Cassels

Avoiding Constructive Dismissal Claims

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As the world grapples with the containment of the COVID-19 pandemic, employers across the country, already feeling its impact through what is, for many, an unprecedented, sharp downturn in business, are grappling with some difficult decisions of their own.

Across the retail and services sectors among other susceptible industries, government directions to practice "social distancing" and, in some cases, to self-isolate or self-quarantine, are leading many prospective clients and customers to stay home. This, in turn, has led many employers to contemplate either temporarily suspending operations or, in other instances, reducing the hours or scope of operations. Other employers, experiencing significant reductions in revenues and, in many cases, employees working at far less than full capacity, might consider reducing compensation.

Before putting such plans into motion, however, employers need to understand the employment law implications of such measures and, in particular, the potential risk for constructive dismissal claims.

What is Constructive Dismissal?

The phrase "constructive dismissal" refers to a situation where, while an employer has not expressly terminated an employee, the employee alleges that the employer's actions amount to a repudiation of his or her employment contract. The risk of constructive dismissal claims typically arises where an employer unilaterally changes a fundamental term or condition of the employment relationship.
An employee who is successful in establishing that a constructive dismissal has occurred would effectively trigger his or her termination entitlements under a contract of employment or, absent a contract with a valid termination provision, at common law.

With this in mind let us now consider some of the most common measures employers might consider to address the economic downturn occasioned by COVID-19.

Temporary Layoffs

The applicable employment standards legislation in every province and territory in Canada, as well as the *Canada Labour Code*, provides employers with the ability to temporarily lay off an employee without triggering a dismissal for purposes of such legislation. The maximum duration of a temporary layoff before it becomes a dismissal varies in every jurisdiction, however. In some jurisdictions, it is quite short. Moreover,

in some Canadian jurisdictions, an employer's agreement to provide benefits or compensation to an employee during the period of layoff may further extend the maximum duration. Different jurisdictions likewise have different rules surrounding the content of any notice of layoff to be provided to employees and the manner in which it is to be provided.

Where an employee remains on layoff beyond the maximum permitted duration for a temporary layoff, the layoff will be considered a termination and will trigger the employee's statutory entitlements to pay in lieu of notice of termination (and, where applicable in Ontario and under the *Canada Labour Code*, severance pay).

While such legislated "authorization" to lay off may provide employers with some comfort in knowing that, by initiating a temporary layoff, they will not be running afoul of any legislation, it will, unfortunately, not insulate an employer from potential claims of constructive dismissal, except where an employee has an employment contract that specifically confers on the employer a right to temporarily lay off.

At common law, the risk will remain that a laid-off employee may allege that, by having been sent home without pay, their employer has repudiated or fundamentally breached their employment agreement. From a practical standpoint, however, we suspect that many employees will understand that we are in very uncertain times at the moment and will think twice before effectively triggering their own terminations to access termination entitlements, rather than "weathering the storm" and applying for EI benefits in the meantime. Moreover, while, at present, the one-week waiting period for Employment Insurance (EI) benefits has only been waived in the case of employees required to self-quarantine, it is conceivable, if not likely, that we will see further employee-friendly changes in respect of EI as more and more businesses re-visit their staffing requirements in response to COVID-19.

Having said that, the practical risk of a constructive dismissal claim arising from a layoff will also likely depend on: (a) whether any benefits or payments are continued by the employer during the layoff period; (b) the duration of any layoff; and (c) how the need for the layoff is communicated to the employee. Transparent communication can assist greatly in reducing the risk of constructive dismissal claims and creating a "we're all in this together" mindset.

Finally, as a last note on layoffs, it is important to ensure that, where temporary layoffs are implemented, they are not targeted at specific individuals for improper considerations including, among others, whether the laid off individual has taken a permitted leave of absence under employment standards legislation due to circumstances arising as a result of the COVID-19 pandemic or otherwise.

Reductions in Compensation and/or Hours

A constructive dismissal risk also arises in circumstances where employers might choose to address the

downturn by reducing employee compensation, either in conjunction with an accompanying reduction in employee hours or otherwise.

Given that it is at the heart of the bargain that is struck between employers and employees, clearly, there are circumstances where a reduction in employee compensation will amount to such a significant change to a fundamental term and condition of employment that a constructive dismissal may be triggered. The main consideration in gauging the risk involved in reducing employee compensation is the quantum of the reduction itself.

In an extreme example, where an employee's salary is reduced by half, for example, the risk may be very high and the reduction may technically constitute a layoff. On the other hand, very limited reductions in salary, particularly, where they are accompanied by reduced requirements insofar as hours of work are concerned, are far less likely to lead to a constructive dismissal claim. The risk can further be reduced where there is some commitment made to repay forgone salary when circumstances, and cash flow, improve.

In the case of hourly employees, where hours are reduced to address a reduction in operating hours, the risk of a constructive dismissal claim will depend in part on: (a) the extent of any reduction in hours; (b) whether the employee has a contract explicitly recognizing that hours may vary (in which case, the risk will obviously be lessened); and (c) how the need for the reduction is communicated to employees. It also is worth noting that employers may be able to further support employees by participating in the Employment Insurance Work-Sharing Program. This Program provides benefits to employees for the days they are not working.

At the end of the day, however, while a legal risk will, to some degree, always be present in effecting such a change to compensation, it is important to keep in perspective the uncertain "new world" in which we are operating and how that is likely to impact the way in which employees will perceive and/or respond to a reduction in compensation and/or hours.
