

Constructive Dismissal

- Occurs when an employer does not intend to terminate the employment contract, but makes changes to terms and conditions of employment that are so fundamental that the original employment contract is considered to no longer be in existence, and as such, has been terminated
- Is defined as a unilateral and substantial change made by an employer to a fundamental term of an employee's employment without the employee's consent and without reasonable notice or where the employer's treatment of the employee makes continued employment intolerable ("poisoned work environment") Examples include:
 - Change in job duties / status
 - Demotion
 - Change in remuneration (may include changes to the commission or bonus plan)
 - Change in location
 - Placing the employee on a temporary layoff (in the absence of a temporary layoff provision in the employment agreement)
 - Manager creating prejudicial, inaccurate performance reviews for employee
 - Harassment or violence in the workplace
- An employer is allowed some flexibility in regards to the organization and reorganization of its workplace. Furthermore, an employer does not always have to secure employee consent before making changes. For example, realigning job duties and responsibilities while maintaining compensation and title is not generally considered constructive dismissal
- Overall there needs to be a balancing of an employer's right to manage its business and an employee's protection against significant alterations to fundamental terms of contract without consent

Determining if a Constructive Dismissal Has Occurred

- In determining whether a constructive dismissal has occurred, some important questions are:
 - Was the change imposed unilaterally by the employer?
 - How substantial was the change being imposed?
 - Is the term of employment being changed a minor or fundamental term of the employment contract?
 - Does the employment contract or policy provide that the employer can make the change?
 - Did the employee acquiesce?
 - Does the employee have to mitigate his / her damages by continuing to work or can the employee resign?
 - If harassment or violence has been alleged, employers have a duty to investigate the complaint

- In the event of a change to a term of the employment contract that an employee doesn't agree with, and assuming the change constitutes a constructive dismissal, the employee may choose to:
 - a) accept the constructive dismissal and continue on in employment; or
 - b) assert that a constructive dismissal has occurred and that the employment relationship has been terminated by the employer
- In the case of (b), the employee can commence legal proceedings seeking his/her entitlement upon a termination without cause, which may include (particularly in the absence of an enforceable employment agreement) common law reasonable notice of termination or compensation in lieu thereof. The amount of notice is dependent upon various factors such as length of service, age, type of position, contractual provisions regarding notice of termination, etc.
- If an employee, who has the onus of proving there was a constructive dismissal, loses his / her case, he / she is then deemed to have resigned without any entitlement to notice or pay in lieu of notice
- In cases where harassment or violence in the workplace has triggered constructive dismissal, the employer could be liable for significant damages (i.e. human rights damages, punitive damages, bad faith damages, etc.)
- *Note: Courts permit and even encourage employees to take a reasonable period of time after a fundamental change to evaluate the change in order to determine whether to take the "constructive dismissal" route*

Employee's Duty to Mitigate

- Unless an express term in a contract provides otherwise, an employee who is constructively dismissed has a duty to mitigate his / her damages associated with the dismissal
- This duty may require the employee to continue in employment after the fundamental change is implemented
- To argue that such a duty exists, employers must ensure all details of the changes are clearly communicated to the employee
- The change must be bona fide and not a disguised attempt to try to get the employee to quit
- Continuing in the position must not be humiliating or embarrassing