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Highlights

CONSTRUCTIVE DISMISSAL

workplace conditions as grounds

The concept of constructive dismissal is not new. The Supreme Court of Canada in *Farber v. Royal Trust Co.* defined constructive dismissal as a "unilateral and fundamental change to a term or condition of the employment contract without notice." However, recently a number of court decisions have held that unjustified or improper discipline, a hostile work environment and/or extensive stress in the workplace can also result in a constructive dismissal. Eric Durnford and Amy Bradbury examine these decisions to determine how to avoid liability for the "new" constructive dismissal. 586

EMPLOYMENT LITIGATION

a guide to defending employment lawsuits

Few experiences are as frustrating as being sued. Employment-related litigation and administrative proceedings are costly and time-consuming. The litigation process and the details of employment protection legislation can be a legal minefield. Failure to respond appropriately may subject the employer and its representatives to substantial damages or other sanctions. Joe Conforti provides a ten-step framework for employers to respond to claims in an orderly manner. 592

IMMIGRATION

employing foreign workers

Recruiting skilled, experienced individuals often requires employers to look globally for their workforce. In so doing, employers are faced with immigration legislation regulating who can be hired to work in Canada, how quickly they can begin working in Canada and how long they can remain employed. Also, obtaining proper work authorizations for employees can be a complex and time-consuming maze for employers to navigate. Suzanne Davies highlights the basic issues that employers should be mindful of when hiring non-Canadian employees and provides some guidance as to the process and timing for obtaining work authorizations for non-Canadians. 596

CONSTRUCTIVE DISMISSAL

employee abuse cases continue to develop

In *Tremblay v. Corman Holsteins Ltd.*, a Saskatchewan Court found that the employer's abusive language, which resulted in a physical altercation with an employee, amounted to constructive dismissal. As Janice Rubin and Nicole Guerin explain, in so doing, the Court continued a recent trend by Canadian courts to find that employee abuse in its extreme form, can trigger a constructive dismissal. 599

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EMPLOYMENT LITIGATION

So You've Been Sued – Now What? A Ten-step Guide to Defending Employment Lawsuits

Joe Conforti
Goodmans LLP

Few experiences are as frustrating as being sued. The process is costly, time-consuming, stressful and detrimental to productivity.

Nevertheless, workplace disputes are inevitable. Regardless of how diligently an employer manages its human resources, most employers will face an employment-related lawsuit at some point. This could include litigation in court (for example, a wrongful dismissal claim), grievances or other arbitral proceedings, or complaints to or investigations by administrative agencies (for example, workers' compensation, occupational health and safety, human rights, pay equity, employment standards).

A framework is necessary to enable employers to best respond to legal proceedings and to minimize the damages that might be awarded. Recommended steps are as follows:

1. *Retain Counsel*: The truth of the old proverb that "one who is his own lawyer has a fool for a client" is often demonstrated in employment disputes where so much depends on human interaction and emotions. Employers and their representatives are typically too involved with or interested in the outcome of any dispute to be truly objective. A rash or improper step by the employer may unnecessarily prolong a dispute, provoke potential into actual litigation, and multiply damages several times over. Upon receiving a threat of litigation, therefore, the employer should immediately retain experienced counsel with expertise in the precise legal field of dispute. This will provide objectivity as to the merits of the employee's claim and temper the employer's response. Based on counsel's recommendations, the employer can then develop a rational strategy to investigate, respond to, and defend the claim.

2. *Review Insurance Policies*: Depending on the nature of the claims asserted, insurance may provide coverage for all or part of the damages sought by the employee together with the employer's legal fees. Accordingly, all potentially applicable insurance policies should be reviewed, copied and forwarded to counsel in order to determine the availability and extent of coverage. This should be done as soon as possible since most policies have specific time limits for providing notice to the insurers of potential or actual claims. Failure to notify the insurers on a timely basis may negate coverage entirely. Typical insurance policies to be reviewed include Commercial General Liability, Employment Practices Liability and Fiduciary Liability. If individuals are named in the claim, counsel should be provided with any policy covering Directors' and Officers' Liability and, potentially, the individuals' own homeowners' insurance, which sometimes provides coverage for defamation or other intentional torts.

