Recent Developments in the Law of Constructive Dismissal

By John C. Field

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1. The Legal Framework

The requisite elements necessary to establish a constructive dismissal may be summarized briefly as follows:

(i) Changes were implemented unilaterally by the employer (i.e. without the employee’s consent).

(ii) Changes were made to fundamental terms of the employment agreement.

(iii) The changes were substantial and disadvantageous to the employee.

(iv) The employee did not condone or acquiesce in the changes.

The leading decision with respect to the doctrine of constructive dismissal remains the Supreme Court of Canada’s decision in Farber v. Royal Trust Co.¹, which held that:

A constructive dismissal occurs where an employer makes a unilateral and fundamental change to a term or condition of the employment contract without providing reasonable notice of that change to the employee.²

¹ [1997] 1 S.C.R. 846. (“Farber”)
² Farber at para. 34.
The Supreme Court of Canada further held that “by unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract.”

**Not Every Change in Employment is Constructive Dismissal**

Not all changes to an employee’s contract, however, will lead to a claim for constructive dismissal. Only changes imposed by the employer that “substantially altered the essential terms of the employee’s contract of employment” will provide a foundation for a claim for constructive dismissal.

Significantly, the conduct must constitute a fundamental change based on an objective analysis. As noted by the Court of Appeal for Ontario in *Smith v. Viking Helicopter*:

>[An] Action for constructive dismissal must be founded on conduct by the employer and not simply on the perception of that conduct by the employee. The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or a unilateral change of a significant term of that employment.

Therefore, each constructive dismissal case involves a contextual analysis of the individual workplace and the changes that occurred. There is no “one-size fits all” approach to constructive dismissal.

In *Farber*, the Court further noted that “the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed.” The Court will inquire into whether a reasonable person in the same position as the Plaintiff would have reached the same conclusion.

Even when an employer commits a breach of a fundamental term of the employment agreement, constructive dismissal does not automatically follow.

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3 *Farber* at para. 24.
4 *Farber* at para. 26.
6 See the discussion on *Kafka v. Allstate* in Part 4 of this Paper.
7 *Farber* at para. 35.
8 *Farber* at para. 37.
If the affected employee, either explicitly or implicitly accepts the change by, for example, continuing to work without objection, the change may be deemed to have been acquiesced in, or condoned by, the employee. That being said, employees generally will be allowed to make an election to accept or reject the change within a reasonable period of time.

The “reasonable period of time”, as the Court of Appeal for Ontario stated in Belton v. Liberty Insurance Co. of Canada, is to provide to employees with “the opportunity to assess their changed situation for a reasonable time, and decide whether they could accept it.”

In Lesage v. Canadian Forest Products Ltd., the employee, Lesage, was hired as a Regional Controller; however, his position was eliminated and he was offered a position as Divisional Accountant. He accepted the position, and then waited too long in bringing his claim. The Court found that the Plaintiff had delayed, and in so doing had accepted, or acquiesced, in the breach.

If an employee claims that a constructive dismissal has occurred, the employee has a duty to mitigate the claimed loss.

What is particularly important about the concept of mitigation within the doctrine of constructive dismissal is that it often forms part of the liability inquiry and not merely part of the damages assessment. The employee’s duty to engage in reasonable mitigation can include remaining in the present job or accepting an alternate position offered by the employer. Our courts often need to consider whether employees have properly mitigated by remaining with their employer in the face of an allegation of constructive dismissal.

In Evans v. Teamsters, Local 31, Bastarache, J., speaking on behalf of the Supreme Court of Canada noted as follows:

In some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer ... requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself.
2. Recent Examples of Constructive Dismissal: Five Prime Areas

There are a number of ways in which employers substantially change the employment agreement, which can ultimately lead to a claim for constructive dismissal.

Changes in remuneration, changes in job content, reductions in status or prestige, changes in geographic location and a hostile or poisoned work environment are prime examples.

