Constructive Dismissal

Justice N.W. SHERSTOBITOFF**[1]

INTRODUCTION 2

I. THE DOCTRINE 3

II. CHANGES LEADING TO LITIGATION 5

A. Change in Duties, Position and Status 5

B. Unilateral Change in Job Responsibilities 6

C. Reassignment to a Different Job 7

D. Demotion 8

E. Loss of Status, Authority and Prestige 9

F. Change in Remuneration 11

G. Job Tranfers/Relocation 12

H. Employee's Options 14

II. MITIGATION 15

CONCLUSION 18

[1] Saskatchewan Court of Appeal, Regina, Saskatchewan. With research and writing assistance from Phyllis Norrie, Student at Law.

It is well recognized that an employment relationship may be ended at law in a number of ways apart from the usual and obvious manner of a clear, written or oral direction to an employee that he has been dismissed. In recent years, a large number of employment law cases have relied on the doctrine of "constructive dismissal" where a plaintiff employee alleges that her resignation was precipitated by the employer's failure to fulfil the essential terms of the contract of employment. The employee argues that since the employer's breach was a repudiation of the employment contract, she is entitled to accept the repudiation, resign and sue for damages for wrongful dismissal.

Courts have maintained substantial flexibility in arriving at a result in any particular case, as the circumstances giving rise to allegations of constructive dismissal are many and varied. However, certain basic principles which have been seen to apply in any situation will be reviewed within the text of this paper which will also canvass some of the leading, as well as the most recent, Canadian cases in this area.

I. THE DOCTRINE

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

It is important to emphasize that no breach of the employment contract so as to amount to repudiation occurs where an employee is given advance notice that the change will occur. The proper length of that notice period will, of course, depend on those factors which are generally taken into account in making such a determination.

Whether or not an alteration in the employee's terms and conditions of employment amounts to a repudiation of the contract depends on the seriousness of the breach. To constitute a constructive dismissal, the change must affect a fundamental term, going to "the root" of the employment contract. In *Re Rubel Bronze and Metal Company Limited*[1] the English Court of King's Bench stated the principle in this way:

> *The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation.* [...] *But* [...] *a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain.*[2]

The question of whether a constructive dismissal has occurred is a question of fact. Courts must analyze the nature of the working relationship between the parties as well as the express or implied terms of the employment contract and the changes made by the employer. The contractual change must be assessed objectively and reasonably rather than based simply on the employee's subjective perception of the employer's conduct.[3]

When there is a breach of an employment contract such that a constructive dismissal has occurred, the employee must decide whether or not to accept the change. If he is not prepared to accept the employer's repudiation, he must advise the employer to that effect and attempt to have the employer reconsider the change or negotiate a more appropriate alternative.[4] An employee should attempt to negotiate with the employer rather than simply resigning.[5]

An employee has a period of time in which to decide whether or not her new terms and conditions of employment can be treated as a constructive dismissal. *Campbell* v. *MacMillan Bloedel Ltd.*[6] held that an employee must decide within a "reasonable time". The question of the length of time that is reasonable in any particular situation may be difficult to predict; it will depend on all the surrounding circumstances, particularly the conduct of the parties between the time of the alleged change and the point at which the employee moves to take legal action.[7] If an

employee accepts a change, does nothing and continues on working under the altered terms and conditions of employment, he risks losing his claim of constructive dismissal.[8] Where a number of changes in the terms of employment have been made, an employee must accept or reject all; he cannot accept the more favourable while insisting on the continuation of some of the former employment terms.[9]

The rationale of the doctrine of constructive dismissal perhaps can be viewed most simply as the court's recognition of an employee's version of just cause.[10] Once a contract of employment has been made, neither employer nor employee has the right to unilaterally change a fundamental term of the contract. Just cause can give an employer the right to terminate the contract altogether; an unacceptable change made by an employer in the employment relationship may give rise to a finding of constructive dismissal. The judicial analysis will be informed by the same principles in either case. The final result of an action will be based on the particular fact situation before the Court, viewed in the context of the history of the employment relationship.

II. CHANGES LEADING TO LITIGATION

The classic constructive dismissal has been described as involving "a demotion, accompanied by a loss of prestige and a reduction in remuneration".[11] In the discussion which follows, several types of changes which have frequently been litigated will be examined.

