Employee Discharge and Documentation in Ontario

Constructive Dismissal

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1) **Introduction**

Suppose the following occurs. Your firm has suffered an economic downturn, and you have decided some radical changes have to be made. Instead of laying off employees, you decide that everybody’s wages should be cut by ten percent, and that some ancillary benefits will be withdrawn. Further, you shuffle the management structure of your firm, demoting some long-serving managers and promoting “young guns” into their spots. You catch one manager using company property improperly (personal long-distance phone calls, for example) and demote her too, but keep her pay the same. As part of this restructuring you close down one location entirely and spread its operations to other locations in throughout Ontario.

Most of these measures appear reasonable, and in fact necessary in hard economic times. However, what happens if your employees feel differently? Suppose, in the above situation, a number of employees do not want to shift locations or be demoted or accept the lower rates of pay? These employees may then quit, and make a claim against you for constructive dismissal. Do you have to pay?

This paper is designed to explore several practical issues involving constructive dismissal. It starts by setting out the basic test and purpose behind constructive dismissal, based on the leading Supreme Court of Canada decision. It then explores some recent cases about what employer actions constitute constructive dismissal, including changes to a job, employers who act in good faith, and changes to the level of pay or the benefit structure. Next, we will discuss whether an employee must accept the changes an employer imposes on him or her and continue to work while looking for a new job. Finally, we discuss whether and to what extent employers may discipline their employees without triggering a constructive dismissal.
2) **Constructive Dismissal**

   *a) What is constructive dismissal?*

   In the general law of contract, if one party commits a repudiatory breach of a contract, the innocent party is entitled to terminate the contract and then sue for damages. This principle also applies to employment contracts. When an employee resigns or quits in response to a repudiation of the contract by the employer, the law recognizes that this was not a true resignation. Instead the employer is deemed to have dismissed the employee. Since no actual dismissal has taken place, this is referred to as a constructive dismissal.

   The law of constructive dismissal requires a balance between the competing interests of employees and employers. Employers must be able to arrange their businesses in the most profitable way possible. This means that they must have flexibility to modify job assignments, work schedules, compensation structure and other terms and conditions of employment to respond to rapidly changing economic and technological conditions facing Canadian companies. On the other hand, employees should be able to reasonably rely upon the fact that the essential nature of their job will remain intact. The constructive dismissal doctrine allows employees to rely upon promises made by employers and quit without financial penalty when those promises are broken. The constructive dismissal doctrine therefore enhances the degree of trust that an employee feels in his or her employment by making it more expensive for employers to make fundamental changes to that employment.
b) Farber v. Royal Trust: The leading case

The leading case on constructive dismissal is the Supreme Court’s decision in *Farber v. Royal Trust Co.* Although that case was decided on the basis of the Quebec Civil Code, the Court stated that the principles of constructive dismissal are the same in both common law and civil code systems. The facts of that case are relatively straightforward. Mr. Farber was a regional manager for Western Quebec for Royal Trust, a real estate company. He supervised over 400 real estate agents, and administered 21 offices. With commissions, his income in 1983 had been $150,000, including a $48,000 guaranteed base salary. Royal Trust decided to undertake a major restructuring, part of which involved eliminating its regional manager positions. It offered Mr. Farber a job as the manager of the Dollard branch, a job he had held eight years earlier. It did not offer any guaranteed base salary. Mr. Farber estimated his income would be cut in half. Royal Trust offered him a $40,000 reorientation allowance and a higher commission rate than usual. The Dollard branch (at that time) was not very profitable, so Mr. Farber tried to negotiate for a more profitable branch. Royal Trust refused to vary its offer, so Mr. Farber refused to go to the Dollard branch and sued for constructive dismissal.

The Supreme Court found that Mr. Farber had been constructively dismissed. The test for a constructive dismissal under the Civil Code was set out as follows:

To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the

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unilateral changes imposed by the employer substantially altered the essential terms of the contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed.²

Under the common law, the test is virtually identical:

Thus, it has been established in a number of Canadian common law decisions that where 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 or herself constructively dismissed.³

The Supreme Court also gave some examples of what constitutes a constructive dismissal:

In a number of decisions in both Quebec and the common law provinces, it has been held that a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed. In some decisions, it

² Ibid. at para. 26.