Employers should be cautious in making the following changes and seek legal advice at the outset to assess the likely outcome of the desired change before putting it into effect.

   i) Change in Remuneration

If an employer unilaterally reduces an employee’s remuneration it may provide grounds upon which constructive dismissal will be established. There is no bright line test, however, in this regard. Some employers have unilaterally implemented a salary reduction and yet not been found to have engaged in constructive dismissal. The result will depend upon the degree to which overall remuneration has been reduced.

Two recent Ontario cases dealt with changes in remuneration.

In *Davies v. Canadian Satellite Radio Inc.*\(^{12}\), the plaintiff worked as Vice-President – Programming for the radio division of a national broadcasting conglomerate. The plaintiff had been earning a salary of $250,000 per annum. He was approached by John Bitove, the defendant’s Chairman and CEO, and told that the company could no longer afford to pay his salary and employ him on a full-time basis. Bitove asked the plaintiff to work on a part-time basis and accept a $100,000 reduction in annual salary. The plaintiff refused to accept the newly proposed terms. The court found that this clearly amounted to constructive dismissal.

In *O’Sullivan v. Cavalier Tool & Manufacturing Ltd.*\(^{13}\) the plaintiff had been acting as Shop Foreman for the defendant, earning $93,000 per annum. He was informed that he would be returning to the shop-floor, be required to ‘punch a clock’ and must accept a $35,000 reduction in annual salary. Prior to accepting the position of Acting Shop Foreman, the plaintiff had been employed in a

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\(^{12}\) 2010 CanLII 5628 (ON SC).

\(^{13}\) 2010 CanLII 3937 (ON SC), affirmed 2011 CanLII 480 (ON CA).
supervisory role also earning more than $90,000 annually. The Court found that this change amounted to a constructive dismissal.

In contrast, in the recent Nova Scotia decision of *Gillis v. Sobeys*¹⁴, the employer eliminated an employee’s position in the regional office and offered her an alternate position that entailed a reduction in salary and a return to the shop floor.

The employee had been earning $69,900, and was eligible for an additional bonus of up to 20% of her salary. She was offered two possible alternate positions. She was offered a position with a salary of $54,500 and a one-time lump sum payment of $23,000. She rejected this offer and claimed constructive dismissal.

The trial judge confirmed the requisite, objective approach to constructive dismissal and further found that a reasonable person, in a similar situation, would have accepted the shop floor position.

Therefore, this reduction in remuneration clearly did not amount to a constructive dismissal.

The recent Nova Scotia decision reflects the earlier Ontario case of *Black v. Second Cup*¹⁵. The employer decided, for economic reasons, to separate leasing and franchising functions which initially were the responsibility of the employee. As a result of the change, the employee’s position would have become Vice-President – leasing. The new job resulted in a $10,000 salary reduction. The plaintiff refused to accept the new position. The Court found that he was not constructively dismissed.

ii) Changes in Job Content

Changes in job content can, depending on the nature of the changes, also lead to a unilateral, substantial change in the employment agreement.

Cases that deal with changes in job content usually involve alleged demotions and reductions in responsibility; however, they can also include promotions and the unilateral addition of extra work for an employee without increased compensation.

Absent an express contractual term to the contrary the right of an employer to demote an employee depends entirely on the circumstances of the case.

¹⁴ 2011 NSSC 443 at 39.
¹⁵ 1995 CanLII 7270 (ON SC).
In *Mifsud v. MacMillan Bathurst*\(^\text{16}\), Mifsud was originally employed as a die cut operator by the employer. He was subsequently promoted to a foreman position and remained in this position for 9 years. He then was demoted due to inadequate performance. The Court of Appeal for Ontario found that the employee had an obligation to mitigate by staying in the new role and there was an implied term in the employment agreement that permitted the employer to take such action, if the employee was not effectively fulfilling his or her role. Mifsud’s action was dismissed.