A. Change in Duties, Position and Status

This heading encompasses a number of situations commonly giving rise to a constructive dismissal claim. The principle was stated in *Brown* v. *Canada Biscuit Co. Ltd.*[12] in the following manner:

> *If a person undertakes to do certain work for another person for hire, for reward, well then he is entitled to insist that he shall do that work alone; that is when a person is hired under*

> *a definite capacity, specified and unequivocal, well then he may not be forced under that contract to do anything else; he can legally and lawfully refuse to do anything else but what he undertook to do under his contract.*[13]

However, the clearly restrictive position adopted in *Brown* has been relaxed by the more recent cases. In *Canadian Bechtel Ltd.* v. *Mollenkopf* the Ontario Court of Appeal stated that an individual has "no vested right in the particular job initially given to him".[14] Cromarty J. in *Cadenhead* v. *Unicorn Abrasives of Canada Limited* held that "[a]n employee's duties are not totally frozen when a job description is prepared"[15] and, also stated that an employer must be allowed a reasonable amount of leeway in altering the duties of his employees. The overriding question must always be whether the alteration made by an employer to an employee's duties, position or status is a substantial one. As the British Columbia Court of Appeal has succinctly stated:

> *One term which, if not express, may be implied in a contract of employment is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract.*[16]

B. Unilateral Change in Job Responsibilities

When an employee has agreed to accept a particular job, her employer cannot unilaterally compel her to accept significant changes in job duties. However, it will only be in unusual cases that an employee has been expressly hired to fill a specific position and to perform such specific functions that *any* alteration amounts to constructive dismissal.[17]

O'Grady v. *Insurance Corporation of British Columbia*[18] is the oft-cited example of such a case. The plaintiff was specifically hired as secretary and general counsel to the defendant corporation. Following an extensive reorganization approximately a year later, the plaintiff's position was abolished and he was offered a new position - a lateral transfer -as senior executive

(legal) in charge of motor vehicle insurance litigation. The plaintiff resigned and brought a suit for wrongful dismissal. The British Columbia Supreme Court held that there had been a unilateral change in the terms of the employment contract amounting to a dismissal because the plaintiff had been hired to perform the job responsibilities of a specific position.

C. Reassignment to a Different Job

A lateral transfer or reassignment of an employee will not usually attract liability.[19] An employee may be seen to have expressly or impliedly agreed to job reassignments at the discretion of the employer, particularly where there is a history of accepting reassignment within the business organization. In *Rose* v. *Shell Canada Ltd.*,[20] the Court held that while there may have been no implied term at the time of hiring that the defendant company had a right to post the plaintiff to various jobs and places within its operation, the plaintiff's acceptance of a number of reassignments over the years showed a meeting of minds on a new term, a "term by conduct".[21]

Companies are given some flexibility to try out their employees in related positions in order that their skills may be better utilized in the furtherance of the company's business interests. In *MacKenzie* v. *Ralston Purina Canada Inc.*,[22] Mr. Justice O'Leary of the Ontario Supreme Court held that the reassignment of the director of product management (dog foods) by the defendant employer to a new position of director of marketing services was not a fundamental change in the nature of the employee's responsibilities so as to be a breach of the employment contract. The judge found that the move to the new position which involved no loss of salary or benefits was not a demotion, but, in fact, amounted to a promotion. He also concluded that the plaintiff employee had not contracted for a particular position so the employer could be allowed some latitude in his movement upward and laterally. In his judgment, O'Leary J. stated:

> *While Purina could not demote* [the plaintiff] *without giving him proper notice, in my view it was an implied term of his contract of employment that Purina was entitled to move him from one executive position to another so long as such move did not constitute a fundamental*

change in the kind of work he would be doing and provided that such change was within his area of education, training and experience.[23]

In a very recent decision, a college administrator was held to be justified in refusing a promotion because he didn't think he was qualified for the job, thereby winning a wrongful dismissal suit in the B.C. Supreme Court.[24] The plaintiff had been the Director of Adult Basic Education at a community college from 1986 to 1989. Morale and administrative problems led to the appointment of a new college president in 1989. The president, against the advice of some of his senior administrators, promoted the plaintiff to a management position which required him to develop and implement programs, a type of work he had never done before.