³ Ibid. at para. 33.
has been held that a unilateral change to the method of calculating an employee’s remuneration justifies the same finding. Other decisions have found that a significant reduction in an employee’s income by an employer amounts to a constructive dismissal.\(^4\)

In Mr. Farber’s case, he had been demoted and his income had been cut in half. His demotion would have resulted in a considerable loss of status and prestige because he would have been supervising fewer employees in a smaller, less profitable region. The fact that the Dollard branch was one of the least profitable in Quebec further undermined his status and prestige. The change in remuneration was detrimental to Mr. Farber, not only because he would earn less, but because removing his base salary entirely would subject him to greater fluctuations in income.

One final wrinkle to that case was that the Dollard branch turned out to be extremely profitable in the long run. This had no effect on the Court’s decision because, at the time of the offer, the Dollard branch was in an extremely precarious financial position. Mr. Farber’s calculations that he would lose money by moving to the Dollard branch were therefore reasonable at the time they were made. The growth of the Dollard branch was not foreseeable.

3) **What employer actions may constitute constructive dismissal: recent cases**

   a) **Cases involving no loss in pay or benefits**

   In *Royal Trust*, Mr. Farber was both demoted and received a loss in pay. The question sometimes arises whether a constructive dismissal can take place

\(^4\) *Ibid.*, para. 36.
without a loss of pay. The answer is yes. Demotions, or even changes in the type of job done or the working conditions of an employee, may result in a constructive dismissal.

Bowen Estate v. Ritchie Bros. Auctioneers Ltd.\(^5\) is an example of a constructive dismissal unaccompanied by a loss of pay. In that case, Mr. Bowen was a yard foreman for three years with Ritchie Bros. Auctioneers, a heavy-equipment auctioneer. He worked in the main office almost adjacent to the manager. In 1993, the employer decided to split Bowen’s job into two parts. It then offered Mr. Bowen a position at the gatehouse of the company’s property at the same salary and the same job title. The gatehouse job had until then been performed by a part time employee. The Court found that this new job was a “significantly worse position than the one he occupied immediately before.”\(^6\) The Court was especially concerned about the fact that the “yard shack” was a tiny, unheated shed at the periphery of the employer’s premises and that his office in the main building, while not excessive, was “adequate and luxurious” compared to the yard shed.\(^7\) Mr. Bowen had objective cause to believe that his employer was sending him a clear signal that it hoped he would quit. Thus, moving Mr. Bowen out of the office into the yard shack was a fundamental change in his employment and constituted a constructive dismissal.

\[ b) \text{Whether an employer must breach a specific term of the contract: The obligation and effect of good faith} \]

\(^5\) [1999] O.J. No. 4102 (Ont. CA) [hereinafter Bowen].
\(^6\) Ibid. at para. 14.
\(^7\) Ibid. at para. 12.
Bowen was one example of a case where constructive dismissal was found without the Court having to point to a specific term of the employment contract that had been breached. Another, more explicit, example of this is Shah v. Xerox Canada Ltd. In that case, Mr. Shah had had a lengthy, successful career at Xerox until May 1995, when he undertook a new position of technical support analyst. After that date, he started to receive negative performance reviews that were unsubstantiated and unjustified. He also received two warning letters that did not specify any particular wrongdoing and were without justification. Finally, he was put on probation without being provided with a reasonable opportunity to respond to the criticisms against him. The Court of Appeal found that Xerox had made Mr. Shah’s position “intolerable”. They concluded that an employee may claim for being 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 some cases, courts have also taken a broad view of what they will define as a fundamental term of employment. One such case is Menard v. Royal Insurance Co. of Canada. Ms. Menard had worked for Royal Insurance for fourteen years as an adjuster. In 1985, she took medical leave because of stress. The stress was as a result of a reorganization that Royal Insurance undertook. It cut its workforce from 90 people to 15 and promoted Ms. Menard to the senior person in the Sudbury office. She was on long term disability for some months before returning in April 1985. Her employment record therefore noted that she had problems dealing with stress. In 1986, Ms. Menard received a warning from

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8 [2000] O.J. No. 849 (Ont. CA) [hereinafter Shah].