*Blight v. Nokia Products Ltd.*\(^\text{17}\) is a recent Ontario Superior Court of Justice decision in which an employee of Nokia was demoted from his position as Manager – Information Management to a new position referred to as ‘Special Projects’. The trial judge found that there was a constructive dismissal based on the loss of management duties and the employee’s demotion in the chain of command.

In *Chandran v. National Bank of Canada*\(^\text{18}\) the plaintiff was a senior manager at the Bank with responsibility for eleven employees. The Bank conducted a survey in Chandran’s office and nine of the eleven employees who reported to the plaintiff complained that he made condescending remarks, embarrassed employees and engaged in bullying behaviour.

The Bank subsequently sent a disciplinary letter to the plaintiff and informed him that he would be relieved of his supervisory duties and reassigned to one of two possible roles.

The plaintiff rejected both proposed roles and sued for constructive dismissal. The trial judge found that the plaintiff had been constructively dismissed, despite his salary remaining the same, as he would have lost his supervisory duties. The Court of Appeal upheld this decision.

iii) Reduction in Employee Status/Prestige

A reduction in an employee’s status or prestige can provide the basis for a claim in constructive dismissal. These issues often arise in connection with changes in job content, or remuneration.

In *Schumacher v. Toronto-Dominion Bank*\(^\text{19}\), the employee, Schumacher was one of the top five earners at The Toronto-Dominion Bank. He was responsible

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\(^\text{16}\) 1989 CanLII 260 (ON CA).
\(^\text{17}\) 2012 CanLII 2093 (ON SC).
\(^\text{18}\) 2011 CanLII 777 (ON SC), affirmed 2012 CanLII 205 (ON CA).
\(^\text{19}\) 1999 CanLII 3727 (ON CA).
for trading operations in five key areas, had 102 people reporting to him, and his group handled very large dollar volumes of investments.

Schumacher had been on a constant upward trajectory over the course of his 10-year career. However, with the hiring of a new Vice President, Schumacher’s position was substantially reduced. He lost control of several areas for which he had previously retained responsibility, in particular the most important areas were lost to him. As a result, fewer people were required to report to him, and he had much less control over investments.

The Court found this loss of prestige and status, along with a reduction in salary due to bonus losses, amounted to constructive dismissal.

In Davies and Blight, the plaintiffs were able to establish constructive dismissal due to a reduction of status. In Davies, the trial judge noted that “requiring an executive to report to a lower level within the corporate hierarchy may be viewed as a fundamental breach of the employment contract, leading to a finding of constructive dismissal.”

In Blight, the Court found that the plaintiff had established a constructive dismissal because the plaintiff’s new position involved a loss of staff management and a clear demotion in the company’s chain of command.

iv) Change in Geographic Location

Generally speaking, courts have found that a substantial change in the geographic location where an employee performs his or her work will constitute constructive dismissal.

For example in Marshall v. Newman, an 18-year employee of a small insurance brokerage in Belleville, Ontario was found to have been constructively dismissed when she was informed by her employer that another person had been hired to perform her job and she was being transferred to another office which was approximately a one-hour drive from the employee’s home. The Ontario Court of Appeal found that the location of the employee’s workplace was an essential term of her contract.

A change in geographic location, however, does not always amount to a substantial change to an essential term of the employment contract.

20 Davies, note 11.
21 O’Sullivan, note 12.
22 Davies, note 11 at 55.
23 2004 CanLII 15915 (ON CA).
In *Viking Helicopter*, Smith alleged that he had been constructively dismissed because the employer wanted him to relocate, with the business, from Ottawa to St. Clet, Quebec. This relocation was undertaken for economic reasons. Smith refused to relocate and resigned.

Finlayson J.A., writing on behalf of the Court of Appeal for Ontario, observed that a “decision to change its manner of conducting its business or a move to another place of business does not necessarily result in such a fundamental breach of its contract with its employees as to constitute a constructive dismissal.”