In his written reasons for deciding in the plaintiff's favour, Mr. Justice Davies stated that while the defendant college had a contractual right to "assign" duties to the plaintiff, and by all indications, the college's plans were "well intentioned", it did not have the right to change the plaintiff director's duties and responsibilities beyond his present capabilities. The changes in this case were held to constitute a fundamental breach of the plaintiff's employment contract.

D. Demotion

In cases where the proposed or implemented change is a clear demotion, that is, a reduction in benefits or job responsibilities, a court will almost always find a constructive dismissal. In *Kenzie* v. *Standard Motors (77) Ltd.*,[25] a Saskatchewan court found that the plaintiff's demotion from sales manager to salesman constituted constructive dismissal with virtually no further discussion of the matter. Courts will look as well at the loss of prestige within the business organization.[26]

In determining whether a change in position can be considered a demotion, courts have examined the relative range of salaries of the positions. The plaintiff vice-principal of a vocational

school affected by a provincial reorganization was offered a new and seemingly equivalent position by the new employer.[27] The plaintiff refused to accept the position. The evidence indicated that while the plaintiff's salary was to remain constant, others who had held comparable positions in the system as well as individuals whom the plaintiff had formerly supervised were to receive salary increases. The court found that the plaintiff was correct in viewing the new position offered as a lesser one, as a result of the non-elevation of salary plus the loss of prestige.[28]

E. Loss of Status, Authority and Prestige

Closely linked to an employee's demotion, employment changes which involve a loss of prestige, embarrassment or an undermining of the employee's authority will likely be viewed as constructive dismissal. Many of the cases which fall under this heading involve situations of corporate reorganization.

In *O'Grady* v. *I.C.B.C.*,[29] Anderson J. described the plaintiff's move from the position of general counsel and secretary to a position as counsel in charge of a specialized field of litigation in the following manner:

> *The plaintiff would suffer a substantial loss of prestige with consequent embarrassment and humiliation.* [...] *[H]e would be required to work under a general manager with whom he had had a serious confrontation.* [...]
>
> [...] *The new position offered to him was clearly subordinate to his old position* [...] *[it] was entirely different from the old position* [...] *[i]t is apparent that there was a fundamental breach of the contract and that, on the issue of mitigation, it was not unreasonable for the plaintiff not to have accepted the new position offered to him by the corporation*.[30]

The court in *Burton* v. *MacMillan Bloedel Ltd.*[31] relied in part on reasoning similar to that set out in *O'Grady* in order to find in the plaintiff's favour. Burton, a ten-year employee with the defendant company, was one of six department heads reporting to a group vice-president. However, subsequent to a corporate reorganization, he was the only department head still required

to do so. The plaintiff felt that the vice-president to whom he was to report had effectively become the real manager of the department while he would be seen as merely acting as an assistant. Mr. Justice Munroe of the British Columbia Supreme Court held that the alteration to the plaintiff's working conditions limited him and, thus, amounted to a fundamental breach of his employment contract. In the Judge's view, one salient factor in the circumstances surrounding the breach was the loss of prestige and the embarrassment resulting from such a change.

It should be noted that while the plaintiffs in both *O'Grady* and *Burton* underwent a downward change in reporting function, such a change in and of itself will not always satisfy the test of constructive dismissal. In *Moore* v. *University of Western Ontario,*[32] the impact on the plaintiff of a major reorganization in order to improve the effectiveness of the university's vice-presidents was that the plaintiff's reporting structure would suffer. However, the Ontario Supreme Court found that Moore was not constructively dismissed.

Mr. Justice Gray stated that while the reorganization was admitted to have affected the status and career expectations of individuals, the court had to decide whether or not there was a fundamental change of employment. In arriving at his decision, he concluded that "many factors are to be taken into account" when deciding the importance of a particular position in the university's structure so that "reporting status is not the sole criterion to decide on the indication of status in a job or position".[33] Gray J. held that there was no fundamental change of the plaintiff's employment in this case. Thus, whether or not a change in reporting function gives rise to a constructive dismissal would seem to depend to a large extent on whether it would create such a loss of status and prestige so as to be seen as a demotion within the organization.

