

# Additional duties lead to constructive dismissal

*Employer increased employee's workload; employee fired after refusing to continue with increased role*

BY RONALD MINKEN

**WHEN WE THINK** about a situation that leads to a finding of constructive dismissal, it is usually a situation where something has been taken away from an employee, such as key responsibilities, job title, or a reduction in earnings. However, in *Damaso v. PSI Peripheral Solutions Inc.*, the Ontario Superior Court of Justice determined that an employer who added duties to an employee breached the terms of the employment agreement, resulting in the constructive dismissal of the employee and an award of 12 months notice.

Otoneil Damaso was hired by PSI Peripheral Solutions — a developer of engineering solutions for office printing and distribution centres in Mississauga, Ont. — for the positions of field service technician and computer technician. His duties and responsibilities were clearly set out in writing at the time of hire.

Damaso's employment continued for the next 10 years. However, changes to the business were required over time and in response to the economy. In Damaso's tenth year of employment, the employer added to his existing duties the role of IT administrator but did not provide Damaso with any additional financial compensation.

About one year later, Damaso was feeling overwhelmed with his new duties and approached the employer. He began requesting a pay raise due to the additional functions he was performing and also informed the company of his concerns regarding the level of work. PSI explained that due to the financial difficulties the company was experiencing, it could not provide a raise. Damaso informed PSI he was not prepared to continue with the IT administrator function, so the company decided to hire an independent contractor to take over IT administration.

PSI instructed the independent contractor to change all of the passwords so Damaso would not be able to independently access the company's internal computer system, which was required for him to perform his other duties. One month later, PSI provided Damaso with a letter informing him that his employment was being terminated in 12 months' time and he was expected to continue performing all of his duties until his termination. Damaso went on disability leave for a few months and

then sued for damages for constructive dismissal.

The court determined Damaso had been constructively dismissed by PSI when the company required that he perform additional duties not agreed upon at the time of hiring and which created a level of work that the company knew Damaso could not handle. The court stated that the additional duties were overwhelming and prevented Damaso from being able to complete all of his tasks. The fact that the employer took away Damaso's access to the server by changing the passwords also prevented him from being able to perform his duties.

The court awarded Damaso 12 months notice and stated that he did not fail to mitigate his damages by refusing the 12 months of working notice proposed by the employer.

## Lessons for employers

Employers must be very careful when implementing changes to the terms of employment of its employees. Although the courts will grant employees some flexibility to make changes to their business and the responsibilities of its employees, the changes must be reasonable and moderate. Fundamental changes that are implemented without enough notice to the employee may result in the constructive dismissal of the employee and the employer's obligation to provide damages for notice. It is recommended that employers consider carefully prior to implementing any changes affecting an employee's duties, work environment and or earnings to minimize liability going forward.

## Lessons for employees

Employees should be aware that changes implemented by their employer without enough advanced notice may lead to a claim for constructive dismissal and an award of damages. Not all changes will be enough to result in a constructive dismissal situation and the duty to mitigate or minimize one's losses may require the employee to continue working with the employer despite the change. In addition, agreeing to the changes or going along with the changes without objecting may result in the employee losing rights to damages for constructive dismissal.

## For more information see:

- *Damaso v. PSI Peripheral Solutions Inc.*, 2013 CarswellOnt 17617 (Ont. S.C.J.).



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