Constructive dismissal: Firing can go both ways

June 1, 2018 by Mike Edwards Leave a Comment

When a business is humming along, and workers are all pulling in the same direction, employers might never give a second thought to a disgruntled employee lurking behind a bench.

What did you do to cause such resentment? Was it a job reassignment? Or was a much-younger supervisor put in place that put a nose out of joint?

There are many reasons a business — your shop, even — might face a "constructive dismissal" suit by an employee. In a nutshell, this is when the employee is "firing" the boss, not the other way around.

According to Damien Buntsma, associate counsel, Miller Thomson of Vaughan, Ont., "there are two sides to what usually ends up in litigation from the employment side with respect to terminations.

"One is where the employer actively terminates somebody. You end up with a wrongful dismissal lawsuit. The other side of that is something that is usually much trickier which is called a constructive dismissal. So that is where things usually end up in litigation as well."

Bunstma notes that this is where an employee will say that he views that the employment contract has been breached or the employer has demonstrated that they no longer wished to be bound by the employment agreement.

Employment is a contract

But just what is an employment agreement? This can be a signed, written document, with the employee agreeing to show up at work at the time stipulated by the employer, and to perform the duties provided under the contract. In turn, the employee would expect his pay, benefit and vacation time.

An employment agreement also contains implied terms that are recognized by the courts. "So implied terms in any contract would be the duty of good faith, honesty, to provide a safe and healthy workplace in accordance with their obligations under statute," says Buntsma of the employer.

Cissy Pau, principal, Clear HR Consulting in Vancouver, B.C., has AWMAC (Architectural Wood Manufacturers Association of Canada) as a client, in addition to working with individual association members. "Typically," says Pau, "a client will say 'Jim's just not working out. We hired this guy to become the supervisor and want to demote him to CNC operator. We thought he could be a manager but doesn't really have that skill set.'"

Pau works with companies to figure out what to say and how to say it in these scenarios. "It's often a very difficult thing for people to do because you're telling a person 'we don't think you're good enough at your job.'"

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to them?' Often, it's no.

"If people aren't happy, how could they not know? You have to expressly tell them that you should be advising the employee along the way as to whether they are meeting expectations or not. There needs to be some conversation around next steps, consequences or what your options are. Is it maybe a straight termination or is it do we want to demote, or is it something else?"

That is where an employer's alarm bells should ring immediately, she says. "You, as an employer, cannot unilaterally change a fundamental term of their employment without their express agreement."

There is a misconception amongst those who would seek to pursue constructive dismissal litigation, according to Ed Upenieks, certified specialist in civil litigation at Lawrences in Brampton, Ont.

"Employees think that if certain things happen all they have to do is say 'oh, that's constructive dismissal' and they can leave and get a package," says Upenieks. That is not how it works."

More than hurt feelings

Upenieks notes that taking this route leaves the onus on the employee to prove just cause and pass the test in court. "The fact that one particular employee is hurt or feels hard done by is not an objective test," says Upenieks.

"The court always looks at what are the express terms of the contract."

Whether written or implied, were the terms breached by the any changes? "It has to be a fundamental change," says Upenieks. "Reporting to one different person doesn't cut it. It has to be fundamental."

What constitutes a fundamental change? Substantial change to salaries, hours or in job duties, according to Upenieks. "So, a small change isn't sufficient."

Tied in with change is the reporting relationship. "If you've gone from being the boss of 100 people and then having someone 20 years old as your boss and not having anyone report to you — that could be substantial," says Upenieks. Geographical location, major change in working conditions or being put on probation without due reason are considered by the court. "If an employer makes some changes, it's up to the employee to accept them expressly."

Constructive dismissal can also occur after a series of acts by the employer. This is where the employer behaviour demonstrates to their employee they no longer wish to be bound by the employment agreement. "That arises by employer's conduct which makes the relationship completely intolerable," says Bunstma.

Ounce of prevention

Preventative measures certainly help to limit any chance of a constructive dismissal suit from an employee, all three agree.

"The easiest way to avoid it is to treat your employees with respect, honesty and good faith," says Buntsma. "You abide by what would be the employment agreement. On a day to day basis, you do not change the terms and conditions of employment — that you understand what you contracted for in the relationship and provide that to the employee."

Pau is continually counselling her clients, whether they have 5, 50 or 100 employees. "We help them develop policies and processes and systems to manage their staff," says Pau. "It could be for specific policy requirements like creating a policy manual or helping them figure out how to pay their employees properly."

Clear HR Consulting often will recommend to clients they seek legal counsel on issues like

to make processes work internally," Pau says. "How do you set expectations with your employees? Do you have job descriptions? Do you know how to tell employees what you expect of them? What do you say if they are not working out?

"Those things I think a lawyer can provide information on the legal context but not on the day to day operation of it."

Managing employee absences, progressive discipline, coaching and performance management should all be done in accordance of the employment agreement or the statutory obligations that the employer has, according to Buntsma. "Your HR department — if you have one — is essentially the face of your organization towards its employees and the obligations towards them," he says. "Their role is the most important role within the organization in order to avoid such things as constructive dismissal. A lot of times what you need to have is a strong HR professional that is coaching management on its obligations. And making sure that those obligations are met."

It's time for pros

When there are any questions or doubts as to how to deal with employee discipline or a problem employee that is dealt with through HR, it should then be followed-up by the employer through a human resources professional or through legal counsel. Bunstma recognizes that not all shops can afford an in-house HR professional, so he recommends finding an HR consultant and labour and employment lawyer.

"Both exist within the same world," says Buntsma. "HR consultants can be brought in and exist within the same world and deal with less complex day to day operational matters and then they advise employers on how to deal with those. In more complex organizations that have significant employee issues they should engage legal counsel. Before any employee issues are dealt with improperly by the employer that could cause any constructive dismissal claims, they should consult with an HR consultant or legal counsel."

Upenieks observes that courts in Canada are slanted in favour of employees as opposed to employers. "Employers with 5 to 100 employees should have a regular lawyer, a corporate lawyer or trusted advisor in any significant situation," says Upenieks. "But I think they should contact the lawyer just so that they can find out if what they are doing is offside or if it will have unwanted consequences.

"Obviously, employers are concerned about legal costs and law firms are mindful of them. Often you can save yourself a lot of grief and a lot more lawyer's fees if you take the time to make the call first.

"It's basically preventative medicine."

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