9 Ibid. at para. 6.

her employer that she was not meeting the reporting standards. She was put on notice that if her performance did not improve, Royal Insurance would consider terminating her employment. She worked hard and by February 1988 was given a positive performance review. No further performance issues arose until July 1990, when Royal Insurance asked her to explain a certain file. She was told that her performance was “disappointing and if this type of performance continues then we will have to seriously question your continuance of employment with Royal Insurance.”11 Another request was made of the same file in September 1990. Ms. Menard did not respond until October 2, 1990 when she said she was unable to cope with the workload and the changes within the company and industry. She offered her resignation. Royal Insurance accepted the resignation on October 4th without any contact with Ms. Menard and chose October 19th as her departure date.

The Court held that Royal Insurance’s conduct prior to October 2, 1990 did not constitute constructive dismissal. Ms. Menard had argued that they failed to provide adequate training and assistance and increased her workload. The Court did not accept those arguments and also did not find fault with the two letters of July and September 1990. However, the Court did find that the employer’s actions after October 2nd constituted constructive dismissal. Mr. Peeling, Ms. Menard’s manager, met with her on October 19th for an exit interview. Ms. Menard told him she felt under considerable pressure at that time. Mr. Peeling at no time mentioned the employer’s benefit plan, nor did he suggest that Ms. Menard consider short or long term disability leave although this was his response in 1985 to a similar problem. The Court found that Ms. Menard was suffering from depression and was disabled when she wrote her resignation. The

11 Ibid. at para. 10.
Court also found that Royal Insurance could have known about this and that it was under a legal obligation to assist her in making a claim for disability benefits. Her conduct in 1990 was a mirror to her conduct in 1985. By not informing Ms. Menard of her disability entitlements, Royal Insurance “were demonstrating their own intention not to be bound by the employment agreement.”\(^{12}\) They breached both their obligation to act in good faith, and their obligation to provide the benefits that were part of Ms. Menard’s full compensation package. Therefore, Ms. Menard had been constructively dismissed.

This case demonstrates several aspects of constructive dismissal. First, courts require employers to be sensitive to the needs of employees with disabilities. Second, the entire compensation package is treated as a fundamental term of the contract of employment. Constructive dismissal is not limited to lowering the actual salary of the employee; denying some ancillary benefits may also constitute a breach of a fundamental term. This is discussed in greater detail below.

Third, courts are more willing to give employers flexibility with respect to constructive dismissal when they feel that they are acting in good faith. Good faith certainly cannot immunize an employer from a finding of constructive dismissal; however, it is one factor that the courts consider. In *Cox v. Royal Trust Corp. of Canada*,\(^{13}\) the employer reassigned Cox to a position that involved fewer managerial functions. The Trial Judge found that the employer acted in good faith and hence there was no constructive dismissal. The Court of Appeal overturned that finding, stating:

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\(^{13}\) [1989] O.J. no. 675 (Ont. CA) [hereinafter *Cox*].
While I totally agree with the trial judge that the defendant acted bona fide and with genuine concern both for the company and the plaintiff, I do not [agree that] . . . a properly motivated company cannot be liable for constructive dismissal. It is one of the factors, and an important one, but here does not override the very fundamental changes noted above; particularly, the loss of management functions and reporting to a former subordinate.14

Finally, in Rezonja v. McCleary15 a receptionist’s hours were cut back to almost nothing when she returned to work full time from sick leave. The Court found that this constituted a constructive dismissal, not only because of the cutback in hours, but because “her attempts to clarify the situation were met with hostility and silence. That hostility and silence could only have been interpreted by the plaintiff as signifying that she had been dismissed from her job.”16

Good faith is a factor tending to disprove constructive dismissal, but it cannot provide absolute protection to employers. Bad faith, in terms of hostility or improper motives, can result in a court being more likely to find a constructive dismissal.

c) A decrease in pay or benefits

Finally, the question sometimes arises as to how much salary reduction will be necessary to constitute a constructive dismissal. The Supreme Court in

14 Ibid. at page 4.
15 [1999] O.J. No. 5589 (Ont. SCJ)
16 Ibid. at para. 49.
Farber found that the reduction in pay has to be “significant”\textsuperscript{17}. What is significant?

