



Constructive Dismissal:

How to Implement Workplace Change

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Changing Terms of Employment – Constructive Dismissal & Mitigation

1. *Clarke v. Halifax Herald Limited* – 2017 NSSC 337 - 🗨️ 😞
2. *Halifax Herald Limited v. Calvin Clarke* – 2019 NSCA 31 - 👍 😊

Constructive Dismissal

1. Was there a unilateral change that breaches the employment contract?
2. If so, did the change substantially alter an essential term of the contract?


Mitigation - *Evans*

- Even if constructively dismissed, in some circumstances the duty to mitigate may require the employee to return to work for the same employer, assuming there are no barriers to re-employment
- What are barriers? Work environment that would be demeaning, involve hostility, humiliation, embarrassment or acrimonious relationships
- Multifactored, contextual analysis → objective standard


Key Facts

- Traditional advertising revenue in newspaper industry on decline globally
- Created new position selling diverse range of products
- Employee highly pessimistic about prospects in the new role
- Protests and eventually leaves despite income being protected
- Employer worked hard to address concerns, told employee how valuable he was and advised his projections would not be acceptable to the employer, either

Trial Decision

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- Actual sales figures (i.e., sales after employee walked out the door) held not to be admissible
- Finding that income “would have” gone down, despite denying admissibility of actual sales figures
- No failure to mitigate by walking out the door, despite no environment of hostility, embarrassment, humiliation, etc.

Court of Appeal

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- Actual sales figures were relevant & admissible to both constructive dismissal and mitigation → this on its own justified a new trial
- Actual sales figures were relevant to assessing whether the employee's subjective beliefs were reasonable (e.g., whether a reasonable person would have foreseen growth in the new role)
- Employer fully believed that sales were to increase and said why → this evidence went unchallenged

No Constructive Dismissal, No Failure to Mitigate

- Trial Judge failed to appreciate or consider the magnitude of the change to the role (i.e., not fundamental change)
- Employer has to show intention to no longer be bound by the employment contract
- No analysis of severity of changes or the uncontested evidence → focused solely on subjective views of employee
- No concerns about acrimony or work atmosphere at the time of resignation

Key Takeaways – Implementing Change

- Provide notice, if possible
- If income related, “Red Circle” → at least for a period of time
- Convey to the employee their importance at the workplace → intention is key
- Commit to re-visit and follow up about impact of changes
- Ensure no environment that is demeaning or toxic atmosphere
- Document any concerns raised and responses → preserve evidence



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