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REDUCTION IN COMPENSATION AND CLAIMS OF CONSTRUCTIVE DISMISSAL— HOW MUCH IS TOO MUCH?

A unilateral reduction in an employee's compensation may amount to a fundamental breach of the employment contract and result in a claim of constructive dismissal. The recent decision of *Robertson v. West Fraser Timber Co. Ltd*., 2009 BCSC 602, provides a concise summary of the basic principles of constructive dismissal: "*by unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations. The employee can then treat the contract as repudiated, accept the repudiation and leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages*."

The BC Supreme Court has recently provided some practical guidance on how much compensation can be reduced before it amounts to constructive dismissal. In *Pavlis v. HSBC Bank Canada*, 2009 BCSC 498, the Court held that "*an employer's failure to pay a portion of an employee's salary may amount to a fundamental breach where the unpaid amount makes up a significant or substantial part of the employee's total remuneration*". The Court concluded that a 9 – 10% reduction of an employee's salary without more does not amount to a fundamental breach, a 14 – 17% reduction in compensation with other significant unilateral changes can constitute a fundamental breach, and a reduction of 20% or more alone is enough to constitute a fundamental breach. Although each case will turn on its own facts, this case provides some much needed guidance for employers.

That being said, it is generally accepted that an employer can make changes to the terms and conditions of employment if it provides the employee with reasonable notice of the change. The reasonable notice should mirror the amount of notice given to the employee under the common law for termination of employment or under the specific employment contract.

Unfortunately, the Ontario Court of Appeal has recently cast some uncertainty on this general employment law principle. In *Wrongko v. Western Inventory Service Ltd.*, 2008 ONCA 327, an employment contract provided an employee with a two year notice period. The employer, wishing to change this overly generous provision provided the employee with two years' notice that this termination provision in his employment contract would be changed to a maximum of 30 weeks. The employee objected to this and refused to sign the modified employment agreement that was to take effect in 2 years. The employer believed it had given reasonable notice of the change. At the end of the notice period, the employer advised the employee it would terminate his employment unless he signed the modified agreement. The

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employee refused and was terminated.

The Ontario Court awarded the employee two years' salary. It held that an employer cannot simply rely on giving reasonable notice of a unilateral change. Rather, it must terminate the employee with proper notice and offer re-employment at the end of the notice period on new terms. While this decision is not binding in BC, BC courts may be inclined to follow it in the future since leave to appeal to the Supreme Court of Canada was refused. Therefore, where an employer wishes to make fundamental changes to employment terms with reasonable notice, it should seek the employee's signed agreement that the changes will take effect after the notice period. If the employee refuses to agree, the employer will have to give reasonable notice, or the notice specifically required by the employment contract, of termination of employment, and offer new employment on the revised terms to be effective immediately after the notice period.

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RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS—LIFE AFTER *SHAFRON v. KRG INSURANCE BROKERS (WESTERN) INC.,* 2009 SCC 6

Restrictive covenants in the form of non-competition and non-solicitation clauses have become a common feature in many employment agreements. A properly drafted non -competition clause may, in the right circumstances, prevent a past employee from competing with his or her former employer: 1) in a substantially similar capacity as the employee was engaged at the time of termination; 2) within a certain geographic area; and 3) for a limited period of time. In the same light, a well drafted non-solicitation clause can prevent a former employee from soliciting customers and/or employees with whom the employee had actual and direct contact with during their employment. It should be noted that there has been a trend by courts to enforce non-solicitation clauses where it would be sufficient to protect the employer's interest instead of enforcing a non-competition clause.

Unfortunately for many employers, Canadian courts have become less willing to enforce restrictive covenants in the employment relationship. In part, this is because restrictive covenants are considered to be a restraint of trade and as such are *prima facie* void unless they can be justified as being reasonable with respect to the interest of the parties and the public interest. For some employers though, actual enforcement has not been a viable option, knowing both the cost associated with this and the difficulty involved. Instead some employers have included broad restrictive covenants as a mere gentleman's agreement, in an attempt to dissuade key employees from taking clients and walking across the street to compete, never with the intention of enforcing. However, those employers who want the greatest chance of enforcing restrictive covenants must ensure that the clauses are as narrow as possible to protect their interest and that they are drafted in clear and unambiguous terms.

In order for a post-employment restraint to be enforced, the employer will have to prove that the restrictive covenant: (a) protects a legitimate proprietary interest of the employer; (b) the restraint is reasonable between the parties in terms of: (i) temporal length; (ii) spatial area covered (geography); (iii) nature of activities prohibited; and (iv) overall fairness; (c) the terms of the restraint are clear, certain and not vague; and (d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

To ensure the greatest chance of enforceability of the covenant, the individual circumstances of each case must be reviewed and the covenants drafted accordingly. This is not a situation where "one shoe fits all." The overarching principle remains that the restrictive covenant should be drafted as narrowly as possible and extend no further than is necessary to protect the legitimate interest of the employer.