In Viens v. Suburban Distributors Ltd.\textsuperscript{18}, the employee was called into his employer’s office one day and asked to take a twenty percent pay cut or be laid off. The Court found that this was a constructive dismissal. In Provincial Partitions Inc. v. Ashcor Implant Structures Ltd.\textsuperscript{19}, an employee was constructively dismissed when the employer cut his salary by $50 per week, roughly 4\% of his anticipated earnings from salary and commissions. However, there were other factors that contributed to the finding of constructive dismissal in that case, including unfulfilled promises of greater authority and responsibility and the fact that the decrease took place unilaterally without notice. Finally, in Pulak v. Algoma Publishers Ltd.\textsuperscript{20}, the employer offered its employees a choice between a ten percent wage cut or a work week of somewhere between 32 and 24 hours. The court found that this constituted a constructive dismissal, stating:

\begin{quote}
I am satisfied on the authorities that, within reason, a unilateral adjustment of fringe benefits and a unilateral adjustment of one’s ability to earn, for example a realignment of sales territory, or a cut back of hours of work etc. may not constitute constructive dismissal. It appears to be otherwise with the rate of pay.
\end{quote}

\textsuperscript{17} Supra note 4.

\textsuperscript{18} [2000] O.J. No. 2623 (Ont. SCJ).

\textsuperscript{19} (1993), 50 C.P.R. (3d) 497 (On. Gen. Div.).

While, within reason, an employer may cut back on an hourly rated employee’s hours of work, the employer may not unilaterally insist that the employee work the same hours for less money. This would constitute constructive dismissal.

The Court in that case appears to have overstated the effect of a decrease in remuneration. Prior and subsequent cases have demonstrated that the employer has some leeway to decrease benefits before a constructive dismissal has occurred. For example, in Black v. Second Cup Ltd., [1995] O.J. No. 75 (Ont. Gen. Div.), the employee had some of his responsibilities taken away from him and had his base salary reduced by $10,000 (from $95,000 to $85,000). The Court found that he was not constructively dismissed. However, the employee seemed to concentrate his arguments on the issue of whether he was demoted and did not rely upon the loss of base salary.

Courts have also, on occasion, drawn a distinction between a reduction in base salary and other benefits. In Otto v. Hamilton & Olsen Surveys Ltd.21 The employer unilaterally cut its employees’ paid vacation time from six weeks to four, and also ceased its five percent contribution to the R.R.S.P. plans of its employees. The total loss to the two employees who quit and claimed constructive dismissal as a result were between 6.49 percent and 8.00 percent of their total compensation. The trial judge found that they were constructively dismissed, but the Alberta Court of Appeal disagreed. The Court of Appeal was convinced by several factors. First, the benefits removed were not base salary but just collateral benefits. Salaries were maintained. Second, the company had a practice of regularly increasing the benefits package during good economic times.

Third, the company did not decrease the compensation package in bad faith, but instead decreased it because of an economic downturn. Finally, the employer actually had one of the most generous compensation packages in the industry, even after the cuts.

The British Columbia Court of Appeal drew the same distinction between salary and collateral benefits in *Poole v. Tomenson Saunders Whithead Ltd.* In that case, the employee was the Vice-President Special Projects with the employer. In 1983, the employer suffered substantial financial difficulties and decided to undergo a corporate restructuring. Part of the restructuring included appointing a new President, to whom Poole did not want to report. The important event for our immediate purposes is that the employer only paid Poole a $9000 bonus, being 10 percent of his salary. Poole was entitled to a 15 percent bonus for “satisfactory service”, 20 percent for “commendable performance” and 25 percent for “outstanding performance.” The Trial Judge found that the failure to pay a bonus of at least 15 percent (or $13,500) constituted a fundamental breach of the employment contract. The Court of Appeal overturned this finding, stating:

> 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, would not by itself, usually meet such criteria [of a fundamental breach] and hence would not qualify as a fundamental breach. Damages could be expected to afford a complete remedy.