The broader proposition that loss of prestige and status does not necessarily constitute dismissal was put forward in *Reber* v. *Lloyds' Bank International Canada.*[34] The plaintiff bank executive was transferred from Vancouver to New York, to an equivalent posting with the exception that he would have a dramatic reduction in his discretion regarding loans without approval. The plaintiff's action for constructive dismissal was successful at trial, but the British Columbia Court of Appeal stated:

> [The trial judge] *proceeded on the basis, which* [in this Court's view was] *not supportable in law, that any transfer which involved a loss of prestige and position is a `demotion' and that nothing more is required to justify the employee in treating the contract as terminated by the act of his employer. In some respects, the proposed transfer could be seen as a demotion. It simply does not follow that it was a breach of contract going to its root.* [...] *Most important of all, the trial judge found as a fact that there was to be a modest increase in salary and that the two positions were in the same grade. It is right to say that those factors did not conclusively establish that the proposed move was not a demotion. But the existence of `positive aspects' was a factor to be taken into consideration in deciding whether the transfer was such a demotion as to amount to a fundamental breach. It cannot be enough to find that there are some negative aspects, none of which are shown to have been a breach much less a breach of a fundamental term. When all aspects of the move are considered, it was in substance a lateral move*.[35]

The Appeal Court held that there had been no breach going to the root of the employment contract. Its decision is significant in that it further refined the concepts of constructive dismissal and demotion.

F. Change in Remuneration

A transfer to a position of less authority or less prestige will often be accompanied by a change in remuneration and/or benefits. However, a change in remuneration and/or benefits alone, imposed unilaterally and without proper cause, has been held to amount to constructive dismissal. In *Farquhar* v. *Butler Brothers Supplies Ltd.*,[36] Mr. Justice Lambert of the British Columbia Court of Appeal stated that, in his opinion, "the question of salary goes to the very root of the contract".[37]

While it has on occasion been stated that any reduction in any part of a remuneration package will constitute constructive dismissal of an employee,[38] that position has generally not been taken. In *Poole* v. *Tomenson Saunders Whitehead Limited* the "non-payment of a relatively minor portion of the consideration to be paid for services which are to be performed over a prolonged time period"[39] was not held to be a fundamental breach.

A change in benefits can amount to constructive dismissal if the change is sufficiently significant so as to be considered fundamental to the remuneration. A United States citizen was employed as a senior geophysicist with the Canadian subsidiary of the American firm, Amoco. To balance the salary of the plaintiff and other expatriates on loan to the Canadian subsidiary with what they would have earned in the United States, the employer paid a "temporary annual tax and currency differential" allowance representing, in the plaintiff's case, about one-quarter of his salary. When he became a Canadian citizen, the allowance was discontinued. The plaintiff took the position that such a sharp reduction in salary, along with his being transferred from the payroll of the parent company to that of the subsidiary, was a fundamental change in his employment contract amounting to constructive dismissal. After reviewing the history and purpose of the allowance an Alberta Court concurred with that position, finding that the cessation of the employment benefit in question could be construed as dismissal.[40]

A change in the method of determining an employee's remuneration may result in a constructive dismissal where the change is significant. Where the change is from salary plus commission to straight salary,[41] or from salary to straight commission,[42] an employee's income security may be lessened and long-term concerns may be raised.[43]

G. Job Tranfers/Relocation

A number of cases have dealt with the issue of whether or not a change in the geographical location of employment is a constructive dismissal.[44] Recently, courts have been inclined to find an implied term in the contract of employment that the employee will accept reasonable regional transfers not involving a demotion or undue hardship. In *Durrant* v. *Westeel-Rosco Ltd.*,[45] Murray J. stated that he failed to see "how large national or international corporations can operate effectively without such an implied term in their contracts of employment".[46]

A number of the factors which may be important in persuading a court that such an implied term exists were discussed in *Page* v. *Jim Pattison Industries Ltd.*[47] This case arose after the

employer decided to close its Saskatoon operation and transfer the plaintiff to Calgary. When the plaintiff refused the transfer, he was paid the statutory two weeks severance pay. He brought an action for wrongful dismissal. There had been no written agreement between the parties, hence, the issue became whether there was an implied term in the oral employment contract requiring the plaintiff to accept transfers. The trial judge concluded there was such a term and stated:

