

You Raise the Issue

GARETT EISENBRAUN

Suing for Wrongful Dismissal

Question: I have heard that it is possible for a company to get sued for wrongful dismissal, even where an employee has not been laid off or terminated. Is this true?

Answer: Most employers know that if an employee is dismissed without just cause, there is an obligation to provide either reasonable advance notice of dismissal or payment in lieu. Yet many will be surprised to learn that an employer may have to pay severance, even where the employee has not been terminated, but where his/her duties or compensation have been altered or reduced. In these circumstances, the employer may have 'constructively dismissed' the employee, which at law is sometimes the same as actually having let the employee go.

The Supreme Court of Canada recently confirmed the principle of constructive dismissal in a case involving a large Canadian real estate Company. The Plaintiff, then age 44, had been employed by the Company for 18 years, was highly regarded and had received many promotions. As western region manager, the Plaintiff supervised over 400 employees at 21 locations, with in excess of 16 million dollars in sales. He earned \$150,000 in salary and benefits.

As a result of the Company's restructuring, the Plaintiff was offered the position of manager in the region's worst performing branch. In this position he would supervise 20 employees, whose sales the previous year totalled \$616,000. In addition, the Plaintiff's salary would be entirely based on commissions.

Despite the Plaintiff's request, the Company refused to negotiate any of these new terms of employment. It advised the Plaintiff that unless he showed up for work at his new job, he would be viewed as having quit. The Plaintiff chose not to report, and instead sued for constructive dismissal.

The Supreme Court of Canada held that the Plaintiff had been constructively dismissed and awarded him the equivalent of one year's salary as severance.

Constructive Dismissal Considerations

Question: What considerations will a court recognize in determining if an employee has been constructively dismissed?

Answer: An objective standard will be applied to decide if a demotion or alteration of duties or compensation constitutes constructive dismissal. The test is whether a reasonable person, looking at the position offered, would believe the essential terms of his/her employment contract had been substantially changed. Relevant considerations include not only the financial impact on the employee, but also the possibility that the proposed job changes could diminish the employee's status among co-workers, or even job satisfaction.

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fielddlaw.com

It is also important to note that constructive dismissal does not require either that the employer intends to eliminate the employee, or that it act in bad faith in reassigning him/her. Finally, an employee's willingness to accept some of the changes was not conclusive evidence that a constructive dismissal did not occur. What an employee threatened with job loss is prepared to accept as a replacement position, cannot be the yardstick of the employee's rights.

Protective Restructuring

Question: In the near future, I plan on restructuring my company which will include some significant changes in job positions for a number of employees. How can my company avoid being sued?

Answer: At least two fairly straightforward options exist. On the one hand, your Company may wish to include in the employment contract a right to change an employee's duties and responsibilities from time to time, which will reserve the employer's right to make these changes. This would have to be agreed to by the employee. Alternatively, if the move is part of a restructuring, the Company can always give the employee advance notice that his/her current position will be ending, and advise that after a certain date the employee may continue to work for the Company in the new position, or may choose to leave the Company. The length of advance notice will usually depend on how long the employee has been with the Company, although other factors such as employee age, and responsibility of his/her position may also be taken into account.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

REPRINTS

Our policy is that readers may reprint an article or articles on the condition that credit is given to the author and the firm. Please advise us, by telephone or e-mail, of your intention to do so.