the plaintiff. The plaintiff's failure to report the harassment (due to her fear of losing her job and embarrassment) did not bar her claim.²¹⁷ The defendant's policy manual did not require the plaintiff to report

²¹¹ *Cooke*, para 22

²¹² *Cooke*, para 23

²¹³ *Cooke*, para 26

²¹⁴ *Cooke*, para 47

²¹⁵ *Cooke*, para 50

²¹⁶ *Cooke*, para. 52

²¹⁷ *Cooke*, para. 63

unwelcomed conduct.²¹⁸ The judge noted that victims of abuse are often reticent to report abuse.

The plaintiff was awarded two months' salary less amounts earned from new employment.²¹⁹ Further, the judge awarded \$3500 for aggravated damages as the plaintiff suffered mental distress beyond what could be considered normal distress and hurt feelings arising upon dismissal.²²⁰

Verbal abuse also occurred in the recent case, *Qubti v. Reprodex Ltd.*, 2010 ONSC 837, where the 50 year old plaintiff, who immigrated from Palestine as a child and began working as a driver, was subjected to racist, homophobic and demeaning "taunts" by co-workers and supervisors. The abuse caused stress and anxiety, ultimately requiring medical treatment. He claimed the abuse started as soon as he commenced his employment.²²¹ He eventually resigned and later sued for constructive dismissal and intentional infliction of mental suffering.

The judge accepted that co-workers and superiors subjected the plaintiff to various forms of verbal abuse that was directed at the plaintiff by:

- (1) swearing (or using slang in an angry tone);
- (2) making homophobic comments;
- (3) referring to the plaintiff as "Reli" or "Retarded Eli"; and
- (4) making derogatory comments about his ethnic background.

The judge found he was constructively dismissed due to the verbal abuse that he suffered while working for the defendant.²²² This finding was made despite the judge questioning the frequency with which he objected to the abusive comments to the individuals, or his superiors, making the comments. The judge concluded he did not

²¹⁸ *Cooke*, para. 62

²¹⁹ *Cooke*, para 66

²²⁰ *Cooke*, para 70

²²¹ *Qubti*, para 1

²²² *Qubti*, para 79

condone the defendant's actions as medical evidence demonstrated that he was, in effect, not capable of leaving.²²³ He had suffered post-traumatic stress disorder as a result of the continual abuse. The frequency of the abuse made it more difficult for him to leave.

The plaintiff was awarded four months' notice but was not awarded any aggravated or punitive damages as the judge found the defendant's conduct was not so malicious or outrageous to deserve punishment on its own.²²⁴

It should be noted that, such constructive dismissal claims act as a potential alternative to human rights claims where the abuse is related to an enumerated ground under the *Human Rights Code*, R.S.B.C. 1996, c. 210. It will be interesting to learn which forum becomes preferred, as there are few areas in the common law in which human rights claims overlap to such a degree as instances of abuse by employers that can amount to constructive dismissal.

D. Retirement

Retirement issues continue to present challenges in the constructive dismissal context, and the elimination of mandatory retirement at age 65 may increase the incidents of such issues being brought before the Courts.²²⁵ While the cases examined below did not involve any challenges based on this legislation and involved retirement plans instituted prior to the legislative change, they raise different issues centering around if and when employees must retire.

In *Johnson v. Global Television Network Inc.*, 2008 BCCA 33, the plaintiff worked for nearly 40 years, ultimately as on-air operations manager.²²⁶ He supervised 11 or 12 staff and had a large budget. The plaintiff's position was eliminated after the defendant

²²³ *Ibid.*

²²⁴ *Qubti*, para 104

²²⁵ *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007*, S.B.C. 2007, c. 21

²²⁶ *Johnson*, para 3

transferred its operations to a sister network.²²⁷ The defendant offered to keep the plaintiff on the payroll until his retirement, approximately eight months later when he turned 65.²²⁸ Alternatively, the plaintiff could keep working on a variety of different projects, which were menial compared to his former position and, according to the plaintiff, jobs that were union responsibilities and tasks that he was not capable of performing.

The plaintiff rejected both options and argued the re-assignment amounted to a constructive dismissal because it involved a fundamental change to the terms and conditions of his employment contract.²²⁹ The defendant argued the plaintiff resigned or was required to retire approximately eight months after the elimination of his position due to the defendant's retirement policy.

