

Employer changes mind about changing worker's hours

Employer told worker he was getting new shift hours but backtracked when worker protested

BY RONALD MINKEN

CONSTRUCTIVE DISMISSAL is a well-known employment law concept. In short, constructive dismissal can occur when an employer fundamentally changes a term or condition of an employee's employment and the employee does not agree, either explicitly or implicitly, to its occurrence. While the analysis of whether an employee is entitled to damages resulting from constructive dismissal changed as a result of the Supreme Court of Canada's 2008 decision in *Evans v. Teamsters, Local 31*, the basic concept of how it can occur has remained somewhat unaltered. The Ontario Labour Relations Board's recent decision in *Oca v. Home Depot of Canada Inc.* is a great reminder of this fundamental employment law concept.

Ferdinand Oca was employed as a day shift order picker at a Home Depot store and was one of four employees who picked products for delivery to customers. In October 2011, Oca was moved from the day shift to the night shift where he experienced difficulty in having co-workers assist him with the larger and heavier products for delivery, with which the other order pickers assisted him during the day shift. Oca requested assistance from his supervisor, but such assistance was declined and Oca did not elevate his concern with more senior management.

Worker filled out shift availability report
In October 2012, Oca completed a report outlining his shift availability by stating that he was available for eight hours a day, 40 hours a week anytime the store was open. The report also indicated Oca would be given shifts that included days, evenings, overnight shifts and weekends. In January 2013, Oca was informed that his hours of work would be changed from 8 p.m. - 4:30 a.m. to 10 p.m. - 5:30 a.m. In response, Oca provided Home Depot with a letter of resignation.

Following receipt of this letter, Home Depot met with Oca and indicated it would not change his hours and he could continue to work the 8 p.m. to 4:30 a.m. shift. Oca refused the offer and indicated that he would only agree to it if Home Depot would sign a document stating that his hours of work would never change. Home Depot refused to agree to those terms.

Accordingly, Oca filed a complaint with the Ontario Ministry of Labour alleging that

he was constructively dismissed and therefore entitled to his statutory termination and severance pay.

Upon reviewing the facts, the employment standards officer assigned to the matter decided not to make an order to pay in Oca's favour. Oca appealed this decision to the Ontario Labour Relations Board, who determined that Oca was not constructively dismissed from his employment given that the change "was a modest one" which "came

The employee's hours had been changed before, he had indicated in writing his willingness to work any hours, and company policy indicated employees were expected to work a variety of shifts.

in the context of a situation where (Oca's) hours have been changed before, where he has indicated, in writing, his willingness to work any hours and where the company has a policy, signed by (Oca), indicating employees are expected to work a variety of hours and shifts."

Additionally, the Ontario Labour Relations Board indicated that even if the change to Oca's hours constituted constructive dismissal, the new hours were never implemented and in fact recalled by Home Depot in their meeting with Oca. Accordingly, the

board found that in these circumstances there can be no constructive dismissal.

Lessons for employers

Prior to making any changes to an employee's employment, employers should ask themselves whether these proposed changes will result in the constructive dismissal of an employee's employment. There is general disagreement between employers and employees of what may be a fundamental change resulting in constructive dismissal, so each case must be examined closely on its facts.

Lessons for employees

While employers are permitted to make changes to an employee's employment, such changes cannot be fundamental changes without the employee's agreement, whether provided expressly or implicitly. As a result, employees must be cautious in responding to potential changes posed by their employers, as their response may demonstrate that such changes are acceptable and prevent an employee from claiming constructive dismissal in the future.

For more information see:

- *Oca v. Home Depot of Canada Inc.*, 2014 CarswellOnt 9906 (Ont. L.R.B.).
- *Evans v. Teamsters, Local 31*, 2008 CarswellYukon 22 (S.C.C.).

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