Whether changes in geographic location amount to constructive dismissal will depend upon a myriad of factors and thus the outcome in some cases is difficult to predict. Employers should keep in mind that changes in location for bona fide economic reasons may not amount to constructive dismissal; however, these changes may turn upon the industry in which the employer is engaged and the relative change in distance as well.

v) Humiliating/’Poisoned’ Workplace/Environment

If an employer creates a humiliating or hostile work environment, or knowingly allows such an environment to continue, this also may provide a basis for a finding of constructive dismissal.

Constructive dismissal can arise as a result of harassment and sexual harassment. A plaintiff who claims constructive dismissal on the basis of harassment or sexual harassment is not required first (or subsequently) to have sought a remedy through any governing human rights legislation. Moreover, harassment may occur outside of the ambit of enumerated grounds protected under the relevant human rights legislation.

The genesis of this expanded portion of the doctrine of constructive dismissal is found in the decision of the Ontario Courts in *Shah v. Xerox Canada Ltd.* Shah performed well. He was placed on an exchange program by the Program Manager. However, the Program Manager raised concerns about Shah’s performance and the amount of time he was spending on the exchange program. Shah thought this was unusual as his Program Manager had arranged the exchange program.

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24 *Viking Helicopter*, note 5 at p. 8.
25 1998 CanLII 14747 (ON SC), affirmed 2000 CanLII 2317 (ON CA). (“*Shah*”)
Shah received further criticisms of his performance. When he sought a transfer, his Program Manager refused to sign off on it. Shah became ill, yet the Program Manager maintained what the trial judge termed an approach that was authoritarian and impatient, that was not conducive to resolving the problems of communication, for which the Program Manager had the greater part of responsibility.

This case is of particular importance because the Court noted that it “may find an employee has been constructively dismissed, without identifying a specific fundamental term that has been breached, where the employer’s treatment of the employee makes continued employment intolerable.”

Our Courts now are prepared to find that employment agreements import employer obligations to act with decency, civility and respect. A significant or demeaning change to an individual’s work environment therefore can also lead to a finding of constructive dismissal, irrespective of any change in remuneration.

In *Bowen v. Ritchie Brothers Auctioneers Ltd.*

Employers also should be aware of *Stamos v. Annuity & Marketing Service Ltd.*

This case stands for the principle that a poisonous work environment, giving rise to constructive dismissal, can be generated by the employee’s co-workers. In this case a new employee shouted at and berated the plaintiff, and made sexist and racist remarks. The business owner made no effort to address these problems. The employee then successfully sued for constructive dismissal.

On October 10, 2012, the jury in an Ontario Superior Court action in Windsor awarded a former Wal-Mart assistant manager $1.46 million (more than she had even requested). The employee was a 10-year Wal-Mart employee who brought a claim for constructive dismissal, along with tort claims, including intentional infliction of mental suffering. She also sought punitive damages. The Plaintiff also sued the store manager for tort claims as well.

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26 *Shah* at para. 6.
27 1999 CanLII 9306 (ON CA).
The jury awarded damages against Wal-Mart for $200,000.00 for intentional infliction of mental suffering, $1 million for punitive damages and $10,000.00 for assault. The jury also awarded damages against the individual store manager of $100,000.00 for intentional infliction of mental suffering and $150,000.00 for punitive damages. Remarkably, the jury did not award any damages for constructive dismissal. The recent media reports on the case noted that the jury deliberated for less than two hours which was a shorter period than the time taken by the trial judge to instruct the jury before their deliberations.

While the jury’s award is perverse and is likely to be a subject of an appeal to the Court of Appeal, the decision stands as a reminder that employers need to manage the risk of claims for a constructive dismissal, combined with tort claims, where there are allegations of a poisoned work environment.

In *Qubti v. Reprodux Ltd.*²⁹, an employee also successfully claimed constructive dismissal as a result of a poisoned work environment. The plaintiff was a delivery driver for the defendant and established that he had been subject to racist and demeaning taunts sufficient to cause him great stress and anxiety requiring medical attention.