The trial judge found there was no express or implied term in the contract which mandated the plaintiff to retire at age 65.²³⁰ The trial judge concluded the plaintiff was constructively dismissed as the offer to re-assign the plaintiff from management duties to "hands-on union work" constituted a fundamental change.²³¹ The plaintiff was awarded damages representing 24 months of salary and bonuses.²³²

The Court of Appeal reversed the finding that mandatory retirement at age 65 was a not term of the employment contract.²³³ The Court held that by joining the Staff Retirement Plan and receiving consideration (in the form of employer contributions), it became a term of his contract that he would retire at 65.²³⁴ While there was no issue with the trial judge's conclusion regarding constructive dismissal, damages were

²²⁷ *Johnson*, para 13

²²⁸ *Ibid.*

²²⁹ *Johnson*, para 17

²³⁰ *Johnson*, para 18

²³¹ *Johnson*, para 19

²³² *Ibid.*

²³³ *Johnson*, para 34

²³⁴ *Ibid.*

reduced to eight months' salary (the period of time between the termination and the plaintiff's mandatory retirement).²³⁵

Given the plaintiff's age and circumstances in the TV industry, the judge was satisfied with his mitigation efforts, which involved real estate projects. The relationship between the parties was sufficiently frayed that it was not reasonable for the plaintiff to continue working for the defendant.

The Alberta Court of Appeal reached a different result in the face of an unwritten retirement policy in *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345. There, the 65 year old plaintiff worked for the defendant for 38 years, ultimately as a customer support advisor.²³⁶ The defendant had an unwritten retirement policy requiring employees to retire at 65 (or shortly thereafter).²³⁷ The plaintiff discussed retirement with the president and was told he could continue working until "year end", which he thought meant the end of the defendant's fiscal year.²³⁸ The plaintiff was subsequently advised that his retirement was effective at the end of the calendar year and that a replacement was being sought. The plaintiff stated that while he would respect the mandatory retirement policy, he disagreed with it and was only leaving as a result of it. The defendant acknowledged the plaintiff's contribution at the staff Christmas party and presented him with a gift.

The plaintiff's lawyer wrote the defendant outlining that the plaintiff did not want to retire and the defendant could not force him to retire. A "significant" wrongful dismissal claim existed against the defendant. The defendant advised the plaintiff that it would make an exception to its retirement policy and stated the plaintiff could continue working, but noted it was "shocked" that he would allow the hiring of a replacement employee and accept a retirement gift from the defendant.

²³⁵ *Johnson*, para 51

²³⁶ *Magnan*, para 3

²³⁷ *Magnan*, para 4

²³⁸ *Magnan*, para 6

The plaintiff attended the defendant's office the day after the letter and returned some property that he used as an employee and told staff he was leaving. He did not report for work the next day and commenced his claim one month later.

The trial judge concluded he was constructively dismissed on the basis that it was the plaintiff's intention to retire at the fiscal year-end.²³⁹ Damages were awarded equal to three months' wages and benefits.²⁴⁰ It was unreasonable for the plaintiff to return to work for the defendant.

The Court of Appeal agreed that there was a constructive dismissal. However, the Court of Appeal disagreed with the damages award and found there was no pleading referencing the plaintiff's intended retirement date and set aside this finding.²⁴¹ The plaintiff was awarded an 18-month notice period, which increased the award by seven months after taking into account set-off.²⁴²

The issue of retirement outside of a mandatory retirement policy was considered in *Fisher v. Lakeland Mills Ltd.*, 2008 BCCA 42, where the plaintiff started employment with the defendant when she was 48 years old. At age 65, the plaintiff continued to work for the defendant in the accounting department and was assured by the president that she could stay as long as she wanted.²⁴³ After an employee resigned, the plaintiff was required to undergo training to assist with shipping duties due to the reduction in staff. The plaintiff found the training difficult and outlined this to the office manager. During that conversation, the officer manager asked whether she had considered retirement and, if not, the company would have to hire another person to deal with the shipping duties. That employee would require additional work and would have to assume some of the plaintiff's duties.

