

## What Is a Constructive Dismissal?

By Carolyn Hart

A constructive dismissal typically occurs when the employer makes a **major** unilateral change to an employee's contract. A contract of employment, whether written or verbal, cannot be changed by the employer or the employee without both parties agreeing to the change. Example of unilateral employer changes that may give rise to a constructive dismissal include a reduction in pay, a reduction in hours, changes in benefits, changes in duties, demotion or relocation.

It is expected that employers will make some changes to your job over time. The test used by the courts to determine whether there has been a constructive dismissal arising from a change is "would a reasonable person conclude that a **key** term of employment had been changed". If the answer to that question is yes, the employee is entitled to consider herself to have been dismissed and to claim damages in lieu of reasonable notice.

It is important to note that an employer can make unilateral changes to an employee's term of employment, without triggering a constructive dismissal, if the employer gives the employee reasonable notice of the changes.

An employee must object to a unilateral change to her terms of employment with a short time or the employee may be deemed to have accepted the new term. An employee may object to a change and resign or continue working under protest. Resigning does not prevent an employee from suing for wrongful dismissal. Working under protest may be advisable to satisfy the employee's duty to mitigate their loss of earnings.

Employees are encouraged to seek legal advice as soon as they become aware of any major changes to their terms of employment.

It is an implied term of every employment contract in Ontario that the employer will treat the employee with civility, decency and respect and ensure a healthy work atmosphere. Therefore, constructive dismissal may also occur when an employee experiences humiliating and unfair treatment in the workplace. Such treatment could include; bullying, harassment, sexual harassment, discrimination, threats, physical violence and conduct that is intended to force an employee to quit.

The test used by the courts to determine whether there has been a constructive dismissal arising from humiliating or unfair treatment is "whether the conduct of the employer is such that a reasonable person should not be expected to persevere in the circumstances." Employees should complain to their employer about humiliating or unfair treatment, before claiming constructive dismissal, so that the employer has an opportunity to take corrective measures.

Employees are encouraged to seek legal advice promptly if they are unsure how to complain or if a complaint is not taken seriously.

Finally, if you believe that you have been constructively dismissed, you should be aware that you have two years to file a law suit. The clock starts running when you resign or give notice that you do not accept a change to your job.