The moving target of constructive dismissal law

BY JUDY VAN RHIJN
For Law Times

Lawyers do not like being asked by employees whether an employer's unilateral action constitutes a constructive dismissal.

The law of constructive dismissal frequently changes and advice that is correct today can be incorrect tomorrow.

Doug MacLeod of MacLeod Law Firm says constructive dismissal is probably the toughest issue employment lawyers face.

"It's an all-or-nothing thing, like being pregnant. Either you are or you're not," he says. "If you get it wrong, your clients end up with nothing. You are talking the difference between zero damages and two years pay. The employer can lose 24 months of salary and lawyers' fees. It's big, big, money."

Jennifer Costin at Siskinds LLP is seeing that the way constructive dismissal is being used is changing.

"You have your textbook categories of changes to pay, hours, work location, unfair work practices, and a toxic work environment," she says.

"There is a heightened understanding of harassment and bullying. People are fitting more constructive dismissal claims under the last category."

In fact, the concept of constructive dismissal is broadening legally but not always in practice.

In the 2015 decision in *Potter v. New Brunswick Legal Aid Services Commission*, the Supreme Court broadened the concept of constructive dismissal to include a series of acts that show the employer intended to no longer be bound by the employment contract. In this case, the employer placed an employee on paid administrative leave without providing a legitimate business justification.

The court even reversed the onus of proof where an administrative suspension is at issue, requiring the employer to show that the suspension is reasonable or justified.

In any other situation, the burden of proof remains on the employee.

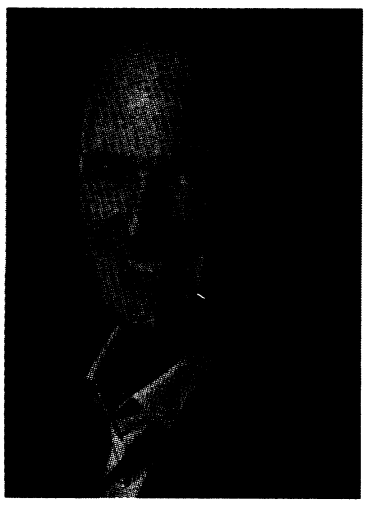
Peter McSherry, an employment lawyer in Guelph, Ont., says this makes constructive dismissal cases more challenging and more risky than a typical termination of employment situation.

"The employee is in a disadvantaged bargaining position in an area where the vast majority of cases get settled," he says.

MacLeod says the Potter decision took him by surprise.

"Up until that decision, a lot of employers put people on paid leave for business reasons," says MacLeod. "The Supreme Court said it was constructive dismissal, which was news to a lot of people."

MacLeod notes, however, that constructive dismissal is an area where the law is constantly changing. "Advice that is given today may be right, but it could change," he says.



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"This issue is litigated all the time and it's hard to predict what the court's going to do."

For this reason, McSherry says he would not rely on this decision alone if faced with a similar fact situation.

"It is a judgment call. When is it clear that they have no intention of bringing you back? If you know they're going to terminate the employee anyway, particularly if the employer has not put anything in writing, you could wait the seven weeks, like in the Potter case, and then sue for constructive dismissal, but I wonder if it is better for the employee to wait until they are actually terminated? Then the burden of proof goes in their favour," says McSherry.

In this situation, or when an employee is being offered a newly created position, McSherry recommends getting as much detail in writing from the employer as possible.

"Ask for more details of what's being offered so the employer's story is tied to something. Judges are trying to deal with two people with markedly different descriptions of a conversation," he says.

"It's like trying to pin jello to the wall."

Adding to the woes of employees who take the constructive dismissal route is the increasing prevalence of offers inviting the employee to work out his or her notice period in order to mitigate damages.

This concept, which started in 2008 in *Evans v. Teamsters Local Union No. 31*, was confirmed in the Potter case.

Potter reaffirmed that employees have a duty to mitigate their damages by remaining in the workplace, unless the employment relationship has become untenable.

"People may have an obligation to work out their notice period after constructive dismissal is declared unless there is harassment or humiliation," says Costin. "The trouble now is that if you declare constructive dismissal, you may be stuck with having to do that. It wouldn't usually be the employee's first choice, whereas some employers are thrilled at the idea. The upside is that it saves them a lot of money and they get some work out of the employee."

Costin has seen employers use this strategy to effectively call the employee's bluff.

"They can still say they don't agree that it's a constructive dismissal, but if it is, they invite them to work out the notice period," she says.

"It's reasonable for them to do so, unless it's humiliating."

Costin notes that the requirement to mitigate this makes claiming constructive dismissal a harder decision for employees.

"It's never an easy argument anyway. It's always a bit of an uphill battle, to go through that and still have to work out the notice period," she says. **LT**