²³⁹ *Magnan*, para 17

²⁴⁰ *Magnan*, para 18

²⁴¹ *Magnan*, para 24

²⁴² *Magnan*, para 34

²⁴³ *Fisher*, para 4

The plaintiff felt that she was given no choice but to retire.²⁴⁴ She spoke with the president again but he did not offer any assurances about her employment security.

The trial judge concluded that the plaintiff had been constructively dismissed.²⁴⁵ What began as an innocent suggestion regarding reorganization progressed to a state where a significant change occurred in the plaintiff's employment.²⁴⁶ The failure of the president to assure the plaintiff that she could continue in her job furthered this problem.

The Court of Appeal agreed with this finding and found the president's silence was an affirmation that the plaintiff had to assume these new job duties or leave.²⁴⁷ Those duties were a significant change in her employment that the defendant was not entitled to impose unilaterally. The Court of Appeal upheld the ten-month notice period.²⁴⁸

Practitioners can likely expect the issue of mandatory retirement and constructive dismissal to become more common in light of aging population, recent dips in investment values and the British Columbia *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007*, a major change which the courts likely have not yet felt to the full extent.

E. Miscellaneous Issues

1. Sale of Business: Vendor and Employee

In *West Care Pharmacy Ltd. v. SwiftRX Ltd.*, 2008 ABQB 473, the plaintiff company sold its assets to the defendant.²⁴⁹ The agreement provided that the principal of the plaintiff would be employed by the defendant for two years and would continue thereafter subject to a 30-day termination clause.²⁵⁰ During the two-year period, the

²⁴⁴ *Fisher*, para 10

²⁴⁵ *Fisher*, para 14

²⁴⁶ *Fisher*, para 13

²⁴⁷ *Fisher*, para 17

²⁴⁸ *Fisher*, para 25

²⁴⁹ *West Care*, para 1

²⁵⁰ *West Care*, para 13

principal approached the defendant to inquire whether the employment arrangement would continue or an exit strategy should be organized. No agreement was reached at the meeting. The day after this meeting, all of the information on the principal's computer was erased and she subsequently received a letter asking her to vacate the premises. The principal phoned the president of the defendant company and agreed to vacate the premises on the assumption that they would talk the following week. The president never called her again.

The judge accepted that the principal's employment was unilaterally terminated and found that she was constructively dismissed.²⁵¹ While the parties may have agreed to discuss the terms of the principal's termination in the future, no terms were formally agreed upon. Since the president did not contact the principal after agreeing to do so and the principal abided by his request to vacate the premises, the principal was entitled to assume the terms of her employment were substantially altered and that she was terminated. The principal was awarded the balance owing under the two-year contract.

In *Alberta Permit Pro v. Booth*, 2009 ABCA 146, the plaintiff was the founder Alberta Permit Pro ("APP") and eventually sold it to another company.²⁵² Booth formed another company which contracted with APP to provide consulting services for three years subject to a termination provision, which required APP to provide a termination payment to Booth. Booth's job title remained "President" of APP. A dispute arose between Booth and the principal of the purchasing company over debt liabilities. Via email, APP informed Booth that since he did not accept its offer regarding an amendment to the purchase agreement, it was in APP's best interest if he worked out of his home office. Further, APP would immediately change the locks on his office door and change his job title from president to consultant.

At trial, Booth was awarded damages for breach of contract and failure to make the termination payment. The judge found Booth was an employee of APP rather than

²⁵¹ *West Care*, para 42

²⁵² *Alberta Permit*, para 3

an independent contractor.²⁵³ The judge concluded the email and subsequent actions of APP constituted constructive dismissal, within the meaning of the purchase agreement which obligated APP to make the termination payment.²⁵⁴ This finding was based on the cumulative effect of the changes: it was impossible for Booth to carry out his job duties at home, Booth's job title was changed and the overall manner in which APP treated Booth. For example, APP had previously terminated the agreement for a short period of time due to a disagreement with Booth, but later rescinded this decision. All of these changes supported the conclusion that Booth was constructively dismissed.

On appeal, APP argued the judge erred in focusing her analysis on an employer-employee relationship, rather than a vendor-purchaser relationship and failed to apply the correct test for fundamental breach.²⁵⁵ The Court of Appeal found that the trial judge did not err in concluding the parties were in an employment relationship.²⁵⁶ In respect of the dismissal, APP argued that the term of the agreement required an intentional election to terminate the consulting agreement and thus the email was insufficient. The Court of Appeal agreed with the trial judge that in examining the context surrounding the email, which effectively prevented Booth from completing his consulting tasks, there was a constructive dismissal.²⁵⁷ Viewed objectively, the email could be construed as a notice of termination.