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23 *Ibid.* at page 6. This raises the possibility of an employee continuing to work after their pay is cut, but then bringing a court action to recover the lost pay and force the employer to pay them at the original (higher) pay rate.
Further, the Court held:

There is in my opinion a clear distinction between the payment of an annual bonus which could vary depending on the employer’s characterization of the employee’s performance . . . and a basic, fixed, monthly wage agreed upon by the parties to be paid for the services to be rendered by the employee during the term of the contract. In the latter instance one could readily infer that a refusal to pay the agreed salary indicated an intention of the employer not to be bound by the agreement. However, even the cases cited by the trial judge indicate that there must be some circumstance beyond the mere non-payment of salary to give rise to the inference that the employer has refused to perform the contract.\(^\text{24}\)

4) **Mitigation**

All claimants, no matter what type of suit they have brought, are under a duty to mitigate their damages. Mitigation is simply taking steps to minimize the losses incurred as a result of the harm that has been suffered. Constructive dismissal claimants are no different. Like any other wrongful dismissal claimant, they must take reasonable steps to look for replacement work.

One unique issue of mitigation that arises in the context of constructive dismissal is whether an employee who has been constructively dismissed must continue to work under the altered terms of employment while looking for other

work. An employee may still claim constructive dismissal even if he or she continues to work for the same employer under the altered terms so long as he or she has not condoned the change in conditions.

The leading decision on the obligation to continue to work is *Mifsud v. MacMillan Bathurst Inc.*\(^{25}\) In that case, Mifsud was demoted from supervisor to foreman (a position he held some years earlier) at the same pay. The Court of Appeal rejected his claim for damages resulting constructive dismissal on the grounds that he did not mitigate his damages by accepting the new terms of employment. The Court 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. 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

\(^{25}\) (1989), 70 O.R. (2d) 701 (Ont. CA).
where it would be patently unreasonable to expect an employee to accept continuing employment with the same employer in mitigation of his damages.26

In *Mifsud*, the fact that Mifsud was demoted was not enough to convince the court that he would be demeaned if he had to remain at the job. It was significant that he had been transferred to another plant to be foreman, so there was no issue of having to report to somebody who had previously been a peer or subordinate. In *Cayen v. Woodwards Stores Ltd.*,27 the British Columbia Court of Appeal made it clear that courts must take an objective view of whether an employee would be demeaned by his or her new post, instead of just accepting the employee’s subjective perception. In that case, Ms. Cayen was transferred to another job. She considered it a demotion and felt anger and disappointment. The Court found that she failed to mitigate by not taking the new post, stating that there was no objective reason why she could not have assumed her new post.

Subsequent cases seem to indicate that the courts take a lenient view as to whether an employee must continue to work in order to mitigate his or her loss. In *Malacek v. Service Maintenance Inc.*,28 the employee Malacek was demoted from a general manager of an auto parts plant to a lead toolmaker. He would keep the same hourly wage, but would lose his bonuses and his ability to choose his own overtime. The Court simply stated that Malacek could not remain at his employment in his diminished position and was therefore allowed to decline the demotion and look for work elsewhere.


In *van Valkenburg v. Carressant Care Nursing Home of Canada Ltd.*

The Ontario Court of Appeal accepted that acrimonious negotiations between the employee and her employer before she was constructively dismissed meant that she did not have to accept its offer in order to mitigate her damages. Unlike in *Mifsud*, the job offered to her was not of equivalent compensation and a “pall” was placed on the offer because it was to be reviewed in three months. In all the circumstances, she was entitled to walk away from her job.

