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EMPLOYERS' ALERT

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A constructive dismissal is said to occur when a substantial/fundamental term of employment is altered, such that the employer evidences an intention to no longer be bound by the employment contract. If the employee rejects the change and treats it as an act of repudiation, he or she is then entitled to claim damages for wrongful dismissal.

One question that often arises in the context of a constructive dismissal is whether the employer can nevertheless rely on contractual termination provisions to limit the employee's alleged entitlements at common law. In *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383 ("Moore"), the Ontario Court of Appeal offers some guidance on this hotly debated topic.

Termination provisions can limit an employee's constructive dismissal entitlements

The *Moore* case involved an employee who brought an action against her former employer seeking damages for constructive dismissal. The trial judge found that the employer had violated the employment agreement and committed acts of constructive dismissal, including by:

- altering the employee's responsibilities from that of a non-supervisory line technician to a line supervisor; and
- denying the employee various benefits listed in the employee handbook.

Notwithstanding his conclusion that a constructive dismissal had taken place, the trial judge went on to find that the employment agreement between the parties properly limited the employee's termination entitlements. In that respect, the trial judge relied heavily on the language of the employment agreement, which provided as follows:

Termination provisions can limit an employee's constructive dismissal entitlements

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> If [the employer] terminates your employment, you shall be entitled to receive only such notice of termination, termination pay, benefit continuation and/or severance pay, if any, as are required by the [*Employment Standards Act, 2000*] in the circumstances of the termination. **This paragraph defines and limits your full entitlement** to notice of termination, pay in lieu of notice, benefit continuation and severance pay upon termination of employment, and **shall apply regardless of any changes to the terms and conditions of your employment (including changes in position, duties and responsibilities, reporting relationships, and compensation)**. Please read it carefully. [Emphasis Added]

The employee appealed the decision, arguing that once the trial judge determined that a constrictive dismissal had taken place, the employment contract was void and its terms could not be used to limit her termination entitlements.

The Ontario Court of Appeal succinctly rejected this submission, finding no error in the trial judge's findings that the employer acted within its contractual rights:

> Provisions respecting notice of termination of employment can limit the pay applicable on constructive dismissal... In the present case, the terms of the employment contract specifically address the calculation of notice upon constructive dismissal.

The ruling in *Moore* may have resolved some uncertainty surrounding the enforceability of termination provisions in the face of a substantial/fundamental contractual breach (we wrote a blog on a related topic earlier this year).

Interestingly, other cases appear to have taken somewhat of a conflicting approach, finding that an employer cannot both breach and benefit (i.e. substantially/fundamentally breach the agreement it drew up,

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and then claim a special advantage under it) – see *Ebert v. Atoma International Inc.*, (1997) 70 A.C.W.S. (3d) 1016 (Ont. Gen. Div.). One of the underlying rationales to this principle is that an employer can only rely on a termination provision that forms part of an employment contract that remains in force and effect. Where there is a constructive dismissal, the contract (along with the termination provision therein) is repudiated by operation of law, and the employee is thereby entitled to reasonable notice at common law.

That being said, the distinguishing factor in *Moore* appears to have been that the termination provision expressly contemplated the possibility of a constructive dismissal. Setting aside the academic debate as to whether this is a reasonable distinction, it undeniably informs the language that employers should be adding to their termination provisions.

Key Takeaways

1. **Contractual constructive dismissal provisions:** Termination provisions should make both implicit references (e.g. this provision shall apply regardless of any changes to the terms and conditions of your employment) and explicit references (e.g. this provision shall apply in the event of any claim that you have been constructively dismissed) to the employee's entitlements in the context of a constructive dismissal.
2. **Comply with contractual terms:** As we have highlighted in previous blogs, employers must still ensure that they diligently follow the language of the termination provisions they intend to rely on. Material omissions may preclude reliance on termination provisions that are otherwise enforceable.
3. **Alter terms of employment cautiously:** In another one of our blogs, we highlighted several best practices that employers should consider when making unilateral amendments to employment contracts. Adhering to those best practices may end up being less costly than litigating uncertain disputes over constructive dismissal claims. Written by Titus Totan