

## Constructive Dismissal—Reduction of Vacation Time

The Supreme Court of Canada's decision in *Farber v. Royal Trust Co.* is the seminal decision in Canada on constructive dismissals. In establishing the concept of constructive dismissal, the highest Court in Canada stated that a constructive dismissal occurs when:

"...an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed."

In other words, a constructive dismissal occurs when an employer substantially changes the essential terms of an employee's contract of employment which the employee does not consent to, either explicitly or implicitly. In this situation, the employee may be able to treat the employment contract as being at an end, which entitles the employee to notice from the employer as if the employee had been terminated.

### Employer Actions that Constitute Constructive Dismissal

These "essential terms" referred to in *Farber* can be either expressed or implied terms of the employment contract. Examples of such essential terms being unilaterally changed may include the following:

- The employer substantially reducing a term of the employee's employment, such as the amount of vacation time per year;
- The employer demoting an employee or reducing the employee's remuneration;
- The employer refusing, by words or conduct, to allow the employee to fulfill the conditions of employment (such as locking an employee out of a building or removing support staff);
- The employer harassing or abusing an employee; or,
- The employer giving the employee the choice of accepting the fundamental change or being fired.

To demonstrate the above in greater detail, consider the example above regarding the reduction of the amount of vacation time an employee is entitled to per year. If the employee receives only three (3) weeks of vacation per year, a reduction in the amount of one (1) week would represent approximately a 33% reduction. This would likely be considered a substantial reduction in the terms of the employee's employment, thereby triggering a constructive dismissal, and exposing the employer to a claim for substantial damages. If this reduction were to involve a group of employees, multiple legal proceedings or a class action for damages may result.

By such types of action, employers essentially cease to meet their obligations and are therefore terminating the employment contract. Employees can therefore treat the contract as fundamentally breached and consider themselves as being dismissed through the employer's actions.

### Obtaining Relief from Constructive Dismissal

Even in the presence of such conditions as those mentioned above, constructive dismissal must also be accompanied by certain actions by the employee. The employee would generally have to object to the substantial changes or incidents within a short period of time of their occurrence. However, if the employee does resign, the employee must make it clear to the employer that the resignation is due to the substantial change or incidents.

If the employee does not make it clear to the employer that they do not accept the new terms, then the employee may be seen as having agreed to the changes made. Additionally, employees may not be able to claim constructive dismissal if, for a period of time, they act in accordance with the changes made to their employment. This would be considered implied acceptance and may provide a basis for believing that the employee is in agreement with the unilateral changes. If the employee later becomes dissatisfied with the new terms and conditions of employment, they may not be successful in a claim for constructive dismissal.

### The Employee's Duty to Mitigate

In both wrongful and constructive dismissal situations, the employee has a duty to mitigate damages by seeking new employment. This concept was established by the *Supreme Court of Canada* in *Evans v. Teamsters Local Union No. 31* which stated that,

"...in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer."

Therefore, with a reduction of vacation time, the employee may be required to continue working for the employer who constructively dismissed the employee depending on whether it is unreasonable or intolerable to do so.

Employers must therefore treat any reduction of vacation time with the greatest of caution as an employee response by legal proceedings, whether or not justified, should be avoided at all costs.

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### Upcoming Events

- March 7, 2012 – Women In Business Luncheon
- March 21, 2012 – Markham Theatre: Dee Dee Bridgewater