> *I do so, inter alia, upon a consideration of the defendant's size, its area of operation, branches, number of employees and its original base in the province of Alberta. I do so upon a consideration of the place of transfer in the defendant's operations. I accept that transferring was "a way of life" with the defendant*.[48]

Other cases have discussed additional factors. In *Rose* v. *Shell Canada Ltd*.,[49] acquiescence by the employee to previous geographical transfers meant that a term that the employee would relocate could be implied. In *Lesiuk* v. *British Columbia Forest Products Ltd.*,[50] the employer's financial need to reorganize was considered relevant.

In some circumstances, a court may find an implied term that an employee will not be transferred. In *Morris* v. *International Harvester Ltd.*,[51] while acknowledging that an employee must normally accept a geographic move when reasonably requested to do so by his employer, Madam Justice McKinlay found in favour of the plaintiff who had spent 22 years with the defendant company and distinguished the case at bar in the following manner:

> *However, in this situation the plaintiff was employed for a substantial period of time in one location, and the nature of his position made knowledge of the area and its businesses an important qualification for the job. It was the evidence of both* [the witnesses] *that fleet account executives were not moved within the firm.*
>
> *I find that it was an implied term of Mr. Morris's employment with International Harvester that he would be employed in the London area*.[52]

Clearly, when deciding whether or not to imply a term into a contract of employment, courts, in addition to looking at the terms of hiring and the history of service, will look closely at the circumstances surrounding the agreement.

H. Employee's Options

When an action has been taken by an employer amounting to a constructive dismissal, the question that then arises is whether, and to what extent, the employee's right to sue for breach of the employment contract will be affected by her conduct. The options available to an employee faced with such a situation have been described in *Hill* v. *Peter Gorman Ltd.*,[53] by the Ontario Court of Appeal:

> *He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms.*[54]

Some cases have decided that an employee must decide within "a reasonable time" whether the new terms and conditions of employment being offered him constitute a constructive dismissal. The plaintiff in *Campbell* v. *MacMillan Bloedel Ltd.*,[55] a senior marketing analyst whose position and the department in which he worked were phased out, accepted an alternative job which he soon discovered was a clerical position, and more junior, at a lower salary. After three months in the position he quit when, as the "last straw", he was refused the summer vacation time to which he felt entitled because of his seniority. The Court held that the plaintiff's action in accepting the new position did not waive his right to later sue for wrongful dismissal since three months was a "reasonable" time. In *Farquhar* v. *Butler Brothers Supplies Ltd.* the plaintiff credit and office manager, in that Court's view, was "entitled to a few days, or even a couple of weeks, to think it over".[56]

Predicting what a court will see as a reasonable time may be difficult.[57] The Court will exercise its discretion in each particular case appearing before it. An employee, however, who takes no action and continues to work under a change in the contractual terms of her employment without complaint risks being held to have condoned or accepted the change.[58]

II. MITIGATION

A wrongfully dismissed employee is required by law to make reasonable efforts to secure other employment and courts will reduce the employee's damage award by the amount of certain post-dismissal earnings. There has been conflicting case law on the issue of whether an employee, having been constructively dismissed, is nonetheless required to accept the new terms and conditions of employment under his obligation to mitigate his wrongful dismissal damages. The judgment of Madam Justice McKinlay for the Ontario Court of Appeal in the recent decision of *Mifsud* v. *MacMillan Bathurst Inc.*[59] clearly indicates that an employee may be expected to accept an alternative position offered by his or her employer during a reasonable notice period or until the employee finds other acceptable employment. Her Ladyship stated:

> *The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages. In all cases, comparison should be made to the contractual entitlement of the employer to give reasonable notice and leave the employee in his current position while a search is made for alternative employment.*[60]

A line of earlier cases including *O'Grady* v. *I.C.B.C.*[61] had held that an employee whose position is discontinued on inadequate notice need not accept an alternative offer of employment with the same employer in order to mitigate losses. However, the facts of the *O'Grady* case, involved a situation where the alternative position offered to the plaintiff involved a substantial loss of prestige. The Court found it unreasonable, therefore, to expect the plaintiff to accept that position in mitigation of his loss.

