

Constructive Dismissal: The Cases

Part 2 of 2

In our last newsletter, we explained how constructive dismissal is a term used to describe the circumstances when an employee has not been expressly dismissed from employment, but has been effectively dismissed as a result of unilateral changes made by the employer that substantially alter the employee's essential terms and conditions of work. It may also arise when the employee is required to work in what amounts to a poisoned work environment.

This newsletter reviews some of the grounds that can constitute constructive dismissal and some of the cases in which executives were constructively dismissed from their employment. As noted in our prior newsletter, each employment situation is unique, especially when it comes to deciding whether an executive has been constructively dismissed. Similar factual scenarios may lead to different results, depending on the unique characteristics of any particular employment relationship. For example, an executive whose terms and conditions of work have been static historically may be treated differently in law than one whose terms and conditions of work have been fluid over the

years, such that there is a pattern of material changes to the executive's essential terms and conditions of work.

Changes in responsibilities

Courts have recognized that material changes in an executive's responsibilities can result in a constructive dismissal of the executive from his employment.

Farwell v. Citair

Recently, the Ontario Court of Appeal in *Farwell v. Citair, Inc. (General Coach Canada)*¹ decided that Mr. Kenneth Farwell had been constructively dismissed from General Coach as a result of the change in his responsibilities and position from Operations Manager, Vice-President of Operations to Purchasing Manager. The title of Purchasing Manager reflected a diminished role with significant loss of status and prestige in the company. As well, in Mr. Farwell's new position as Purchasing Manager, he would have to report to his former subordinate, who had been promoted to the position of Operations Manager.

These quarterly newsletters provide practical advice and current legal comments on executive compensation and compensation governance and disclosure. These newsletters will be of interest to directors, executives, lawyers and human resources professionals.



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From the Editor

This newsletter is the second of two issues on constructive dismissal. This newsletter outlines of some of the grounds that constitute constructive dismissal with various cases in which executives have been constructively dismissed. Understanding other cases where courts have determined that an executive was constructively dismissed can be of assistance in assessing whether a constructive dismissal has occurred in another case. Nonetheless, each case must be considered on its own facts and in its own context.

The Court confirmed the award to Mr. Farwell of damages in lieu of 24 months of notice of termination. At the time of Mr. Farwell's constructive dismissal, he was 58 years old, held a high level of managerial employment and had been employed for 38 years. The Court determined that Mr. Farwell had not failed to mitigate his damages because General Coach had failed to offer Mr. Farwell the opportunity to work out the notice period after he refused to accept the position and informed the company he was treating the reorganization as a constructive and wrongful dismissal. As such, the company had failed to trigger this form of mitigation duty.

Schumacher v. Toronto-Dominion Bank

A similar decision was reached in *Schumacher v. Toronto-Dominion Bank*.² In *Schumacher*, the Ontario Court of Appeal decided that Mr. John Schumacher had been constructively dismissed from the Bank and that the Bank owed

him damages for its failure to provide him 13 months of notice of the termination of his employment. The Court also decided that Mr. Schumacher had not failed to mitigate his damages by continuing to work for the Bank because the Bank had not permitted Mr. Schumacher to return to work, unless he unconditionally accepted the changes to his employment.

Mr. Schumacher worked for the Bank for 11 years, from 1984 to 1995. Mr. Schumacher joined the Bank as a trainee, and progressed through the ranks in the Bank until he reached the level of Senior Vice-President with the position of Global Head of Trading. Mr. Schumacher was responsible for the Bank's risk management and worldwide trading in five areas: derivatives, fixed income, money market, funding (including repos) and foreign exchange. Mr. Schumacher had approximately 100 people reporting to him directly and indirectly. Mr. Schumacher became one of the top five earners in the Bank with earnings of \$1.6 million.

On January 23, 1995, without any prior notice to Mr. Schumacher, the Bank hired a Vice-Chairman T.D.S.I. to take over the responsibilities of fixed income, money market trading and bond borrowing and lending (repo business). Mr. Schumacher learned of the hiring as a result of a news leak before a formal announcement was made. Mr. Schumacher believed this signaled the end of his career with the Bank.

At trial, the Court noted that having lost the responsibility for fixed income, Mr. Schumacher had lost the product with the greatest potential for growth, which was the "flagship" business of any investment banking business and considered in the industry as among the most important business in any treasury operation. Fixed income was also described as one of the most prestigious products. As well, Mr. Schumacher lost the synergy arising from the leadership of all five areas. The reorganization effectively rolled back the organizational structure developed by Mr. Schumacher, thereby obliterating one of his most

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notable achievements. As well, the negative impact on Mr. Schumacher's loss of bonus was at least 15% and possibly as high as 25-30%.

Taking into consideration the foregoing, the trial Court held that Mr. Schumacher had been constructively dismissed and was owed damages based on 13 months of reasonable notice of termination. The Ontario Court of Appeal agreed with the trial Court's assessment. Mr. Schumacher was not required to continue working for the Bank to mitigate his damages because the Bank refused to allow Mr. Schumacher to return to work, unless he unconditionally accepted the changes to his position.

