EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Court of Appeal says employee who refused transfer was constructively dismissed

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Readers of *FOCUS* will be aware that it is fairly easy for otherwise reasonable and defensible management decisions to provide the grounds for a claim of constructive dismissal. What may appear to be a completely good faith effort at corporate restructuring (as in *Farber v. Royal Trust Company*, discussed in "Supreme Court issues first ruling on constructive dismissal" on our Publications page) or a realignment of employee responsibilities (*Schumacher v. Toronto-Dominion Bank*, discussed in "Bonus payment makes bank executive's constructive dismissal award the largest ever" on our Publications page) may involve a change in an employee's contract sufficiently substantial to persuade a court that the employee has been constructively dismissed. As the Supreme Court of Canada stated in *Farber*, to determine whether such unilateral changes to the contract amount to constructive dismissal, a court must ask whether, at the time the new terms were implemented, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. And while the dispute is often about characterizing the employee's departure as a resignation or a dismissal, the court need not find that the employer intended to force the employee out or acted in bad faith to conclude that constructive dismissal has occurred.

A case of constructive dismissal therefore involves a detailed inquiry into working conditions before and after the crucial events, and whether the difference between them should be seen as significant. The outcome is frequently difficult to predict: two levels of courts sided against Farber before the Supreme Court unanimously held in his favour. Now, the Ontario Court of Appeal has seen fit to reverse a lower court ruling in a case involving an executive employee of well-known Vancouver businessman Jim Pattison.

At issue in *Reynolds v. Innopac Inc.* (January 22, 1998) was the refusal by Robert Reynolds, Vice-President for Human Resources, to accept a transfer to Vancouver. Hired by Innopac in 1989, Reynolds had lived all of his 38 years in Southern Ontario. Innopac's 17 plants were located in Eastern Canada and the U.S.. While Reynolds did some travelling as part of his job, he was frequently able to return home at the end of the day. At the time of his hiring, no mention was made of a possible relocation of the Mississauga head office.

GOLDEN HANDSHAKE WITHHELD

Although the location of the head office appeared stable, in fact firm ownership was in flux. Jim Pattison had begun acquiring shares in the company, and a take-over bid was anticipated by

Innopac's officers. As a result, Reynolds, like other firm executives, had entered into a 'parachute' agreement with Innopac when he was hired. The agreement was a generous one: Reynolds would receive two years' salary in lieu of notice if he were dismissed other than for cause within two years of any corporate take-over. Dismissal was explicitly defined to include constructive dismissal; and no deductions from the severance would be made for any other employment he might obtain.

Within a year of his hiring, the take-over took place. Pattison offered to retain Reynolds in his position provided he accepted a transfer to Vancouver, the new site of Innopac's head office. Reynolds countered that he would accept the offer if certain monetary incentives were included, and started to seek out other employment in Southern Ontario. After Pattison refused to meet Reynolds' terms, Reynolds accepted a higher paying job with Laidlaw Transit. He then informed Pattison that he would not accept the transfer, and Pattison indicated that he considered the action a resignation.

TRIAL JUDGE: EMPLOYEE RESIGNED

Reynolds sued, claiming that he had been constructively dismissed and that he was entitled to two years' salary and benefits under the parachute agreement. He lost at trial, the judge concluding that he had resigned his position. The judge stated that the relocation of the head office to Vancouver was based on a legitimate business decision; and the requirement that Reynolds transfer out West was reasonable, with Reynolds refusing only because he had found something better in Ontario. Moreover, the judge found, Reynolds' negotiations with Pattison centred almost exclusively on monetary terms, and Pattison simply would not meet the price set by Reynolds. The judge went on to assess damages under the parachute agreement at over $265,000.

APPEAL COURT: EMPLOYER'S OFFER A "UNILATERAL AND FUNDAMENTAL" CHANGE

A majority of the Court of Appeal ruled that Reynolds had been constructively dismissed, because his contract of employment had been unilaterally and substantially changed by the Pattison offer. The Court first noted that the appropriateness of the business decision to move the head office to Vancouver was irrelevant to the question of whether constructive dismissal had occurred. What was of importance was the requirement that Mr. Reynolds move with it; and the Court had difficulty accepting that this requirement was entirely reasonable.

The transfer, the Court held, was vital to Reynolds "in both a business and a personal sense". Reynolds had lived in Southern Ontario all his life, and the move West was not anticipated when he was hired, not least because all the company's operations were in the East and within reasonable travelling distance of home. Working out of Vancouver would have required Reynolds to spend more time travelling and less time with his family.

The Court noted that, in return for giving up the benefit of a provision that was worth $265,000, Reynolds was asking for between $140,000 and $190,000 to move to an uncertain future as the sole remaining Innopac executive, working under the Pattison Group in Vancouver. The fact that Reynolds

was negotiating for his financial security, and was willing to consider taking a chance on the job had no bearing on whether constructive dismissal had occurred:

"Following a unilateral and fundamental change in his employment contract, no employee need say to himself or to his employer, "I consider that I have been constructively dismissed." The test has or has not been met on the facts. Obviously, it would be ridiculous for the law to require that an employee in effect say to his employer, before he can discuss new employment arrangements, "I am now in a position to sue you for damages for constructive dismissal". Such a statement would almost certainly put an end to what are often negotiations for new arrangements which are beneficial to both employer and employee. Negotiations which follow facts which constitute constructive dismissal […] in no way alter the fact that a constructive dismissal has occurred, nor do they prevent the employee from relying on that constructive dismissal if new negotiations prove fruitless."

The only real issue, the Court stated, was whether a reasonable person in the employee's position would consider that the employer had fundamentally changed the employment contract.

Surveying the evidence, the Court concluded that, in fact, this was what had occurred: Reynolds could bring no staff with him and would be the only member of the previous Innopac management team to remain on the job, working in a new city. He would work longer hours and would be expected to do "other things" of an undefined nature. There would be significantly more travel time, which in turn would decrease his efficiency on the job. Reynolds quite properly considered that he had been constructively dismissed, and was entitled to the benefit of the parachute agreement.

In Our View

The outcome of this case should not, of course, be taken to mean that any transfer of an employee without accompanying financial incentives will be viewed as constructive dismissal. The Court was influenced by its view that working under Pattison's direct control represented a significant change for Reynolds as well, and pointed to Pattison's reluctance to specify what other responsibilities would be placed on Reynolds.

The case illustrates the need for employers to plan reorganizations carefully. The manner of communicating new responsibilities to an employee will be closely scrutinized by a court in assessing whether it was reasonable for the employee to view the change as a fundamental breach of the contract of employment.

For further information on this subject, please contact Colleen Dunlop at (613) 563-7660, Extension 222.