In the 1982 decision of Mr. Justice Halvorson of the Queen's Bench of Saskatchewan, *Boyes* v. *Saskatchewan Wheat Pool,*[62] *O'Grady* was distinguished on its facts, indicating that the earlier decision did not establish a firm rule. The plaintiff in *Boyes* was held to have been constructively dismissed but cause was found to justify his termination. The *obiter dictum* of Halvorson J. are of some significance:

> *As to the first point* [the argument that the plaintiff ought to have minimized his loss by temporarily accepting lesser employment with the employer], *I am aware of decisions such as* O'Grady *v.* Insurance Corporation of British Columbia *(1976), 63 D.L.R. (3d) 370, which state that the refusal by a wrongfully dismissed employee to accept a demotion is not a factor to be taken into account on the question of mitigation of his damages. Notwithstanding these decisions, I am of the opinion that there should not be an unyielding rule on this issue, and that each case should be viewed on its own fact. In some situations, of which* O'Grady *is a good example, it would be inappropriate to expect the employee to work at the lesser job while seeking another position. Other situations call for less sensitivity by the employee*.[63]

In *Mifsud* v. *MacMillan Bathurst Inc.*,[64] the plaintiff, who had worked his way up from die cut operator to superintendent during his years with the company, was reassigned from that position to the position of foreman at a different plant. While his salary and benefits were unaffected, the new position involved shift work, was at a lower level, had reduced responsibilities and had decreased prospects of promotion. Madam Justice McKinlay viewed those changes as constituting a demotion, but decided the case simply on the basis that Mr. Mifsud had improperly rejected the opportunity to mitigate his damages. In her view, if the plaintiff had acted reasonably with regard to damages, he would have accepted the new terms of employment and then sought alternate employment elsewhere. The Judge reasoned as follows:

> *Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious (as in this case) it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere.*

> *It must be kept in mind, of course, that there are many situations where the facts would substantiate a constructive dismissal but where it would be patently unreasonable to expect an employee to accept continuing employment with the same employer in mitigation of his damages.*[65]

It is important to note that the Court would not, it appears, have found a failure to mitigate where the employee would have been working in a difficult or demeaning situation.

The reasoning of Madam Justice McKinlay was agreed with and adopted in the most recent Saskatchewan case in this area, *Larochelle* v. *Kindersley Transport Ltd.*[66] Madam Justice Hunter, found that the plaintiff in this case had failed to mitigate his damages when he refused his employer's offer of a different position paying the same salary and almost the same benefits with a sister company. While the judge did find enough of a difference between the two positions with regard to organization of the work and level of responsibility exercised to find a constructive dismissal, the plaintiff's damages were reduced to the difference between a $1,000 Christmas bonus he would have received in the old position as compared to $500 on the new job. In the judge's view, those were the losses the plaintiff would have suffered had he accepted that position.

At present, in light of the *Mifsud* ruling, and in view of the *Larochelle* decision, it appears that employees who are facing situations which are or may be a constructive dismissal, along with their counsel, will need to assess the entire situation very carefully in order to avoid making a potentially costly miscalculation with regard to mitigation. The Ontario decision widens the range of circumstances in which it will be considered appropriate and necessary that an employee take an alternative position offered by the employer in reasonable mitigation of his damages.[67] Where the alternative employment is comparable to the previous position in terms of salary, benefits and working conditions, and where the job situation is not intolerable nor the personal relationships acrimonious, accepting the alternative employment may well be viewed by the court as a reasonable step.

CONCLUSION

Not every action of an employer in breach of an employment situation, although unacceptable to an employee, will give rise to a finding of constructive dismissal. A unilateral change in the contract of employment without providing reasonable notice may allow for a claim that the employee has been constructively dismissed, but only where the change is of some considerable significance. In every situation, the facts of the case must be examined to first, see if the contract allows, either expressly or impliedly, the change in question, and, secondly, to determine if what has occurred amounts to a breach of a fundamental term of the employment contract.