Finally, in *Weselan v. Totten Sims Hubicki Associates (1997) Ltd.* the Ontario Court of Appeal again decided that an employee did not have to accept the amended job in order to mitigate his damages. In that case, the employee’s old job was in Simcoe, and the new job offered was in St. Catharines. The salaries were the same, but the employee would have to drive an hour and a half each way to get to and from work, at an estimated annual cost of $34,000. The Court of Appeal held that the Trial Judge should have taken that fact into account when deciding whether accepting the St. Catharines job was necessary for the employee to mitigate his losses. The extra driving meant that both the working conditions and the net remuneration would have been different in St. Catharines than Simcoe; therefore, it was reasonable for the employee to have refused the new job outright.

5) **Discipline**

One final issue with respect to constructive dismissal is whether disciplining an employee short of dismissal constitutes a constructive dismissal.

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The recent legal debate over this issue was initiated by the Supreme Court of Canada’s decision in *McKinley v. BC Tel*\(^3\)\(^1\). That case involved a wrongful dismissal action, not a constructive dismissal. The Court decided that dishonesty is not always just cause for dismissal. However, in a part of its reasons not entirely related to the holding in the case, Mr. Justice Iacobucci stated:

This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee’s pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.

Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee’s misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment.\(^3\)\(^2\)

Howard Levitt, a Toronto employment lawyer, is on record as stating that it is “open season on lesser forms of discipline.”\(^3\)\(^3\) It is his view that the law has changed and that the same progressive discipline that is available in the unionized

\(^{31}\) 2001 SCC 38.

\(^{32}\) *Ibid.* at paras. 52-53.

\(^{33}\) “Dishonesty not always cause for dismissal, SCC concludes: Did top court open door to lesser forms of discipline?” *The Lawyer’s Weekly* 13 July 2001 at 12.
workplace is now applicable in the non-unionized workplace. His two premises appear to be that (1) until now employers could never discipline without creating a constructive dismissal; and (2) the Supreme Court now says they may do so.

However, employers have had limited rights to discipline employees in the past. Administrative warnings and demotions, when there was just cause to give them, are proper exercises of managerial authority that do not always trigger a constructive dismissal. In *O’Dwyer v. Dominion Soil Investigation Inc.* the employee was promoted to branch manager in 1989. In 1991 and 1992, the branch began to suffer considerable losses and an increase in bad debt. O’Dwyer also purchased some $17,000 worth of radio equipment before receiving authorization from the company, and when the company turned him down, he tried to cover up the fact that he had already purchased the equipment. He also used the company car for personal use, contrary to company policies. In September 1992, O’Dwyer was informed that he was being demoted to senior engineer at the Windsor plant, but would maintain the same pay and benefits. He took two weeks vacation and never returned to work.

The Court held that the employer would have had just cause to summarily dismiss O’Dwyer in September 1992 when it demoted him to senior manager. The issue was therefore whether it could demote in circumstances where they could dismiss. The Court decided that the company could demote O’Dwyer:

> What could D.S.I.I. do once it had “cause to dismiss”? Without limiting the options of the company, it seems to me that it can, among other things, dismiss the employee for cause and not be subject to any damages. Secondly, it could have demoted

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O’Dwyer to a position of less responsibility and kept him at his same wages and benefits and again not been subject to any damages. Thirdly, it could have demoted him to a position of less responsibility, decreased his pay and benefits and fought a case of constructive dismissal. Fourthly, it could have done nothing.

It is not entirely clear, however, whether the Court was saying that in this case the employer could have successfully both demoted and reduced pay.

