Constructive Dismissal – Ontario Court of Appeal Finds Manager's Unreasonable Criticism to be a Constructive Dismissal

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The Ontario Court of Appeal has recently affirmed the decision in *Shah v. Xerox* [1] that intolerable treatment of an employee can constitute a constructive dismissal.

The Facts

Shah commenced employment with Xerox as a full-time employee in July, 1984. Until November 1995, Shah had a successful career at Xerox receiving good performance reviews, bonuses and pay raises on a regular basis. On November 22, 1995, Mike Harvey, Shah's manager, met with him and raised for the first time concerns about his performance. Between November, 1995 and March 18, 1996, Shah received no other criticisms regarding his performance. However, on March 19, 1996 Shah received his first warning letter which stated in part:

> *This level of performance is below the minimum acceptable level for your assignment. Immediate and a sustained improvement is required to maintain employment in your current position.*

On May 14, 1996, Shah attended another meeting with one of his supervisors in which Shah was asked to sign a specific task list assigned to him for completion. Shah refused to sign stating that many of the tasks were ones that other employees had previously been unsuccessful in completing and that the deadlines were, therefore, unreasonable. Later that day he received another warning letter from Harvey.

Then, on May 17, 1996, Harvey delivered another memorandum to Shah advising him that he would be on probation until June 17, 1996 stating that he had not immediately improved his performance as required in the "warning letter". The memorandum concluded that:

> *[F]ailure to correct this unsatisfactory performance ... will result in termination either at the end of the probation period, or before that time if no positive improvement is evident during the early stages of probation.*

On May 21, 1996, Shah delivered a letter to Harvey stating that he was resigning. He then sued for wrongful dismissal.
The trial judge agreed with Shah and held that Xerox's treatment of him made his continued employment intolerable and, therefore, amounted to an unjustified repudiation of the employment relationship.

[1] [2000] O.J. No. 849 (C.A.).

Regarding the conduct of management, the trial judge stated that:

> *Where the conduct of management personnel is calculated to cause an employee to withdraw from the employment, it may, in my judgment, amount to constructive dismissal. The test, I believe, is objective: it is whether the conduct of the manager was such that a reasonable person in the circumstances should not be expected to persevere in the employment. As the particular circumstances are crucial, each case must be decided on its own facts. The test should not be lightly applied. An employer is entitled to be critical of the unsatisfactory work of its employees and, in general, to take such measures - disciplinary or otherwise - as it believes to be appropriate to remedy the situation. There is, however, a limit. If the employer's conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable, there will, in my view, be constructive dismissal whether or not the employee purports to resign.*

The Court of Appeal agreed.

Xerox made only one submission on appeal - that the trial judge had applied the wrong test for constructive dismissal. It argued that the trial judge should have attempted to ascertain the terms of Shah's employment agreement in order to determine whether Xerox had unilaterally changed a fundamental term of that agreement. Xerox relied heavily on the Supreme Court of Canada's decision in *Farber v. Royal Trust Co.* [2] and on the reasons of the Ontario Court of Appeal in *Re Stolze and Addario*. [3]

In *Farber*, the Supreme Court held that:

> *[W]here an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment - a change that violates the contract's terms - the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself constructively dismissed.*

In *Re Stolze*, the Court of Appeal similarly stated that:

> *The law is clear that in assessing whether there has been a constructive dismissal of an employee the terms of the employment contract between the parties must be ascertained. The court must then consider whether the act or acts of the employer have been such as to constitute a repudiation of the fundamental terms of the*

[2] [1997] 1 S.C.R. 846.

[3] (1997) 36 O.R. (3d) 323.

contract. If so, the employee was constructively dismissed when the facts constituting the repudiation were completed.

The Court of Appeal in *Shah*, however, agreed with the trial judge holding that it is also possible to find that an employee has been constructively dismissed without identifying a specific fundamental term that has been breached, "where the employer's treatment of the employee makes continued employment intolerable".

In concluding that Shah had been constructively dismissed, the Court of Appeal held that Xerox's conduct towards Shah between November, 1995 and May, 1996, making Shah's position intolerable, demonstrated that it no longer intended to be bound by the employment contract.

Final Thoughts

What, then, is the test that should be applied when determining if an employee has been constructively dismissed?

In *Shah*, the Court of Appeal agreed that, in some cases, such as where an employer requires an employee to relocate or to take a different position as part of a restructuring, the court must ascertain the terms of the employee's employment contract in order to decide whether the employer has changed a fundamental term of that contract.

The Court also recognized, however, that in other cases, an employer's conduct can amount to an repudiation of the entire employment relationship constituting a constructive dismissal. In *Whiting v. Winnipeg River Brokenhead community Futures Development Corp.* [4] for example, the Manitoba Court of Appeal held that a plaintiff had been constructively dismissed where her employer had unjustifiably criticized her, levelled vague accusations and created a hostile and embarrassing work environment.

In such a case, an employee's continued employment would no longer be possible and, regardless of whether the employee resigns, would constitute a constructive dismissal.

Cases like these will be fact specific and the courts will likely only grant relief in cases where the conduct complained of is clearly excessive and unreasonable.

Employers with reasonable human resources policies and managers who follow those policies sensibly and under the guidance of experienced human resources professionals are much less likely to run into difficulty.

[4] (1998), 159 D.L.R. (4th) 18 (Man.C.A.).