If the contract does not allow for the change, and the change does affect a substantial term or condition, the employee may be able, subject to the requirements of the law on mitigation, to treat the employment contract as at an end. However, if there has been no repudiation of the contract by the employer for the employee to accept, he or she will be in breach by resigning in those circumstances.

One writer has said that "[f]or the unlucky employee, the area of constructive dismissal can prove to be a minefield".[68] As employment relationships, fuelled by economic and other external pressures, become increasingly complex, not only employees, but also employers, practitioners and judges will continue in their attempts to grapple with the many difficult issues which are involved in determining the cost, both personal and in financial terms, of the termination of employment.

FOOTNOTES

1. *Re Rubel Bronze and Metal Company Limited,* [1918] 1 K.B. 315.

2. *Ibid*. at 322.

3. *McKilligan* v. *Pacific Vocational Institute* (1981), 28 B.C.L.R. 324 at 339 (C.A.); *Lesiuk* v. *British Columbia Forest Products Ltd.* (1986), 8 B.C.L.R. (2d) 297 at 300 (C.A.).

4. H.A. Levitt, *The Law of Dismissal in Canada* (Aurora, Ontario: Canada Law Book, 1985) at 44.

5. *Page* v. *Jim Pattison Industries Ltd.*, [1982] 5 W.W.R. 97 at 101.

6. *Campbell* v. *MacMillan Bloedel Ltd.*, [1978] 2 W.W.R. 686 (B.C.S.C.) (where 3 months was held to be reasonable); see also, *Farquhar* v. *Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 (C.A.) (a few days to 2 weeks).

7. J.D. Schiller & C.G.M. Gibson, "Constructive Dismissal and Wrongful Resignation" (1989) 47 Advocate 865 at 869-870.

8. *Holgate* v. Bank of Nova Scotia (1988), 78 Sask. R. 175.

9. *Ibid*. at 178.

10. B.A. Grosman, *The Executive Firing Line: Wrongful Dismissal and the Law* (Toronto: Carswell, 1982) at 72.

11. *Supra* note 7 at 866.

12. *Brown* v. *Canada Biscuit Co. Ltd.,* [1934] 3 D.L.R. 216 (N.B.S.C.).

13. *Ibid* at 223. The statement was made by the trial judge (decision unreported) in charging the jury. On appeal, the charge was held to have been improper. The Supreme Court of Canada, however, restored the trial decision: *Brown* v. *Canada Biscuit Company Limited,* [1935] S.C.R. 212.

14. *Canadian Bechtel Ltd* v. *Mollenkopf* (1978), 1 C.C.E.L. 95 at 98 (Ont. C.A.).

15. *Cadenhead* v. *Unicorn Abrasives of Canada Limited* (1984), 5 C.C.E.L. 242 at 251 (Ont. H.C.).

16. *Orth* v. *MacDonald Dettwiler and Associates Ltd.* (1986), 8 B.C.L.R. (2d) 1 at 13 (C.A.).

17. *Supra* note 12; *O'Grady* v. *Insurance Corporation of British Columbia* (1975), 63 D.L.R. (3d) 370 (B.C.S.C.). [hereinafter *O'Grady* v. *I.C.B.C.]*.

18. *O'*Grady, v. *I.C.B.C.] ibid*.

19. *Reber* v. *Lloyds' Bank International Canada* (1985), 61 B.C.L.R. 361 (C.A.); *Lesiuk* v. *British Columbia Forest Products Ltd., supra* note 3; *supra* note 16.

20. *Rose* v. *Shell Canada Ltd.* (1985), 7 C.C.E.L. 234 (B.C.S.C.).

21. *Ibid*. at 239.

22. *MacKenzie* v. *Ralston Purina Canada Inc.* (1981), 9 A.C.W.S. (2d) 110 (Ont. H.C.).

23. Taken from pp. 18-19 of the trial judgment as quoted in Levitt, *supra* note 4 at 58.

24. *Noonan* v. *Northwest Community College* (3 January 1991) (B.C.S.C.) Davies J., reported in *The Lawyers Weekly* (1 March 1991) 15.

25. *Kenzie* v. *Standard Motors (77) Ltd.* (1985), 40 Sask. R. 228 (Q.B.).