The above cases present a cautionary tale to purchasers. Those acquiring businesses would be well advised to consider the manner in which former principals or owners will be dealt with when negotiating the purchase of the business, as the foregoing demonstrates that such former principals could be seen to be employees of the entity being purchased.

²⁵³ *Alberta Permit*, para 2

²⁵⁴ *Alberta Permit*, para 33

²⁵⁵ *Alberta Permit*, para 41

²⁵⁶ *Alberta Permit*, para 42

²⁵⁷ *Alberta Permit*, para 51

2. Communication: Misunderstandings on the Part of Employees

Constructive dismissal claims may also arise in light of misunderstandings between the employer and employee based on statements or conduct by either or both parties. Employers, employees and practitioners alike would be well-served to ensure that as many avenues of communication as possible have been exhausted prior to embarking on litigation to foreclose the possibility of such misunderstandings having occurred.

In *Gillette v. Ian Sisett Corporation*, 2008 BCSC 1116, the plaintiff was a legal assistant with the defendant for approximately 31 years. The plaintiff was involved in a car accident and suffered certain injuries to her neck, back and shoulders.²⁵⁸ Upon returning to work she continued to be in pain and was on medication. She told her employer that she could only work for three hours per day due to her pain. She testified that he told her that she was of no use to him or the firm and that she should collect employment insurance. Another employee asked for her key shortly after this discussion which confirmed to the plaintiff that she had been terminated. Later, an associate from the defendant's office offered to give her a cheque for \$1500, which the plaintiff refused.

The employer testified that the plaintiff did not look well during this time and he was concerned about her tolerance for the medication she was taking. Given the concerns for her health, it was not useful for her or the firm for her to continue working until she healed. The employer explained this in a letter to the plaintiff and that the \$1500 was a monthly advance to supplement her employment insurance, as a subrogated loan, until the ICBC claim was resolved.

The judge rejected the plaintiff's claim and accepted the employer's conclusion regarding her ability to work, which was also shared by her physicians.²⁵⁹ There could be no constructive dismissal or breach of accommodation when the plaintiff's proposal

²⁵⁸ *Gillette*, para 3

²⁵⁹ *Gillette*, para 29

to continue working was contrary to medical advice.²⁶⁰ The employer's comments only outlined his position regarding the plaintiff's health and that she had returned to work prematurely.²⁶¹ An objective assessment of the facts at that time did not support the plaintiff's argument that the employer's comments constituted constructive dismissal.

An employee misunderstanding of a different nature occurred in *Iliescu v. Voicegenie Technologies Inc.* (2009), 71 C.C.E.L. (3d) 123 (Ont. S.C.J.), aff'd by 2010 ONCA 104. The 45 year old plaintiff worked for the defendant for 15 months as a software manager. After completing his probationary period, where he received exceptional reviews, he received stock options and a promotion as provided in the contract. Afterwards, the plaintiff received an email from his supervisor noting that he and a client had not gotten off to a good start. The plaintiff concluded he was constructively dismissed and only appeared in the office one further time.

The defendant's president sent the plaintiff an email stating he was the "best qa person we ever had" and outlined the importance of the plaintiff's contributions.²⁶² The president to encouraged the plaintiff to work with his supervisor. The plaintiff replied outlining a series of issues that he wanted addressed and stated that he would not work on the client's project until they were addressed.

The plaintiff rejected a proposed performance improvement plan and outlined his criteria for returning. He informed the defendant that his employment would end on a specific date but that the client's project could be completed on time, but "on [his] terms only". The defendant responded that the plan was not negotiable and sought clarification whether he was resigning. If not, he was to show up for work the next day. The plaintiff did not return to work.

The defendant argued the plaintiff abandoned his position. The plaintiff argued he was constructively dismissed based on the imposition of the performance

²⁶⁰ *Ibid.*

²⁶¹ *Gillette*, para 33

²⁶² *Iliescu*, para. 9

improvement plan, the removal of his security card and computer access and failure to grant further stock options.