The Supreme Court of Canada's 2009 decision in *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6, has sent a clear message that in order for restrictive covenants to be enforced, the terms must be clear and unambiguous. At issue in *Shafron* was the meaning of the term the "Metropolitan City of Vancouver." The Court ultimately declined to enforce the restrictive covenant, finding that this term was ambiguous. The Supreme Court also refused to follow the practice of "notional severance", stating that it was not appropriate in the employment context to fix an otherwise defective provision to make it legal and enforceable. The Court held that, *"Employers should not be invited to draft overly broad restrictive covenants with the prospect that the court will sever the unreasonable parts or read down the covenant to what the courts*

consider reasonable. This would change the risks assumed by the parties and inappropriately increase the risk that an employee will be forced to abide by an unreasonable covenant."

It is clear after *Shafron* that courts will take a strong stance on employment contracts that contain overly broad or ambiguous covenants. Such covenants will be at risk of being completely struck down, leaving employers with little protection.

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DEFINED CONTRIBUTION PENSION PLANS - *NOLAN V. KERRY (CANADA) INC.,* 2009 SCC 39

In a ground breaking decision released on August 7, 2009, the Supreme Court of Canada has ruled that an employer did not violate its obligations as administrator of its employee pension plan when it used funds in the plan to pay the plan's administrative and investment costs, or when it allowed surplus funds arising from the defined benefit (DB) component of the plan, covering one group of employees, to be used to meet its funding obligations to another group of employees covered by the defined contribution (DC) component of the plan.

Before beginning it's analysis, the court clarified the terms "defined benefit" and "defined contribution". Defined benefit plans guarantee the employees specific benefits on retirement. Actuaries are generally retained to estimate the contributions needed, and should the actuary determine that the funds in the trust are greater than the amount needed to cover future benefits, the plan is said to be in surplus. If the legislation and plan documentation permit, the employer may use surplus funds to cover its obligations (a "contribution holiday"). In defined contribution plans, the employer guarantees the amount of contribution it will make for each employee, and the benefits on retirement are determined by these contributions. Since no benefits are guaranteed, these plans do not have surpluses or deficits.

Under the pension at issue, the employer had historically paid the pension plan expenses directly. In 1985, following plan amendments, the expenses for actuarial, investment management and audit services began to be paid from the pension trust fund. Justice Rothstein noted that there is no statutory or common law authority that would oblige an employer to pay these expenses. The court made it clear that the obligation of the employer will be determined by the text and context of the plan.

The court also found that silence does not create this obligation. The pension plan in this case included an "exclusive benefit" clause, which stated that the pension trust funds could not be used for purposes other than for the *exclusive benefit of the employees included under the plan*. The court held that as the existence of the plan was a benefit to the employees, and the payment of plan expenses was necessary to ensure the plan's continued integrity and existence, it was to the exclusive benefit of the employees that expenses for the continued existence of the plan were paid out of the pension trust fund.

Until 2000, the pension plan was a defined benefit plan only. Justice Rothstein noted that when plan documents provide that funding requirements will be determined by actuarial practice, the employer may take a contribution holiday unless other wording or legislation prohibits it. The court found that in regards to the defined benefit plan, nothing in the plan documentation prevented the employer from taking a contribution holiday where the actuary certified that no contributions were necessary to provide the required retirement income to members.

However, in 2000, the company added a defined contribution component to the plan and closed the defined benefit plan to new employees, causing some employees to be governed under the defined contribution component, while some remained under the defined benefit provisions. The employer expressed its intention to take contribution holidays from its obligations to the members governed by the defined contribution part by using the surplus from the original defined benefit component. The court found that as long as there was one trust in which both the defined benefit and defined contribution members were beneficiaries (as could be retroactively amended for in this case), the use of the trust funds for either the defined benefit or the defined contribution members would not infringe the exclusive benefit provision nor constitute a partial revocation of the trust. Justice Rothstein emphasized that there was no reason why a single plan could not have defined benefit and defined contribution components, whose members were beneficiaries of the same trust, provided the plan documents and legislation did not prohibit it.

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WHEN IS A DEAL A DEAL?

In labour relations management and union representatives are often responsible for resolving outstanding grievances. Settlement discussions occur both inside and outside of the grievance process mandated in the collective agreement. The agreements that result from these negotiations are reflected through formal written contracts, correspondence between the parties and even oral understandings.

Occasionally, disputes arise between employers and unions over whether an enforceable settlement agreement was actually reached. This is the issue that was faced by Arbitrator Foley in the recent case of *TELUS and TWU*, June 8, 2009 with respect to an underlying grievance alleging that the Company had moved bargaining unit work from BC to excluded employees in Alberta (the "Grievance"). A Company representative wrote to the Union setting out a plan to address the Union's concerns expressed during the grievance process. The Company's letter concluded as follows, "The Company believes this training and work assignment satisfies the redress sought by the Union and resolves the matter." The Union never responded to the Company's letter.

Later, when the Union discovered that the Company did not implement the plan as outlined in its letter it alleged that the Company had failed to live up to the resolve for the Grievance relying on the letter as a binding settlement.

In the course of his award Arbitrator Foley reviewed a number of important "themes and principles" respecting the settlement of grievances:

First, grievance settlements should be encouraged and it is important that the terms under which settlements are reached be written clearly so that they are readily enforceable.

