

Labour & Employment**April pay cut is constructive dismissal | Stuart Rudner**By **Stuart Rudner**

Stuart Rudner

(April 16, 2021, 8:34 AM EDT) -- It doesn't seem like it's been over a year, but on April 2, 2020, my article in *The Lawyer's Daily* was titled *Constructive dismissal and COVID-19*. In that post, I wrote that "How our courts will treat this unprecedented situation in the future remains to be seen."

Here we are a year later, and although we have not yet seen a judicial decision on whether a temporary layoff will be a constructive dismissal during a pandemic, we do have one which confirms that reducing an employee's pay between 16 per cent and 20 per cent is a constructive dismissal.

As readers will know, constructive dismissal involves a unilateral and substantial change to a fundamental term of the employment contract or relationship. The Supreme Court of Canada set out the test for constructive relatively in *Potter v. New Brunswick Legal Aid Services*

Commission 2015 SCC 10, which test was referenced by the court in *Kosteckyj v. Paramount Resources Ltd.* 2021 ABQB 225:

The first branch of the *Potter* test has two steps. First, the court must determine objectively whether a breach has occurred. To do so, the court must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change or if the employee consents or acquiesces in it, the change is not a unilateral act and will not constitute a breach. To qualify as a breach, the change must also be detrimental to the employee. Second, once it has been objectively established that a breach occurred, the court must ask whether 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 (*Potter*, at paras. 37-39).

The second branch of the *Potter* test necessarily requires a different approach. On this branch, constructive dismissal consists of conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract (*Potter*, at para. 42).

In *Kosteckyj*, the company implemented cost-cutting efforts to reduce the financial impact of the pandemic. As a result, the plaintiff's salary was cut by 10 per cent, RRSP contributions (six per cent of salary) were suspended, and the state of her bonus was put in limbo. Less than a month later, the plaintiff was dismissed without cause in a further cost-cutting effort.

Impact of a pandemic

The plaintiff alleged that she had been constructively dismissed when her wages were cut. In assessing whether there was a constructive dismissal, the court briefly mentioned the financial context:

Both parties accept that the Cost Reduction Program was a legitimate business reaction to turbulent economic times. However, it significantly affected Ms. Kosteckyj by imposing a salary reduction of 10%, a suspension of the RRSP contribution valued at 6% of her salary and the "delay/cancellation of the 2019 Bonus Program". I find that the compensation reduction

imposed by the Cost Reduction Program was detrimental to Ms. Kosteckyj and that a breach of her employment contract occurred.

The court did not delve deeper into the issue than that. To my mind, it is still entirely possible that another judge might try to find a way to help an employer if they can show that they truly had no alternative but to impose changes in order to reduce labour costs. But at this point, it is purely speculation. As I said in my article in *The Lawyer's Daily* last April:

Some ... have suggested that it is not right to assess constructive dismissal through a pre COVID-19 lens. That is a compelling position, and I have tremendous sympathy for the businesses that, realistically, have no choice. The law was certainly not created to handle situations like this, but at this point, the law of constructive dismissal has not changed.

It is quite possible that a court will, when asked to interpret the current set of circumstances, decide that the law of constructive dismissal cannot be applied in its current state to the entirely new situation we face. Or it is possible that a government body will intervene. However, neither of those things has happened yet.

I do note that some jurisdictions, such as Ontario, have amended their employment standards legislation to provide that COVID-related layoffs will not be deemed to be constructive dismissals under the legislation. However, that does not impact the common law.

How much of a cut is too much?

With respect to the extent of the pay cut, the court found that the total impact was substantial enough to be a constructive dismissal:

The 16% reduction, together with the loss of a cash bonus of \$6,267, would result in a total reduction of 20%. The effect of the Cost Reduction Program significantly affected Ms. Kosteckyj's compensation in the range of 16.65% to 20%, without considering any value for the RSUs. I find that the implementation of the Cost Reduction Program resulted in the constructive dismissal of Ms. Kosteckyj.

While much of the discussion in the early stages of the pandemic focused on temporary layoffs, we saw many employers try to avoid layoffs by imposing wage and/or hours reductions. That is less risky, but still far from without risk.

No constructive dismissal with agreement

A layoff or pay cut is not a constructive dismissal if it is allowed by the terms of the contract. Employers that do not have such rights built into their contracts can obtain the consent of the employee(s) at the time, either explicitly or implicitly.

An employee who waits too long to object to a change can be deemed to have accepted it. The defendant in *Kosteckyj* asserted that by failing to object to the pay cut, the plaintiff had effectively accepted it. However, since she only had 25 days before she was dismissed, the court rejected that argument.

At the end of the day, we are still waiting for more judicial interpretation of constructive dismissal during a pandemic to see whether the existing law will be applied in the same way to entirely new circumstances.

Stuart Rudner is a leading Canadian employment lawyer and mediator at Rudner Law. He is the author of You're Fired! Just Cause for Dismissal in Canada. He can be reached at 416-864-8500 or stuart@rudnerlaw.ca.

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437- 828-6772.

