SMHI LEGAL NOTES
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Constructive Dismissal - Not a Sure Thing

Constructive dismissal is a type of wrongful termination of an employee by an employer. What makes constructive dismissal different and tricky is that it is the *employee* who must actually make the decision to leave his or her employment. In other words, if the employer has made significant changes to the job or the employer's behaviour is so intolerable that the employee is left with no choice but to resign, then the employee may be able to make the decision to leave and still sue for wrongful termination.

The Ontario Superior Court of Justice recently decided a claim alleging constructive dismissal.

Rowley worked as a salesman for a steel company for 15 years. His income consisted of a base salary plus commissions on the company's gross corporate sales. Several months before leaving the company's employ, Rowley, along with other sales personnel, were asked to accept a temporary reduction in their rate of commission. The reason for the reduction was the difficult economic situation and its effect on the employer's business. Rowley agreed to this change, and entered into a Temporary Commission Agreement covering a four month period.

Two months later, Rowley was told that his job was being terminated in 12 months.

Rowley continued to work for the company for another two months then he announced that he was leaving the company to become sales manager at another steel company. However, his compensation was less with the new company.

Rowley sued his former employer, claiming that he had been constructively dismissed and that he was entitled to the difference between his previous salary and his new salary for the balance of the notice period. To support his position, Rowley claimed that, after receiving the letter of termination, the employer attempted to transfer his assigned customers to other sales personnel, to require that he take part in joint sales calls with other sales personnel and repeatedly inquired about his progress in finding other employment.

The employer took the position that Rowley had not been constructively dismissed that he was provided with reasonable working notice of 12 months, and that he voluntarily resigned after two months. According to the employer, joint sales calls were consistent with past practice and there had been no attempt to reassign Rowley's customers. In addition, they claimed that their inquiries about Rowley's efforts to find other employment were not persistent and were only intended to be supportive in nature.

The employer further argued that even if Rowley had been constructively dismissed, he had failed to take reasonable steps to mitigate his damages by continuing to work for them for the balance of the notice period, instead of taking the lower paying job.

The Court explained constructive dismissal this way:

Constructive dismissal occurs when an employer unilaterally makes a fundamental or substantial change to specific terms of an employment contract without providing reasonable notice of that change. Constructive dismissal also occurs where the employer's conduct amounts to an effective repudiation of the entire employment relationship, rather than a change in specific terms of the employment contract. Such repudiation occurs where the employer's conduct creates a hostile work environment which renders the employee's continued employment intolerable. Each constructive dismissal case must be decided on its own facts. The test for

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Ordinary Drivers

Leave sooner, drive slower, live longer. ~Author Unknown

There have been several interesting cases involving motor vehicle accidents that have come before the Ontario Courts over the past number of months. While all three recount tragic fact situations, the decisions do provide important direction about the legal obligations of drivers.

Deering v. Scugog (Township)
Five friends decided to go to a late night movie. Nineteen year old Shannon Deering was the driver. The road they took was a low volume, rural paved two-lane roadway. That particular summer, the road had no centre line, no lane marking and no signage. The speed limit was an unposted 80 km/hr.

As Shannon came up a hill on the road, the headlights of an eastbound vehicle appeared over the crest of the hill. Shannon believed that the eastbound vehicle was in her lane, so she steered right and lost control of her vehicle. It rolled and smashed into a culvert. The other vehicle continued down the hill and was never identified.

Shannon had been driving approximately 10 km per hour above the speed limit. There was no alcohol or drugs involved in the crash. Both Shannon and her sister were left quadriplegic and two other occupants of the vehicle sustained serious injuries.

The Court concluded that municipalities have a duty to keep their roads in a reasonable state of repair so as to protect "ordinary drivers" from an unreasonable risk of harm.

The Court went on to describe the "ordinary driver" as follows:

The standard of care uses as the measure of reasonable conduct the ordinary reasonable driver and the duty of repair arises wherever an unreasonable risk of harm exists on the roadway for which obvious cues on or near the road are not present and no warning is provided…The ordinary motorist includes those of average range of driving ability —not simply the perfect, the prescient, or the especially perceptive driver, or one with exceptionally fast reflexes, but the ordinary driver who is of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes.

The municipalities in this case were found to have breached their obligation to maintain its road. However, Shannon was found to be contributorily negligent for driving 90 km per hour up the hill where the crash happened. The result was that fault was apportioned at two-thirds to the municipalities and one-third to Shannon Deering.

This decision, specifically with respect to liability, is currently under appeal.

Morsi v. Fermar Paving Ltd.
On June 15, 2005, at approximately 6:30 p.m., Mark Morsi was driving alone on his way home from work. The weather and

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whether the employer's conduct amounts to constructive dismissal is an objective one, considered from the perspective of a reasonable person in the same situation as the employee.

Following a review of the evidence, the Court concluded that Rowley had not been constructively dismissed. Specifically, the Court found that Rowley had not established that the conduct of the employer, taken as a whole, was likely to cause a reasonable person in the same position as Rowley to find that continued employment with the employer was intolerable, which would have allowed Rowley to treat the employment relationship as at an end.

Based on the Court's finding, it was not necessary to consider whether the notice period was appropriate or whether Rowley had properly mitigated his damages. However, the Court chose to address both issues. With respect to the notice period, the Court concluded that 12 months was a suitable period based on Rowley's age, experience and the fact that he had held a senior sales position. The Court considered his experience and as contacts positive factors that would assist him in obtaining an equivalent position with another employer.

As regards mitigation, the Court agreed with the employer's position that Rowley would have been obliged to mitigate his damages by continuing to work for the employer until the end of the notice period. Although the Supreme Court of Canada has stated that an employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation, this was not, by his own admission, the situation Rowley found himself in.