The Courts have refused to recognize a right to suspend as well, although they have left the question open for argument. In *Haldane v. Shelbar Enterprises Ltd.*35 the employee was a hardworking and valued employee of Shelbar. She was responsible for instituting a no-smoking policy at her workplace, and had decided to phase it in by declaring no-smoking days once a week. One day, the owner called a meeting and declared that day to be a no-smoking day. Haldane got angry and swore at her employer, once in public and again in private. The employer then sent her home for the afternoon and later tried to suspend her for three days. Haldane quit instead of accepting the suspension. The Trial Judge found that she was constructively dismissed. The Divisional Court at first overturned the Trial Judge’s decision, but then two weeks later came back and stated that there is no authority at the common law allowing an employer to suspend an employee, even for cause. The Ontario Court of Appeal agreed with the Trial Judge, but refused to decide the issue of whether a suspension is lawful. It stated:

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When O’Leary J. refers to the possibility of implying a term into the employment contract permitting reasonable discipline, including suspension without pay, he does not elaborate on how that implication might be made. I have referred to the possibility of implying terms either to accord with the presumed intention of the parties, or to accord with existing custom and usage. As indicated above, implying terms through either of those means requires evidence of either the intention of the parties or the applicable custom and usage. . . .

Having regard to the inclusion of progressive discipline powers in virtually all collective agreements, the flexibility which such an implied term would add to the employer-employee relationship and the incorporation into employment contracts as a matter of law of a provision requiring reasonable notice absent just cause for termination, a case could be made for implying a term providing for reasonable discipline into employment contracts. Such a step would, however, raise complex questions concerning both the procedural and substantive scope of that implied term.36

Since Haldane, one lower court decision has been rendered stating that an employer does, in certain circumstances, have te power to suspend an employee for just cause. In Reininger v. Unique Personnel Canada Inc.37, the employee was a truck driver. He was caught drinking and driving when returning from a fishing derby, and his driving license was suspended for 90 days. His employer

36 Ibid. at pars. 13 and 16.
then suspended him without pay, originally for 90 days, and then indefinitely. The employee then brought a claim against his employer for constructive dismissal.

The Trial Judge reviewed the authorities, including *Haldane*, and concluded that there was no binding authority concerning the issue of a reasonable disciplinary or residual power to suspend an employee. The Trial Judge concluded that there was an implied term in this particular contract of employment that the employer was allowed to suspend an employee. The facts leading to this conclusion included:

- The employee’s counsel did not take issue with the position that the employer had the right to suspend without pay;
- The employer had a policy, agreed to by Reininger and other drivers, that drivers were subject to “corrective disciplinary action”;
- Reininger never objected to the employer’s authority to suspend him; and
- Reininger had been suspended on two previous occasions.

The Trial Judge concluded that the 90 day suspension was reasonable, but that the subsequent indefinite suspension was unreasonable. Therefore, the indefinite suspension constituted a constructive dismissal. Interestingly, the Trial Judge referred to the jurisprudence set out in the context of collective agreement arbitration to determine whether or not there was just cause for the suspension. In the end, the employee received nine months notice from the date of his indefinite suspension.
The implications of McKinley are therefore uncertain. It is true that there was, prior to McKinley, a limited right to discipline for cause. However, courts seem to have limited this right to discipline to matters that do not effect an employee’s remuneration – namely, they have restricted suspensions without pay and attempts to lower base compensation. The Court of Appeal expressed some interest in implying a term of suspension for just cause into a contract of employment, but did not do so in Haldane. Given that some discipline was allowed prior to McKinley, Levitt’s second premise (that all discipline is now allowed) is questionable too.

It is still possible to create a factual situation where an employer may suspend an employee. To do so, the employment contract must either state explicitly that suspensions are allowed, or a term granting a right to suspend must be implied into the contract of employment (as was the case in Reininger). As the Court of Appeal said in Haldane, terms are implied through evidence of existing custom and usage. One way that custom and usage may be established is through a company discipline handbook or policy that is followed in all circumstances. It would be important to bring employees’ attention to this handbook when they are first employed. It is also important to follow the rules in the handbook in all cases, because a failure to do so could invalidate any future instances of discipline. The rules themselves must be reasonable and appropriate in order to be implied into a contract of employment. Even following these rules, it is uncertain whether courts will permit employers to suspend employees without pay. As stated above, Reininger was a lower court decision and therefore not binding on other courts. Further, it involved a unique set of facts, and the employee’s counsel never really objected to the proposition that the employer had the power to suspend an employee. Therefore, employers still need to exercise caution when deciding whether or not to suspend an employee.