Greaves v. OMERS

As discussed in our prior newsletter, the court also found Mr. Greaves had been constructively dismissed from his employment with the Ontario Municipal Employees Retirement Board (OMERS), after 12 years of loyal service.³ Mr. Greaves' title was changed

from Vice-President, Equities and Investment Strategy to Vice-President, Canadian Equities Internal, with a 50% decrease in his assets under management. Mr. Greaves was awarded 15 months of reasonable notice of termination. However, unlike in *Schumacher*, the court determined that Mr. Greaves failed to mitigate his damages by continuing his employment with OMERS considering there continued to be mutual respect and understanding between Mr. Greaves and OMERS. Consequently, the court refused to award Mr. Greaves any damages for his lost compensation or benefits during the notice period.

Eviscerating the department

Courts have found that a demotions and material reductions in a department overseen by a manager can constitute constructive dismissal.

In *Canadian Pacific v. Dick*,⁴ the New Brunswick Court of Appeal decided that Mr. Dick had been constructively dismissed by Canadian Pacific and

awarded him damages based on 17 months of notice of termination. Mr. Dick had worked for Canadian Pacific for 20 years, in positions of increasing responsibility, from his start as an office assistant in 1968 to his most recent position in 1998 as the Manager of the General Purchasing Department.

In October 1998, Mr. Dick returned to work after a medical leave, which he had taken for the depression he experienced from his working conditions. Upon returning to work, Mr. Dick was informed that his department had been divided in two and he would now be the manager of the smaller of the two departments. Mr. Dick was also told his staff within that smaller department would be further reduced and that the key employee upon which he relied extensively would be temporarily working on an assignment outside the province. Mr. Dick tried working under his new conditions for a couple of months, but he remained depressed. In December 1998, Mr. Dick resigned and he later commenced an action for constructive dismissal.



Ontario Court of Appeal — Osgoode Hall

The Court noted that Mr. Dick had considerably less prestige within the organization in managing a less important department with minimal staff. The downsizing of the department and the temporary loss of a key employee resulted in additional work and stress on Mr. Dick and made it harder for him to be able to perform his job. Taking into account the foregoing, the Court decided that Mr. Dick had been constructively dismissed.

Change in compensation

Courts have recognized that changes in compensation, in and of themselves, can amount to constructive dismissal.

In *Evangelista v. Number 7 Sales Limited*⁵, the Ontario Court of Appeal decided that Mr. Mario Evangelista had been constructively dismissed by Number 7 Sales and confirmed the award to him of damages based on 15 months of notice of termination, with 3 additional months due to the bad faith manner of his dismissal, along with vacation pay and holiday pay owed for 8 years. Mr. Evangelista had worked for Number 7 Sales as the Used Car Sales Manager for 16 years, from 1988 to 2004. In assessing the period of reasonable notice of termination owed to Mr. Evangelista, the Court took into consideration that he had been induced to leave his prior employer to join Number 7 Sales.

For the first five years of Mr. Evangelista's employment, he was paid on a

commission-only basis of 30% of gross profits. During these initial years, Mr. Evangelista was paid through a company he owned with a partner. In April 2003, Number 7 Sales proposed reducing Mr. Evangelista's compensation from 30% to 18% of gross profits, effective December 2003. Mr. Evangelista accepted the new compensation package and it was implemented in December 2003.

In March 2004, Number 7 Sales again proposed reducing Mr. Evangelista's compensation package; this time, from 18% to 9% of gross profit. The parties had several discussions, but negotiations were at an impasse. Mr. Evangelista was suffering from depression and took time off work from April to July 2004. On Mr. Evangelista's return to work, the parties were still unable to reach a resolution. On July 29, 2004, Mr. Evangelista commenced his constructive dismissal action against Number 7 Sales.

The Court accepted the trial judge's decision that Mr. Evangelista had been constructively dismissed by the employer's unilateral action in changing the compensation, which constituted a fundamental breach of the employment agreement. The Court affirmed the trial judge's decision that Mr. Evangelista was entitled to 15 months of damages in lieu of reasonable notice of termination. The Court accepted the trial judge's determination that Mr. Evangelista was not required to continue working for Number 7 Sales during the notice period, considering the toxic

environment existing at the time of the termination. The trial judge had noted that Number 7 Sales had demonstrated palpable insensitivity in the manner in which it dealt with Mr. Evangelista and subjected him to undue pressure at a time he was in poor health.

Other forms of constructive dismissal

In addition to the foregoing, the courts have recognized various other situations in which an employer may be liable for constructively dismissing an executive from his or her employment, such as:

- Toxic work environments⁶
- Failure to provide a promised promotion
- Unwanted promotion
- Geographic transfers

The following cases highlight some of the more common scenarios in which executives have been constructively dismissed. These grounds are not exhaustive of the grounds upon which an executive may be found to have been constructively dismissed. These grounds, in and of themselves, are not determinative of whether an executive has been constructively dismissed as the facts of each case must be viewed in context, taking into consideration the parties' work history.

Endnotes:

¹ *Farwell v. Citair, Inc. (General Coach Canada)*, 2014 ONCA 177 (CanLII).

² *Schumacher v. Toronto-Dominion Bank*, [1999] O.J. No. 1772 (Ont. C.A.) ("*Schumacher*").

³ *Greaves v. Ontario Municipal Employees Retirement Board*, 1995 CanLII 7288 (ON SC).

⁴ *Canadian Pacific v. Dick*, 2000 NBCA 10 (CanLII).

⁵ *Evangelista v. Number 7 Sales Limited*, 2008 ONCA 599 (CanLII).

⁶ *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419.