In the recent British Columbia Supreme Court decision, *Danielisz v. Hercules Forwarding Inc.*³⁰, an employee failed to establish constructive dismissal due to a poisonous work environment. The trial judge, in refusing to find constructive dismissal, noted that the employee had contributed to the creation of the poisonous atmosphere, and was by no means an innocent party in what had transpired.

In order to manage risk of any claim for constructive dismissal by reason of a poisoned work environment, it is important for employers to have clear policies in place, which are uniformly enforced with respect to dignity in the workplace. In addition, employers should ensure that interactions with and between employees are conducted with civility, dignity and respect.

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²⁹ 2010 CanLII 837 (ON SC), affirmed 2011 CanLII 651 (ON CA). For another example of a situation in which constructive dismissal was established due to a poisonous work environment arising from the employer’s verbal abuse of an employee see: *Strizzi v. Curzons Management Associates Inc.* 2011 CanLII 4292 (ON SC).

³⁰ 2012 BCSC 1155 (CanLII).
3. Mitigation: The Employee’s Duty

As noted above, in the context of constructive dismissal, one of the unique aspects of the doctrine is the fact that mitigation often forms part of the liability inquiry and does not just arise with respect to a damages assessment.

In *Mifsud*, the Court of Appeal for Ontario noted that it may be “reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until [the employee] finds acceptable employment elsewhere.” 31 The Plaintiff’s claim was dismissed in its entirety.

Whether an employee, who has been constructively dismissed, should take a position with their present employer or not will depend on a number of factors. The courts will not place weight on whether the employee subjectively feels that he could not continue to work for the employer. Instead the court will ask whether a reasonable person in the employee's position would have accepted the employer's offer. 32

To make this assessment fairly, the Court will consider whether, in taking the offered position, the employee would have been subjected to an atmosphere of hostility, embarrassment or humiliation.

In *Blight*, the Court found that it was not reasonable for the plaintiff to be expected to mitigate with his employer as an atmosphere of hostility had been created. A similar conclusion was reached in *Chandran*. 34 The trial judge noted that the plaintiff did not have a positive duty to accept continued employment with the defendant as he would have been subjected to an atmosphere of embarrassment or humiliation.

The mitigation requirement, however, may provide an opportunity for employers to minimize liability and risk.

This issue is particularly relevant where the employer has suffered an economic downturn. In *Jadubir v. Martinrea* 35, the employee, Jadubir, was laid off by Martinrea as part of a plant-wide layoff. At the time of layoff he was a Lead Hand toolmaker. Subsequently the employer offered Jadubir a return to work as a toolmaker at a reduced wage. Other Lead Hand toolmakers accepted work in lesser positions, in order to keep working. Jadubir rejected this offer.

31 *Mifsud*, note 16 at p. 6.
32 *Chandran*, note 18 at para. 10.
33 *Blight*, note 17.
34 *Chandran*, note 18.
35 2012 ONSC 1367 (CanLII).
The trial judge found that Jadubir failed in his duty to mitigate by refusing the modified job offer, as there was no evidence of ‘hostility, embarrassment or humiliation’ as a result of the demotion which prevented the employee from mitigating his claim for damages by staying with his current employer. The trial judge reduced the damages from the date of the subsequent offer of employment, subject to the amount of the wage differential.

In *Rowley v. High Strength Plates & Profiles Inc.*\(^\text{36}\), again due to an economic downturn, the employee, Rowley, was asked to accept a temporary reduction in pay. He did so. This changed into a 12 month period of working notice of termination. Two months into this period Rowley announced he was leaving his position. The judge found that Rowley had failed to mitigate his damages by refusing to continue working for the duration of his notice period and dismissed Rowley’s action.

Where possible, employers should seek to limit their liability and risk in the context of introducing changes that may constitute constructive dismissal by providing reasonable notice of the change to all affected employees.

This approach can eliminate exposure to liability for constructive dismissal.

### 4. Attempted Claims of “Common Constructive Dismissal”: *Kafka v. Allstate*\(^\text{37}\)

Recently, in Ontario a novel claim for a class action was attempted based on a claimed “common constructive dismissal”. The author of this paper represented Allstate.