3. *Create an Investigation Team*: In order to respond to a claim, the employer will need to gather and assess information relating to all the facts underlying the dispute. For this purpose, the employer should identify the individual(s) within the organization who will be responsible for managing the litigation through to its completion – whether by negotiated settlement, trial, or otherwise. This claims management function includes conducting the investigation, gathering and reviewing documents, interviewing employees and other witnesses, liaising with counsel, and reporting to senior management. Care should be taken in assigning this role as the responsible individual will likely be the "face of the employer," not only to the other participants in the investigation but also at any examination for discovery and as a lead witness at trial. The individual

must be able to assess objectively the facts uncovered during the investigation and make recommendations to management and to counsel. For this reason, the individual should be knowledgeable about the employer's general policies and practices and have the respect of other employees. It is also important that the individual not be seen as having a vested interest in the dispute or in way biased against the employee making the claim.

4. *No Reprisal/Retaliation*: Various worker protection statutes prohibit employers from threatening or implementing any reprisals, retaliation against an employee simply because the employee exercised his or her statutory rights or initiated certain types of complaints.[1] If an employee establishes that any adverse employment action was taken against him or her as a result of initiating or participating in an employment dispute (for example, if the employee is dismissed, demoted or subjected to other discipline), the employee may be entitled to additional damages or even reinstatement in the case of dismissal. Accordingly, where the complainant or other witnesses or participants remain employed, great care must be taken in making decisions regarding the employee's future job assignments, discipline, rates of pay, etc., once the employer becomes aware of a dispute. Human resources and other management should be involved in such decision-making processes. While the employee need not receive "special treatment" as a result of the dispute, all performance reviews and pay adjustments must be fair – and seen to be fair – and supportable by the evidence; they will be scrutinized and the onus of demonstrating that there was no reprisal or retaliation will usually be on the employer.

5. *Create a Litigation File*: Recent federal legislation requires certain organizations to provide to individuals upon request access to all "personal information" held by such organizations.[2] This mandates disclosure of personnel records, a right enforceable by the federal Privacy Commissioner. Similar legislation will soon apply to all provincially regulated organizations. Current legislation exempts from disclosure any information protected by solicitor-client privilege, information collected about the individual for "investigative purposes" collected without the knowledge or consent of the individual, or where the information was generated in the course of a dispute resolution process.[3] In the event of potential or actual litigation, therefore, it is prudent for the employer to create a distinct file for all documents relating to the dispute and to maintain it at all times separate from the employee's ordinary personnel file. Such a "dispute/investigation" file will assist in maintaining the privilege of the documents. This file should be secured, with access provided only to those individuals with a "need to know" for the purpose of dealing with the

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[1] The following are typical of the statutory protections: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1:

> Section 50(1). No Discipline, Dismissal, etc. by Employer – No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

Human Rights Code, R.S.O. 1990, c. H.19:

> Section 8. Reprisals – Every person has a right to claim and enforce his or rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

[2] See, for example, *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, section 5 and Schedule 1, subsection 4.9.1.

[3] Ibid., section 9(3).

dispute. Segregation of documentation relating to the dispute in this manner from co-workers and supervisors will also minimize the chances for success of any "reprisal" or "retaliation" allegation in the event of any adverse employment action involving the employee.

6. *Gather Relevant Documents*: As part of its investigation, the employer must gather all documents that are potentially relevant to the dispute – whether favourable or unfavourable to the employer's position. This will assist in understanding the context and relevant background facts of the dispute, identify further sources of information including potential witnesses, and permit a fulsome analysis of the merits of the parties' respective positions. The gathering of relevant documents is more than just a component in the employer's own investigation; the disclosure and production of all of these documents to the claimant (subject to solicitor-client privilege) is mandatory in most court proceedings. There are sanctions and potentially additional damages that may be imposed for failure to disclose relevant documents. In addition, the intentional or negligent "spoliation" of evidence can result in civil liability and an adverse evidentiary finding by the court. Documents that are typically relevant to any employment-related dispute include the employee's personnel file (job application, resume, performance reviews, disciplinary record, employment agreement and amendments, etc.), as well as documents reflecting policies of the employer relevant to the issue in dispute (health and safety, sexual harassment, severance, etc.). Another source of relevant documents may be the employee's e-mail messages, voice-mail messages and Internet usage. Employers are usually permitted to rely on "after acquired" just cause in support of a summary dismissal. Electronic communications leave a trail and may provide the "smoking gun" evidence which determines the course of the litigation. The employee may have engaged in improper conduct during work hours or otherwise been in breach of the employer's policies (for example, downloading pornographic web-sites from the Internet, e-mailing harassing materials to co-workers). All of this supports the proposition that a full documentary investigation is essential.

