

Continuing to Work Following Changes to Employment Not Considered Acceptance of Changes

Joe Morrison

It's not easy for an employer to change the terms of an employee's employment without the employee's consent. Any significant unilateral change may give rise to a constructive dismissal claim by the employee. Even in situations where there is an economic justification, an employee does not have to accept a change in their terms and conditions of employment.

However, if an employee does not object to a change, and keeps working following the change, the employee is eventually deemed to have accepted the change, or at least condoned it. The more time that passes, the more difficult it is for the employee to later claim that they were constructively dismissed.

But what happens if an employee initially objects to a change but then keeps working for an extended period while the change applies? Can they still claim constructive dismissal damages?

The Ontario Superior Court recently dealt with this issue head on in *Russo v. Kerr Bros. Limited*¹. In this case the parties agreed that there had been a constructive dismissal when the employer had reduced an employee's compensation significantly as part of a cost savings measures needed to save the business. The employer and employee disagreed, however, on the characterization of the employee's conduct following the change and initial objection. The employer viewed the employee's continuing to work as an acceptance of the change; the employee viewed it as an attempt to mitigate their claim for damages. The court sided with the employee.

¹ [2010] ONSC 6053 (decision released on November 2, 2010)

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Russo holds that, provided an employee initially makes it clear that they are not accepting a change to the terms and conditions of their employment, the employee's continued employment should not be construed as an acceptance of such changes. An employee's conduct in continuing to work is merely a means of mitigating the employee's constructive dismissal damages.

FACTS

The facts in *Russo* are straight-forward:

- Russo started working for Kerr Bros in 1972 as a shipping clerk when he was just 16 years old. He remained employed for 37 years, eventually occupying the position of warehouse manager earning approximately \$85,000 in salary per year plus an annual bonus of approximately \$30,000.
- In April 2009, a new president was appointed with a mandate to determine the viability of keeping the company operating as it had been suffering significant losses and was on the verge of bankruptcy.
- In May 2009, the new president determined that the compensation provided to employees was not competitive and asked all employees to take a 10% wage cut. He also eliminated the pension plan.
- In July, the new president decided further cuts were necessary and determined that four employees, including Mr. Russo, were being paid excessive remuneration given their skill level and the market rates for their positions. He approached the four employees and asked them to accept a further pay decrease and to forgo their entitlement to an annual bonus. In particular, Mr. Russo's salary was to be reduced by \$20,000 and his \$30,000 annual bonus discontinued.
- Although the new president attempted to persuade Mr. Russo to accept these changes, Mr. Russo rejected them. The new president apparently became frustrated with Mr. Russo's position and implemented the changes without Mr. Russo's consent.
- In response, the Mr. Russo retained counsel who wrote to the employer and clearly advised that Mr. Russo was not accepting these changes. The letter did not indicate that Mr. Russo would attempt to mitigate his damages by continuing to report to work, nor did the employer respond by requesting Mr. Russo to continue working. However, Mr. Russo kept working despite these changes.
- Mr. Russo eventually filed a statement of claim alleging constructive dismissal and brought a summary judgment motion as a means of attempting to quickly resolve the matter. As part of the summary judgment motion, the plaintiff argued that his

continued employment was merely an attempt to mitigate his damages, not an acceptance of the changes.

JUDGEMENT

In its judgment, the court addressed the following key points:

1. What are an employee's and employer's options when faced with a constructive dismissal scenario?

In this case, both the employer and employee agreed that there had been a constructive dismissal. However, they disagreed with the characterization of what had happened following the constructive dismissal.

The employer argued that the employee only had two options: (i) accept the change or (ii) quit and claim constructive dismissal damages. As the employee had continued to work once the changes had been implemented by the employer, that meant that the employee had accepted the changes.

The court disagreed. It held that an employee really had three somewhat different options: (i) accept the change, (ii) reject it and sue for constructive dismissal, or (iii) reject it and insist on adherence to the original terms.

In so finding, the court noted the reasoning of MacKay, J.A., in *Hill v. Peter Gorman Ltd.*², which was adopted and discussed by Winkler, C.J.O., in the relatively recent and much talked about case of *Wronko v. Western Inventory Service Ltd.*³. As MacKay, J.A., stated: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

In effect, an employee need not quit to confirm their rejection of a change to their terms and conditions of employment. The employee's continuing to work will not, in itself, lead to a finding that they have accepted the change, provided the employee has clearly advised their employer that they are not accepting the change.

This approach is in line with previous decisions of the Ontario Court of Appeal and the Supreme Court of Canada, where it has been held that an employee has a duty to continue to work as a means of mitigating their constructive dismissal damages. The exception is where the relations between the parties have become too acrimonious, or it is too humiliating for the employee to continue working. It is also parallels the approach that is uniformly taken in a unionized employment context, which requires an employee to "work now – grieve later".

² (1957), 9 D.L.R. (2d) 124 (Ont. C.A.).

³ (2008), 90 O.R. (3d) 547 (C.A.).

2. *Whether Russo's continued employment was an acceptance of the new terms?*

The twist in Mr. Russo's case is that he was not expressly asked to continue to work by his employer, and he did not specify, when he continued to work for 15 months (*i.e.* from the time the changes were made to when the summary judgment motion was heard), that he was only doing so as a means of mitigating his damages.

In determining what to make of the Russo's lengthy stay following the change to his remuneration, the court placed a heavy reliance on the fact that Mr. Russo, through his counsel, had clearly objected to the change. Mr. Russo's conduct, following this clear indication that he was not accepting the change, was not given as much weight.

However, the court noted that there are limits to how long an employee can continue to work before it will be construed as an acceptance of the changes. The court noted the case of *Anstey v. Fednac Offshore Inc.*⁴, which made the following observation:

An employee who remains in the new position changed unilaterally by the employer, with a view to mitigating his or her damages may be expected to do so only for a period constituting reasonable notice or until within that period they secure alternative employment.

As the reasonable notice period was determined to be 22 months in Mr. Russo's case, his continued employment for 15 months (when the summary judgment was heard) was not considered to be an indication of an acceptance of the changes.

This is an interesting point to consider, as in theory, if an employee overstayed their reasonable notice period, they may negate their constructive dismissal claim. However, in practice, it is unusual for an employee to claim constructive dismissal and continue to report to work for an extended period. The relationship typically becomes acrimonious and the employee stops working long before the matter goes to trial.

LESSONS FOR EMPLOYERS

The lesson for employers is that an employee's continued employment following an initial objection to a change in the employee's terms of employment ought not to be considered an acceptance of that change. Once an employee makes it clear that they are not accepting a change to the terms and conditions of their employment, employers should not sit back and allow the employee to continue to work under the changed terms and expect that they can claim that the employee has "accepted" the change.

Once an employee makes it clear that they are not accepting a change, it's up to the employer to make the next move. The employer has some options. It can terminate the employee's

⁴ [1990] F.C.J. No. 477 (T.D.)

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employment and offer new employment on the new terms. In fact, depending on the employee's termination and severance entitlements, it may be possible for an employer to provide the employee with sufficient advance notice of the change to avoid a constructive dismissal claim, or at least avoid any damages that may be attributable to such claim.

Overall, employers contemplating changes to employees' terms and conditions of employment should carefully consider how they are going to approach the imposition of such changes, prior to implementing them. This includes a review of the employee's individual termination and severance entitlements to ascertain whether advance notice can be provided to avoid having to provide termination and severance pay if the employee rejects the proposed changes. The options may differ in each case; understanding exactly what options you have is the starting point for determining how best to proceed.

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