The claim was brought by former Allstate agents who tried to bring a class action for constructive dismissal under the relevant provisions of the Ontario Employment Standards Act ("ESA").

Section 56(1) of the ESA states with respect to termination pay that “an employer terminates the employment of an employee for the purposes of section 54 if, (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period”.

Section 63(1) of the ESA states with respect to severance pay that “an employer severs the employment of an employee if, (b) the employer constructively

\(^{36}\) 2011 ONSC 6221 (CanLII).

\(^{37}\) *Kafka v. Allstate Insurance Company of Canada*, 2011 ONSC 2305 (CanLII); 2012 ONSC 1035 (Div.Ct.) (CanLII); leave to appeal to the Court of Appeal for Ontario dismissed on August 29, 2012. ("Kafka")
dismisses the employee and the employee resigns from his or her employment in response within a reasonable period”.

Under Regulation 288/01 to the ESA, thee is no entitlement to termination pay and severance pay, where the employee refuses an offer of reasonable alternative employment with the employer.

Allstate, for economic reasons, restructured its business by consolidating its operations, locating new roles and altering the manner in which it paid its agents. It provided 24 months’ notice of these impending changes to its Agents.

Three former Agents of Allstate sought to certify a class action, based on a purported common claim of entitlement to termination and severance pay under the ESA. They did not claim common law damages for constructive dismissal.

The Courts addressed whether or not a claim for “common constructive dismissal” pursuant to the ESA could be brought in the form of a class action.

The Agents also argued that a class action was the preferable procedure as it furthered the three goals of the Ontario Class Proceedings Act, 1992: access to justice, judicial economy and behaviour modification.

The Courts dismissed the Plaintiffs' motion for certification.

The motion judge considered whether the proposed changes were ‘fundamental’ in nature, and held that “in order to establish constructive dismissal an employee must show more precisely the impact of the changes upon his or her position and the employment relationship.” The claim therefore lacked the requisite element of commonality required for a class action.

The Plaintiffs also alleged that Allstate was unable to affect unilateral and fundamental changes to the employment agreements regardless of the amount of notice that was provided. They attempted to rely on Wronko v. Western Inventory Service (discussed in more detail below). The Courts rejected any such argument.

The Plaintiffs further alleged that the only option open to Allstate was to terminate all employees and offer to re-hire them according to the new terms. This unreasonable approach also was rejected in the Courts’ analysis.

38 Ibid at 31.
39 2008 ONCA 327 (CanLII). (“Wronko”)
5. Consideration of Three Scenarios

a) The employer provides reasonable notice of a change but the employee specifically rejects it in writing

This issue was dealt with by the Court of Appeal for Ontario in *Wronko*. The facts were as follows.

Western, unilaterally reduced Wronko’s entitlement to pay upon termination from two years to thirty weeks. The change was not immediate. The employer provided a long period of notice. The change would take effect in two years.

Wronko specifically objected in writing to the change and refused to accept the change. At the end of the two years, Western informed Wronko that the changes would now be coming into effect. Wronko then brought a claim for constructive dismissal.

Despite Wronko’s rejection of the new contract terms, Western permitted Wronko to continue working.

The court found that once Western was aware of Wronko’s written objection and rejection of the new terms, it had two options:

1. It could have terminated Wronko’s employment under the existing terms of the contract and then offered new employment based on the new terms, or
2. It could have accepted that there was no agreement by Wronko to the new employment agreement and Wronko’s employment would continue on the existing terms.

The Court of Appeal held that in these specific circumstances, where there was a written rejection of the new terms by the employee, the employer had acquiesced in the employee’s written objection by failing to terminate Wronko’s employment and offer employment on the new terms.

This case provides a cautionary tale for employers. Where an employee specifically objects in writing to the new terms of employment, the employer must consider the risk of inaction on its part and whether such inaction will be interpreted as acquiescence by the employer to the employee’s written objection.
b) The employer provides reasonable notice of a change, but the affected employee rejects the change, continues in his job to mitigate and commences legal proceedings

This is a difficult situation which requires a careful legal, as well as practical, response.