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driving conditions were perfect. There was a 400 metre stretch of road that had recently been resurfaced. This section was not straight, rather there was a long sweeping left curve. As Mark traversed this section, he was confronted by several road signs, some permanent and others temporary, including a yellow and black reverse curve sign with a 40 kilometre per hour advisory tab, a speed sign indicating a 60 kph limit, a construction ahead sign and an orange and black pavement ends sign.

The ordinary motorist includes those of average range of driving ability —not simply the perfect, the prescient...

Mark ignored these signs, especially the speed signs. The evidence from the police and the accident reconstruction expert witnesses was that he exited the long left turn at about 90 kph, accelerated hard onto the short straight section of the road, and reached a speed of 117-120 kph at the transition point. He lost control of his car, hit a telephone pole and was killed.

The trial judge apportioned liability as follows: the paving company – 25 per cent; the municipality– 25 per cent; and Mark – 50 per cent.

On appeal, the Court found that the driver Mark was 100 per cent liable for the accident. This decision was based on the fact that had he driven at or even modestly above the speed limit or, in other words, had used 'ordinary care' while negotiating the reverse curve on the road, there would not have been an accident. The Court concluded that this was not a driver making a mistake, rather it was reckless driving.

Schurr v. Hutchinson

This case involved the driver of a delivery truck rear-ending a car that was then propelled forward and ran into the plaintiff pedestrian. Generally, in these situations, insurance companies consider the driver that rear-ends a vehicle to be the at fault driver.

In this case, the plaintiff argued that both drivers were at fault and therefore responsible for his injuries. To be successful, the plaintiff had to establish that the driver of the car had done something wrong such that she contributed to the accident.

The facts showed that the driver of the car was inexperienced and had been travelling to a place that she was not familiar with. She admitted that she thought the proper thing to do when making a right-hand turn is to stop, turn your signal on, and then look for pedestrians. The delivery truck driver testified that the driver of the car never used her signal and that in fact she stopped suddenly, which caused him to slam into her, sending her car into the intersection.

The jury determined that the driver of the car had crossed the line into the intersection at the time of the accident and that she could not make her right-hand turn safely. She was found to be 20 per cent at fault and her share of the damages was $1 million.

These three cases are a stark reminder that with the privilege of driving come legal obligations and when those obligations are breached the consequences can be significant.

Condo Fees

Condo fees are a fact of life for many residents of the GTA. The fee is a monthly amount to help pay for the operating expenses of the common property elements. In addition, a portion of the fees will be paid into the Condominium Corporation's reserve fund. The reserve fund is used to finance major repairs and renewal projects over the life of the condominium building.

This money is crucial to keep the building and common areas properly repaired and maintained. Therefore, it can become a serious financial burden to the corporation if owners are not paying their monthly condo fees.

The Condominium Act does give the corporation a means for collecting unpaid fees by allowing it to register a lien on the condo. In addition to the outstanding condo fees, the Certificate of Lien also allows the corporation to collect interest and legal expenses.

The Certificate of Lien will be given to the owner of the condominium and it will also be given to all mortgagees. In addition, the Act gives the corporation the power to enforce the lien by giving it the option of foreclosure or power of sale.

Condominium fees are the lifeblood of a condominium corporation and the repercussions of failing to pay the fees can be serious for the owner of the condo.

New Legal Changes for 2012

The following is a pot pourri of recent changes to a number of different laws.

Residential Landlord and Tenant Law
The guideline increase for rents for 2012 is 3.1%. A landlord can legally increase rent once every 12 months, provided the tenant is given 90 days notice in writing.

Family Law
As of January 1, 2012, the rules for dividing pensions under the Family Law Act have been changed. Separating spouses will no longer have to resort to the services of a pension valuator. Instead, a pension plan administrator will determine the value of benefits according to a legal formula. The second major change is that an immediate lump-sum transfer from the plan of the active pension plan member must now be made to the non-member spouse. For retired members, settlement is made by dividing pension plan members payments. For additional information about these changes please contact a member of our family law group.

Accessibility
On January 1, 2012, the Accessibility Standard for Customer Service came into effect for all businesses and organizations in Ontario with one or more employees. For everything you need to know about these changes visit the Ministry of Community and Social Services' website at www.mcss.gov.on.ca

Employment Law
Mandatory retirement has been eliminated for federally regulated workplaces and employers. What this means is that, unless a federally regulated employer can prove that there is a bona fide occupational requirement, it cannot terminate an individual's employment because of his or her age. This change will come into force on December 15, 2012.

CPP
As of January 1, 2012, employees between the ages of 60 and 70 years old are able to take their CPP retirement pension **without** having to stop working or reduce their earnings. Employees must stop contributing to the CPP after the month in which they turn 70 years of age.

Employers must deduct CPP contributions for all employees aged 60 to 65- even if the employee is currently receiving a CPP retirement pension. Employers must also deduct CPP contributions for all employees who are 65 to 70 years of age unless they elect not to contribute to the CPP by giving the employer a signed and completed copy of Form CPT30.

Workers Compensation
The pre-registration provisions of the Workplace Safety and Insurance Amendment Act, 2008 became effective January 1, 2012. The remainder of the Act, which extends mandatory workers compensation coverage to independent operators and some other individuals carrying on business in construction, will come into force on January 1, 2013. Period premiums for those who pre-register will not be charged by the Board because the requirement to pay premiums will not be in force until January 1, 2013, which is also when coverage begins.

Immigration Law
Live-in caregivers will be able to get open work permits about 18 months sooner, thanks to a processing change announced on December 15, 2011 by Citizenship, Immigration and Multiculturalism Minister Jason Kenney.

All the best in 2012
to our clients and friends!

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