The judge found the performance plan to be balanced, fair and well-formulated.²⁶³ The plaintiff misunderstood the defendant's rights and intentions and believed he was entitled to negotiate the performance plan's terms. The plaintiff did not appreciate or accept that the defendant was attempting to salvage a productive working relationship that had recently encountered some problems.

The judge agreed with the defendant and found there was no fundamental or substantial change to the employment contract.²⁶⁴ The plaintiff resigned by not showing up for work as requested by the defendant. The defendant did not evince any intention to end the relationship, but rather attempted to have the plaintiff return on a number of occasions. The judge concluded that the relationship failed because the plaintiff was "unable to appreciate his proper role and his obligation to his employer."²⁶⁵

Employment litigation is by its nature emotionally charged, but the above highlights the extent to which it is important to approach matters with as much objectivity as possible in the circumstances to avoid misunderstandings.

3. Advertising Employee's Position without Notice

In a case with a degree of interest value (though not necessarily a decision that will be often utilized as a precedent given the rarity of the circumstances), the Ontario Superior Court confirmed posting a job vacancy for a position not vacated will amount to constructive dismissal for the individual currently holding the position. In *Patterson v. Lee Munro Chevrolet Ltd.* (2009), 73 C.C.E.L. (3d) 245 (Ont. S.C.J.), the defendant advertised in a local paper that it was seeking candidates for the plaintiff's position. The plaintiff had worked as the service manager for the defendant for 11 years and was off

²⁶³ *Iliescu*, para 31

²⁶⁴ *Iliescu*, para 39

²⁶⁵ *Iliescu*, para. 41

work sick for a few days. The plaintiff's spouse informed the defendant of this and provided the defendant with a doctor's note. While on sick leave, the plaintiff saw the advertisement in the paper. The plaintiff never resigned nor did the defendant provide written or oral notice of termination to the plaintiff.

The court accepted that the plaintiff was genuinely ill, despite arguments made by the defendant that he had a pre-planned scheme to make a wrongful dismissal claim since his wife was on a long-term disability pension.²⁶⁶ The court found that placing an advertisement without providing any explanation or even informing the plaintiff that it would be published, rendered the continuation of the plaintiff's employment untenable.²⁶⁷ Accordingly, the plaintiff was constructively dismissed and awarded salary and commission benefits for eleven and a half months.²⁶⁸

F. Mitigation & Condonation

Given the employee's duty to mitigate damages, a finding of constructive dismissal may nevertheless result in no damages being awarded if an employee fails to properly mitigate their damages. A failure to mitigate may arise due to an employee failing to diligently pursue other options or, in an area particularly relevant to constructive dismissal, where the alternate employment offered by the employer is a reasonable substitute.

The leading decision regarding an employee's duty to mitigate by accepting re-employment from the dismissing employer is that of the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20. In that case, Bastarache J. (writing for the majority of the Court) stated the general principle that it is "appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on

²⁶⁶ *Patterson*, para 11

²⁶⁷ *Patterson*, para 16

²⁶⁸ *Ibid.*

an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer."²⁶⁹

Evans cited the following considerations as relevant to determine whether a reasonable person would accept the opportunity to return to work with their employer:

- (1) "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious",²⁷⁰
- (2) the history and nature of the employment;
- (3) whether or not the employee has commenced litigation; and
- (4) whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left.²⁷¹

Overall, the analysis was considered to be multi-factoral and contextual, though it was also accepted that no employee would be obliged to mitigate their damages in an atmosphere of hostility, embarrassment or humiliation.²⁷² Justice Bastarache expressly noted that the relevant factors increase the likelihood that individuals dismissed as a result of a change to their position due to legitimate business needs will be required to mitigate by returning to the same employer more often than employees dismissed for some other reason.²⁷³ As discussed above, and elaborated upon below, recent jurisprudence demonstrates the degree to which employers are permitted some latitude – and arguably an increasing amount – insofar as altering job duties in the face of economic necessity.