The employer must continue to treat the employee with respect, civility and decency throughout. The employer should not give the employee cause to allege that a ‘poisoned work environment’ has developed – exposing the employee to hostility, embarrassment or humiliation – and thus relieving the employee of the ongoing duty to mitigate by staying with the employer.

At the same time, however, the affected employee cannot be allowed to create a “poisoned” work environment, either by focusing on his civil action while being at work and while the employee should be carrying out his or her employment duties. Both the employee and employer walk a fine line in these circumstances.

c) The employer suspends an employee without pay, as an alternative to termination – is this constructive dismissal?

This issue is one of growing significance. Traditionally, progressive discipline has been more confined to the unionized employment. In Carscallen v. FRI Corporation, the trial judge noted that “historically, the common law has tended towards the view that in the absence of an express or implied term in the contract of employment, it is generally not open to an employer to suspend without pay as a means of disciplining an employee for misconduct.”

Nevertheless, where the employer does not have an express contractual term permitting progressive discipline in the form of a suspension without pay, a decision by the employer to opt for discipline less than termination has been given some possible support by the courts.

In Haldane v. Shelbar Enterprises, Doherty J.A. for the Court of Appeal for Ontario stated:

A case could be made for implying a term providing for reasonable discipline into employment contracts. Such a step would, however, raise complex questions concerning both the procedural and substantive scope of that implied term.

40 2005 CanLII 20815 (ON SC) at 30, affirmed 2006 CanLII 31723 (ON CA).
42 Haldane at para. 16.
These sentiments were echoed by the Supreme Court of Canada in \textit{McKinley v. B.C. Tel.}.\footnote{[2001] 2 S.C.R. 161. ("McKinley")} The court suggested that discipline short of termination may be acceptable in a non-unionized context. Iacobucci J., speaking on behalf of a unanimous court noted that:

\begin{quote}
This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee’s pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.\footnote{\textit{McKinley} at para. 52.}
\end{quote}

Nevertheless, despite some clear advantages to discipline falling short of termination, concern has been expressed that unlike in the unionized context, with its provision for neutral arbitration, progressive discipline could be invoked on an ad-hoc or arbitrary basis.

In \textit{Carscallen}, the trial judge commented on this aspect as follows:

\begin{quote}
In the unionized setting, employers and unions expressly bargain for suspension rights at the time of the formation of a collective agreement. Notably, most collective agreements containing the right to suspend also provide the employee with the right to grieve the fact or the nature of the suspension.

In the white collar non-unionized setting, if a right of suspension is to be contracted for, and upheld as fair and reasonable, a right of review must exist in the contract or policy akin to the unionized employee’s right to grieve. The supervisor imposing the discipline must not be permitted to be the sole judge, jury and executioner. There must be an opportunity to have whatever penalty is imposed reviewed by another party.\footnote{\textit{Carscallen} at 43-44.}
\end{quote}

Therefore, employers who seek to apply progressive discipline would be well advised to have a clear policy setting out circumstances in which progressive discipline may be invoked.
Moreover, this policy should be explicitly referenced in, and form part of, the employment contract for which the parties bargain at the commencement of the employment relationship. It may also be advisable to have a neutral process for review.

The concern remains that where an employer imposes discipline falling short of termination, specifically a suspension without pay, the employee still may argue that this amounts to a constructive dismissal.

For example, if an employee earning $60,000 is suspended without pay for two months the employee would forfeit approximately $10,000 of their remuneration for that year. It is possible that a claim could be brought for constructive dismissal as a result of this change in remuneration.

The case of *Frost v. Toronto Transit Commission* dealt directly with this particular issue. The author of this paper represented the Toronto Transit Commission.

