
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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EMPLOYEES SHOULD BE ENTITLED TO TRY-OUT THE NEW POSITION PRIOR TO ADVANCING ALLEGATIONS OF CONSTRUCTIVE DISMISSAL

In a decision of the Ontario Court of Appeal released last year but only recently reported, the Court arrived at a revolutionary conclusion: employees are entitled to reasonable time to assess new terms of employment before being forced to take a legal position as to whether the new terms amount to a constructive dismissal.

The Plaintiff employees were commissioned insurance sales representatives. Their respective contracts provided that the employer could make changes to the commission schedule with 90 days notice. The employer wrote to the employees enclosing a new contract to take affect 90 days later which materially changed the commission structure. The employees were told to sign and return the contract. They did not. One week after the new effective date, the employees' employment was terminated.

The Court of Appeal held that the employer had the right to terminate the contracts in place but that it had to provide reasonable notice. The employees' failure to sign and return the new contracts did not amount to just cause for their termination.

The Honourable Mr. Justice Jursanz writing on behalf of the unanimous Court held:

"The vulnerability of employees who believe they may have been constructively dismissed and the difficulty of making the life-altering decisions they face must be recognized. In this context, it is understandable that such employees may wish to try to adjust to the new terms and conditions without affirming the employer's right to make these changes and before taking the radical step of advancing a constructive dismissal claim. Allowing employees reasonable time to assess the new terms before they are forced to take an irrevocable legal position not only addresses their vulnerability, but also promotes stability and harmonious relations in the workplace. For these reasons, I am of the view that the appellants had no obligation to acknowledge LICC's right to change the compensation schedule, and that their failure to do so did not constitute a repudiation of their agreement with LICC."

The Court held that damages for wrongful dismissal were appropriate. The employer should have compensated the employees under the new structure to afford them the opportunity to assess their new package for a reasonable time to determine whether to accept it or claim constructive dismissal.

Although this "try out" will not be necessary in all instances of potential constructive dismissal, it does serve a very useful function in situations in which the impact of the changes to employment terms is not readily apparent or ascertainable. Accordingly, the defence of "acceptance" of unilateral changes may no longer be as readily available in defence to the allegation of constructive dismissal simply because a passage of time. Failure will determine the length of the "try out".

"INDUCEMENT" REQUIRES ASSURANCES OF LONG TENURE TO WARRANT AWARD OF INCREASED DAMAGES

A more strict less liberal interpretation of the circumstances in which an employee "induced" from secure employment will be entitled to recover increased damages was endorsed by the Honourable Mr. Justice Echlin in a recent decision.

The Plaintiff entered into a discussion with the Defendant employer about joining it after the company for whom he was employed for 10 years experienced the loss of a major account. While the Plaintiff's employment situation was characterized as "not a bed of roses", his job was not in jeopardy and he was not really looking for work. (Apparently, it was a move suggested by another employee at the former employer who also moved over.) The Defendant was clearly desirous of having the Plaintiff join them and offered him a significant salary increase, but later terminated his employment.

Echlin J. relied on comments of the Honourable Mr. Justice Iacobucci in *Wallace v. United Grain Growers Ltd.* and held and held that absent assurances of long tenure, career advancement or job security by the employer, additional damages for inducement are not warranted. The Court held the Plaintiff was a "willing seducee" and was ready and very willing to change employers.'

The Plaintiff was however awarded *Wallace* damages because the employer (a) maintained allegations of cause throughout the trial on the basis of undocumented performance-related complaints; (b) failed to provide a letter of reference; (c) delayed in payment of statutory entitlements; (d) failed to provide insurance forms required by the Plaintiff; and (e) maintained that the Plaintiff was only an employee of a company no longer in existence creating identity hurdles.

Parties in such cases are well advised to consider carefully their litigation strategies in light of this decision.

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