In both *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316, and *Loehle v. Purolator Courier Ltd.*, 2009 CarswellOnt 3636 (S.C.J.), the Courts concluded the employees had failed to mitigate by not accepting employment with their (former)

²⁶⁹ *Evans*, para. 29

²⁷⁰ *Evans*, para. 30 citing *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710

²⁷¹ *Evans*, para. 30

²⁷² *Ibid.*

²⁷³ *Evans*, para. 31

employers. The key finding in both cases rested on the fact that the working relationships and environments were not poisoned or damaged in any substantive way. These cases indicate that decisions resulting in constructive dismissals solely due to business or economic factors will not likely result in a loss of dignity to employees, assuming the working environment continues to be cordial and respectful. As a result, the reasonableness of rejecting alternative employment with an employer in such circumstances appears to be a consideration that will be examined more stringently.

In *Besse*, the plaintiff was a full-time receptionist at the defendant's dental clinic. The defendant had recently purchased the clinic and his billings were below that of his predecessor. In total, the plaintiff had worked for the two dentists for 18 years. The plaintiff went off on medical leave and later phoned the defendant to inform him she could return on a particular date. The defendant informed her that business was slow and she was not needed for approximately four months. Shortly thereafter, the plaintiff received an email from the defendant proposing that the plaintiff and the other part-time receptionist split shifts. The plaintiff met with the defendant and argued that the schedule of the other receptionist should be altered because the plaintiff had more seniority. The defendant commented to the plaintiff that due to her age he would have to replace her in a few years, which upset her.

The defendant sent the plaintiff a written notice laying her off for 12 weeks and six days (one day short of the deemed termination provision in the *Employment Standards Act*), following which she could return to work. The defendant's decision to lay off the plaintiff followed a discussion with a representative of the Employment Standards Branch.

The plaintiff claimed damages from the defendant. The defendant responded by inviting the plaintiff to return to work immediately and that she could collect all past wages she would have earned.

The logo for Blakes, featuring the name "Blakes" in a stylized, cursive script font.

The plaintiff refused the defendant's offer and after looking for employment in Hope and Chilliwack, moved to Gibsons, B.C. to be with her husband.

The judge concluded the temporary lay-off amounted to a constructive dismissal, since such a right was not specified in the employment contract.²⁷⁴ The fact that the defendant honestly relied upon information provided by the representative from the Employment Standards Branch, which did not take into account all relevant factors regarding lay-offs, was irrelevant to determining whether he repudiated the employment contract. The lay-off breached an essential term of the contract – the continued attendance of an employee at the place of work for pay.²⁷⁵ Even accepting the defendant's breach was based on a misunderstanding of the law, the defendant's action was motivated to reduce expenses and could not be considered unintentional.

The judge went on to conclude that the plaintiff failed to mitigate her damages by not accepting the defendant's offer to return to work.²⁷⁶ The work environment was not poisoned in any way. The judge found the defendant's decision was motivated solely by financial considerations and was made after trying to split shifts between the two receptionists, and the defendant's communications were courteous and respectful throughout. The judge also found the plaintiff failed to reasonably pursue alternative and available employment in the surrounding areas.

In *Loehle*, the 47 year old plaintiff was the national claims manager for the defendant. After the relocation of the claims office out of province, the plaintiff eventually was offered a different management position. The offer of employment included a congratulatory note on his "promotion". Informally, the plaintiff was told it was a three-year assignment. At the end of the three years, another employee was hired for his position. The plaintiff applied for a number of management positions but was unsuccessful. He was encouraged to apply for the position he previously held, but

²⁷⁴ *Besse*, paras 80 & 81

²⁷⁵ *Besse*, para 80

²⁷⁶ *Besse*, para 93

he refused as he was not prepared to accept a demotion. Ultimately, the plaintiff was offered his previous position but with his current salary, which he declined. He did not report to work afterwards.

The judge accepted that a return to the plaintiff's previous position was a demotion.²⁷⁷ While the plaintiff's promotion was for a three-year term for a specific position, the employment contract was open-ended. The failure to place the plaintiff in an equivalent position was simply a failure of management to adequately plan for the end of the plaintiff's work term. The employment contract did not include a term requiring a return to a lower position. The judge agreed that the plaintiff was constructively dismissed.²⁷⁸

However, the plaintiff's claim was dismissed for his failure to mitigate by accepting the demotion.²⁷⁹ The judge found that the plaintiff was well respected within the company and the working relationships with management personnel were not acrimonious.²⁸⁰ Further, the work would not have been demeaning. While the defendant acted inappropriately in offering the plaintiff employment in a lesser position, they did not create an unworkable environment and simply attempted to retain a valued employee. An objective assessment of the situation rendered the plaintiff's decision unreasonable.