The employee was found to be in significant contravention of the employer’s internet usage policy, and was given a 23-week suspension without pay. The employer required the employee to use his entitlement to 9 weeks of accrued unused vacation toward this suspension, resulting in a loss of 14 weeks’ pay. In so doing, the employer therefore removed Frost’s ability to take his vacation at a “mutually convenient time”.

The employee claimed that this unilateral employer action was in breach of his employment agreement, that he never acquiesced in this change and he claimed constructive dismissal.

With the help of a creative pre-trial judge, the parties were able to resolve the dispute without a trial.

The law in this developing area of constructive dismissal law remains somewhat unclear. It is likely to receive further consideration as employers seek to find ways of addressing progressive discipline in a non-union environment without having to resort to dismissal for cause for conduct which may not survive the Court’s contextual analysis.
6. Professional Responsibility: Drafting Written Agreements Which Seek to Exclude the Court’s Inquiry into Constructive Dismissal Claims

In-house counsel may be asked to draft employment contracts in an effort to seek to limit or eliminate an employee’s ability to pursue a claim for constructive dismissal.

In so doing, however, it is important to remember the applicability of rule 2.01, 2.02 and 2.04 of the Law Society of Upper Canada’s Rules of Professional Conduct.

Rule 2.01 requires that, in dealing with clients, lawyers must be competent. Rule 2.02 requires that lawyers must be both honest and candid when advising clients and finally rule 2.04 requires that lawyers must avoid conflicts of interest.

In-house counsel need to be candid with their client where they are asked to preclude the Court’s inquiry into a constructive dismissal claim. They need to consider whether the drafting of any such term will be enforceable, given the nature of the doctrine of constructive dismissal itself. When the employee alleges a unilateral repudiation of a term of a written contract, there is a need to consider candid advice on the ability to preclude the Court’s inquiry.

In-house counsel must be aware that there is a tendency in the courts to focus on the “imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees.”46

In Ceccol, the employer attempted to rely on a complete employment agreement argument and failed. The contractual term in dispute was found to bear two plausible interpretations. One interpretation would remove the common law right to reasonable notice, while the other would preserve it. The court, first commenting on the importance of protecting vulnerable employees, elected the interpretation that retained reasonable notice for the terminated employee.

In-house counsel may need to consider candid advice to the client and potentially a preferred way in which an employer can seek to exclude a court’s ability to consider a claim for constructive dismissal through insertion of an arbitration clause into the written employment contract.

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46 *Ceccol v. Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA) at 47. ("Ceccol")
Success will depend upon the nature of the dispute and the scope of the clause. The clause must be clearly and strictly worded to avoid judicial interference.

In *Huras v. Primerica Financial Services Ltd.*⁴⁷, Huras brought a proposed class action, in which he alleged that the Defendant failed to pay minimum wage for the hours that the class members attended a training program pursuant to the ESA.

The defendant submitted that the dispute fell within the ambit of the arbitration clause contained in the employees’ written contracts and thus the Court was precluded from entertaining the claim.

The Court noted that an arbitration clause must be construed in light of the circumstances in which it was made. The Court found that the arbitration clause did not apply in the circumstances. Despite this, the Court acknowledged that:

> It is established policy that courts should encourage the resolution of disputes through arbitration…where the language of an arbitration clause is capable of bearing more than one interpretation, one of which provides for arbitral resolution, a court should favor that interpretation.⁴⁸

In-house counsel therefore should recognize that in the context of constructive dismissal, even arbitration clauses will be given close scrutiny where the clause seeks to preclude the Courts from intervening. The Court is concerned with the interests of fairness and whether the employee also had the opportunity to obtain independent legal advice. Therefore, where the desired remedy for any alleged constructive dismissal is by way of private arbitration, the relevant clause must be carefully drafted and the employee should be given the opportunity to obtain independent legal advice as well.

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⁴⁷ 2001 CanLII 17321 (ON CA) (“*Huras*”) and followed in *Weiss et al. v. Lewis et al.* 2008 CanLII 76132 (ON SC) at 14.

⁴⁸ *Huras* at para. 18.