26. *Reber* v. *Lloyds' Bank International Canada, supra* note 19.

27. *McKilligan* v. *Pacific Vocational Institute, supra* note 3.

28. *Ibid*. at 339.

29. *O'Grady* v. *I.C.B.C., supra* note 17.

30. *Ibid.* at 378-379.

31. *Burton* v. *MacMillan Bloedel Ltd.*, [1976] 4 W.W.R. 267 (B.C.S.C.).

32. *Moore* v. *University of Western Ontario* (1985), 8 C.C.E.L. 157 (Ont. S.C.).

33. *Ibid*. at 171.

34. *Reber* v. *Lloyds' Bank International Canada, supra* note 19.

35. *Ibid*. at 377-378.

36. *Farquhar* v. *Butler Brothers Supplies Ltd., supra* note 6.

37. *Ibid*. at 92.

38. *Dunse* v. *Quadra Wood Products Ltd.* (1983), 18 A.C.W.S. (2d) 208 (B.C.S.C.), discussed in Schiller and Gibson, *supra* note 7 at 866.

39. *Poole* v. *Tomenson Saunders Whitehead Limited* (1987), 16 B.C.L.R. (2d) 349 at 358 (C.A.); see also, *Barrett* v. *Sutherland Motors Ltd.* (1989), 28 C.C.E.L. 239 (N.B.Q.B.).

40. *Allison* v. *Amoco Production Co*. (1975), 58 D.L.R. (3d) 233 (Alta. S.C.T.D.).

41. *Pearl* v. *Pacific Enescon Inc.* (1985), 7 C.C.E.L. 252 (B.C.C.A.); *Roberts* v. *Versatile Farm Equipment Company* (1987), 53 Sask. R. 219 (Q.B.).

42. *Sherrard* v. *Moncton Chrysler Dodge (1980) Ltd.* (1990), 29 C.C.E.L. 158 (N.B.Q.B.).

43. *Cook* v. *Royal Trust* (1989), 24 C.C.E.L. 106.

44. *Durrant* v. *Westeel-Rosco Ltd.* (1978), 7 B.C.L.R. 14 (S.C.); *supra* note 5; *supra* note 20; *supra* note 14; *Reber* v. *Lloyds' Bank International Canada, supra* note 19.

45. *Durrant* v. *Westeel-Rosco Ltd., ibid*.

46. *Ibid*. at 20.

47. *Supra* note 5.

48. *Ibid*. at 107.

49. *Supra* note 20.

50. *Lesiuk* v. *British Columbia Forest Products Ltd., supra* note 3.

51. *Morris* v. *International Harvester Canada Ltd.* (1984), 7 C.C.E.L. 300 (Ont. H.C.J.).

52. *Ibid*. at 305.

53. *Hill* v. *Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124 (Ont. C.A.).

54. *Ibid*. at 131-132.

55. *Campbell* v. *MacMillan Bloedel Ltd., supra* note 6.

56. *Farquhar* v. *Butler Brothers Supplies Ltd., supra* note 6 at 92.

57. *Supra* note 7.

58. *Steinicke* v. *Manning Press Ltd.*, [1984] 4 W.W.R. 491 (B.C.C.A.); *Ryan* v. *University of British Columbia* (1987), 44 D.L.R. (4th) 550 (B.C.S.C.); *Gray* v. *Sara Lee Corporation of Canada Ltd.* (1986), 45 Man. R. (2d) 82 (Q.B.).

59. *Mifsud* v. *MacMillan Bathurst Inc.* (1989), 63 D.L.R. (4th) 714.

60. *Ibid.* at 722.

61. *O'Grady* v. *I.C.B.C., supra* note 17.

62. *Boyes* v. *Saskatchewan Wheat Pool* (1982), 18 Sask. R. 361 (Q.B.).

63. *Ibid*. at 366.

64. *Supra* note 59.

65. *Ibid*. at 722-723.

66. *Larochelle* v. *Kindersley Transport Ltd.* (1990), 88 Sask. R. 229 (Q.B.).

67. See D. Brillinger, "Accepting employer's alternative job offer may be best way to mitigate damages" *The Lawyer's Weekly* (12 January 1991) 14.

68. *Supra* note 10 at 71.