A different situation occurred in *Lesage v. Canadian Forest Products*, 2009 BCSC 1427, where the plaintiff accepted the employer's alternative employment on the assumption that he could try it out prior to deciding whether to accept a severance package. The court however found the plaintiff accepted by the demotion by failing to expressly make his acceptance of the demotion conditional.

²⁷⁷ *Loehle*, para 47

²⁷⁸ *Loehle*, para 51

²⁷⁹ *Loehle*, para 67

²⁸⁰ *Loehle*, para 65

Initially, the plaintiff accepted employment with the defendant as a regional controller. Shortly after starting his employment, the plaintiff's position was eliminated due to economic conditions. The defendant discussed severance options and indicated that he could try a lower level position as a divisional controller. His salary would remain the same. The plaintiff alleged that he was told he could try the new position and still obtain severance if he did not like the new position.

The plaintiff initially worked in the divisional controller position but left one month later after accepting a job in Alberta. He brought a suit for constructive dismissal on the basis that the divisional controller job was a demotion. The defendant argued the demotion was not a constructive dismissal since the plaintiff's salary was identical and he had similar job duties. However, even if the demotion was a constructive dismissal, the plaintiff had accepted the variation by accepting the position.

The judge found the demotion was a fundamental breach of the contract, despite the freeze in the plaintiff's salary.²⁸¹ The judge found the plaintiff's original position was a more senior position as he was controller for three mills.²⁸² His subsequent position only involved one mill and he had to report to the mill manager. While acknowledging that not every demotion constitutes a fundamental breach, the judge concluded that the severance offer indicated that the demotion was a fundamental breach.

Nevertheless, the judge concluded the plaintiff accepted the new terms and conditions of his employment.²⁸³ An employee has a reasonable time to decide whether to accept an employer's unilateral change before such conduct will amount to acceptance of the new position. The judge accepted that the defendant either offered the plaintiff severance or the opportunity to take the new position, but not both. There was no evidence indicating the plaintiff's acceptance of the demotion was conditional –

²⁸¹ *Lesage*, para 108

²⁸² *Lesage*, para 106

²⁸³ *Lesage*, para 145

the plaintiff may have implicitly rejected the new terms, but did not expressly outline this to the defendant.

Similar results were reached in *Paso Services Ltd. v. Ratz*, 2008 SKQB 356, and *Boyer v. Badger Daylighting Inc.*, 2009 SKQB 210. In *Paso*, the plaintiff claimed he was constructively dismissed when the terms of his compensation were modified. However, the plaintiff remained in his position for a further 10 months prior to complaining about the change. In *Boyer*, the plaintiff worked for seven months after a change in his compensation prior to resigning and working for a competitor. In both cases, the courts found the plaintiffs could not treat the changes as a repudiation of the employment contract after condoning them for such long periods of time. In *Boyer*, the judge stated that given the length of time prior to complaining, the plaintiff was “estopped from claiming he was constructively dismissed”.²⁸⁴ Practitioners must remember to ensure those contacting them in regards to potential constructive dismissal issues act swiftly to avoid such adverse findings.

II. Conclusion

Given the multiple factual permutations that can arise when employment terms are changed, it is perhaps more appropriate to describe the area of constructive dismissal not as a sole pendulum but as numerous pendulums swinging within the broad confines of what is otherwise settled law. The nature of constructive dismissal is so fact-specific that it likely that these pendulums will continue to swing based on such considerations as the availability of other employment and economic conditions generally.

Currently, it appears that the latitude of employers to make changes has broadened somewhat in the face of current economic situations, but that Courts continue to stand firm where an employer’s conduct exceeds what is reasonable – especially where such conduct breaches clear fundamental terms of an employment

²⁸⁴ *Boyer*, para. 23

arrangement such as significant reductions in remuneration, alteration or severance terms or a breach of the duty of good faith. The Court's continued emphasis on ensuring that the potential power imbalance between employer and employee not result in too much harm to the employee has also seen the Court draw a discernable line in the sand insofar as the duty to continue employment in a different position is concerned. While it can be a standard fraught with uncertainty where practical application is concerned, both employers and employees must be prepared to act reasonably when changing terms of employment.