7. *Interview Witnesses*: As part of the employer's fact-gathering process, it is important to identify and interview all witnesses. As litigation can continue for years, this should be done in a timely manner. Otherwise, details may be forgotten; witnesses may be spoken to by the complainant or otherwise induced to change his or her version of the facts; a witness who is well-disposed to the employer initially (for example while employed), may become less cooperative or even hostile at a later point after he or she ceases to be employed in acrimonious circumstances. So that there is no later misunderstanding of what was said during the interview, the witness' version of the facts should be confirmed in writing and signed by the witness.

8. *Demonstrate Good Faith*: Courts are very protective about employees, especially at the time of dismissal when they are the most vulnerable. Employers are held to an obligation of "good faith and fair dealing in the manner of dismissal" so as to minimize the potentially devastating effects (economic and personal) of a loss of a job.[4] Courts will award substantial additional or punitive damages if an employer deals with employment disputes in "bad faith." Examples of employer conduct which have resulted in increased severance or punitive damages include such "hardball" litigation tactics as: withholding minimum statutory termination/ severance payments; asserting and maintaining unfounded allegations of just cause through trial; refusing to provide a fair letter of reference; providing inaccurate and/or derogatory information to subsequent employers or to the industry in general; delaying payment of vacation or other earned wages; withholding a Record of Employment so as to delay receipt of employment insurance benefits. Conversely, favourable employer actions may assist a dismissed employee in finding alternative employment and

[4] *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at 741.

mitigating losses at a very early point in time, make a court more favourably inclined towards the employer, and otherwise minimize damages. Such "good faith" conduct can include arranging for professional outplacement counselling or other job search assistance at the employer's expense, or providing a favourable letter of reference.

9. *Consider Reinstatement*: Depending on the nature of the dispute, a possible remedy at the end of the litigation period is reinstatement of the former employee into his or her pre-dismissal position. This is true, for example, in unionized settings, Canada Labour Code unjust dismissal complaints, or in cases of violations of statute. Courts and other adjudicators have "a principle of proportionality" suggesting that some employee misconduct, although wrongful, may not warrant outright dismissal – the "capital punishment" of employment – but other, lesser discipline appropriate in the circumstances, such as a warning, reduction in pay, or a suspension.[5] It may be the case that, after completing its investigation and upon reflection, the employer concludes that it overreacted in dismissing the employee initially. There is nothing wrong with the employer reversing its decision where new circumstances have come to light. Consider, therefore, whether to extend an offer of reinstatement to the employee with conditions appropriate to the nature of the dispute. Regardless of whether the offer is accepted, this is evidence that the employer took remedial action after acquiring the relevant facts. At the very least, the offer may lessen damages by demonstrating that the employee failed to mitigate damages.

10. *Consider a Communications Strategy*: A workplace is a community, with alliances and divisions the same as any other. It is natural that the co-workers of the complainant will be concerned about and interested in the outcome of the dispute. Depending on the nature of the dispute and the number of people it affects, the wider community outside the workplace may also be impacted. The employer must be ready to address concerns raised by its continuing workforce and the wider community. On the other hand, the employer and its representatives should be cautioned not to make any statements which would divulge confidential information, waive solicitor-client privilege, prejudice the fair trial of the action, or otherwise expose the employer to increased damages (for example, by making disparaging statements about the employee or other "bad faith" conduct). A professional public relations consultant may be of assistance.

Obviously, the best step is to avoid litigation in the first place. This can be best accomplished by proactive human resources management and by treating employees fairly, with dignity and respect, all of which lessen the number and severity of disputes. If a dispute does occur, however, the same principles should continue to prevail. In any event, the litigation and each step towards its ultimate resolution can be taken as a learning opportunity, all with a view to addressing future disputes.

[5] See, e.g., *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 at 188-189.