Second, the general practice employed by most employers and unions, a practice that is recommended and commended, is that a grievance is not deemed to be resolved until/unless there are formal documents signed by authorized representatives of the employer and the union, setting out the specific terms of resolution and confirming that these terms constitute full and final settlement of all the issues raised in the grievance.

Third, in circumstances where there is a dispute as to whether a specific grievance has been resolved, a positive determination, confirming that a resolution/ settlement exists, should only be made where the party advancing that proposition is able to clearly demonstrate that what both the employer and the union intended was the resolution/settlement of all aspects of the grievance on particular mutually understood terms. Such a determination should be based on an objective assessment of any and all verbal and written communication between the employer and the union at the time the resolution/settlement is alleged to have been reached.

Fourth, any written document purporting to contain the terms under which a grievance has been resolved need not contain every precise aspect of the resolution/ settlement as long as the document is sufficiently definite that it can reasonably be concluded to have dealt with all the essential and fundamental elements of the grievance in clear and unambiguous terms. Any significant uncertainty about key aspects of an alleged settlement/resolution can render the alleged resolution/ settlement unenforceable.

Fifth, there need not always be a formal written acceptance of an alleged grievance settlement document for that settlement document to be unenforceable [it appears in this sentence that what the arbitrator meant to say was "enforceable" as opposed to "unenforceable"]. However, it must be concluded, from the subsequent conduct/actions of the employer and the union, that there was clearly a "meeting of the minds" of both parties on how all the essential and fundamental elements of the grievance were being resolved.

Sixth, resolution/settlement of a grievance is not enforceable if it can be demonstrated that there was a mistake in the written document describing the resolution/settlement, this mistake involved an essential and fundamental aspect of the resolution/settlement and one party had accepted the resolution/settlement knowing that the mistake existed. In such a circumstance, it cannot be said that there was a mutually understood agreement on the actual terms of the resolution/settlement (at page 8).

On the facts of the case Arbitrator Foley found that the Company's letter was "vague and exploratory" and "tentative in nature". He concluded that there was no meeting of the minds between the Company and the Union on the resolution of the Grievance.

This case is important because it provides very useful guidance for labour relations practitioners on how to approach, carry out and conclude settlement discussions regarding grievances. We recommend that employers develop consistent practices for formalizing and documenting settlement agreements that encompass all the essential and fundamental elements of the grievance in clear terms. This will assist employers in case subsequent litigation arises over whether a deal is a binding and legally enforceable contract.

Should you wish to know more about this case, or any other area of labour employment law please do not hesitate to contact us.

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IMMIGRATION UPDATE—NEW VISA REQUIREMENTS FOR MEXICAN NATIONALS

On July 13, 2009 Citizenship, Immigration and Multiculturalism Minister Jason Kenney announced that, effective July 16, 2009, Mexican Citizens will no longer be "Visa exempt". As a result, Mexican nationals are now required to apply to a Canadian Consulate abroad in order to obtain a Visa prior to travelling to Canada. This can have serious effects on Canadian business in a number of different circumstances, including:

- Canadian companies that employ Mexican nationals as foreign workers already in Canada;
- Canadian companies that employ Mexican nationals as foreign workers not yet in Canada; and
- Canadian companies that do business with Mexican companies and the ability of delegates of the Mexican business to come to Canada for business purposes.

In regards to Canadian companies that employ Mexican nationals as foreign workers who are already in Canada, it is important to note that those Mexican foreign workers with valid work permits do NOT need to immediately obtain Canadian Visas in order to maintain their status in Canada. If however, it is anticipated that the Mexican foreign worker will be travelling outside of Canada, they will be required to obtain a Canadian Visa prior to seeking re-entry to Canada. Companies in such a situation would be wise to begin the process of obtaining a Visa as soon as possible as the process can take up to a month.

In the case of Canadian companies that are in the practice of employing Mexican nationals as foreign workers, if arrangements have been made to hire a Mexican national and they are not yet in Canada, they will now be required to file their application for a Visa and for their Work Permit in advance of travelling to Canada through the Canadian Consulate in Mexico City. There can be significant delays in this process and so applicants are encouraged to apply early. If travel is imminent, there are expedited procedures, but there is no guarantee that the travel dates will be met.

Where a Canadian company does business with a Mexican company, and from time to time finds that their Mexican colleagues must travel to Canada for business purposes, those individuals will now be required to obtain their Visa and authorization to enter Canada as a Business Visitor in advance though the Canadian Consulate in Mexico City. These applications will require an "Invitation Letter" from the Canadian company. Again, individuals are advised to apply well in advance with respect to such an application due to significant processing times.

Should you require assistance with respect to any of the above, or should you have questions regarding any Immigration related question, please don't hesitate to contact Ryan Neely.

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Farris is a leading Canadian law firm based in Vancouver, British Columbia. The Labour and Employment group is one of its cornerstones. Our lawyers represent a wide range of employers including governmental bodies, educational institutions, and businesses in many different industries. A number of our practitioners are acknowledged in the Canadian Legal Lexpert Directory and many are ranked in the top 500 leading lawyers in Canada.

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