

LABOUR AND EMPLOYMENT

LAW BULLETIN

*June 2002***DEMOTION OF OVER-PROMOTED EMPLOYEE CONSTITUTES CONSTRUCTIVE DISMISSAL**

Demoting an over-promoted employee can constitute constructive dismissal. In *Kolaczynski v. Benz Sewing Machines Ltd.*, an unreported decision of the Ontario Superior Court of Justice issued March 22, 2002, the plaintiff employee was hired by Benz Sewing Machines Ltd. ("Benz") in 1989 as a controller, at a starting salary of about \$40,000 a year.

Benz found that the plaintiff initially did a "great job", and towards the end of 1990 he was promoted to Vice-President and General Manager. He was given a substantial salary increase to \$100,000 per year, plus an override commission on Benz's sales. He subsequently received another salary raise, to \$110,000.00 per annum.

Late in 1995, the plaintiff was assigned responsibility for managing one of Benz's subsidiary companies in Quebec. Although the plaintiff subsequently reported back that everything with the subsidiary was under control, in September 1996, Benz learned that the situation at the subsidiary was deteriorating rapidly. Morale of employees at the subsidiary was very low, the company's dealers were upset and key employees were threatening to revolt under the plaintiff's direction. Benz quickly responded by removing the plaintiff's responsibilities for the subsidiary company and returned him to his previous duties. Financial performance of the subsidiary company recovered after the plaintiff was relieved of his responsibilities.

In 1997, the plaintiff continued to work for Benz, managing the office and acting as a controller for Benz and related companies. He was also asked to oversee the installation of a new computer system, designed to manage the defendant's sales operations.

By late 1997, however, it was becoming increasingly apparent that there were serious problems with Benz's records of accounts payable and accounts receivable. Benz told the plaintiff that he would no longer be in charge of office management and that as a consequence of the reduction in his responsibilities, his salary would be reduced from the rate of \$110,000 to \$75,000 per annum. The plaintiff's override commission was also eliminated by this date, but the plaintiff was promised a bonus of \$25,000.00, if he got the computer system installed successfully by June 30, 1998.

The plaintiff continued in his employment, performing his reduced duties at his reduced salary. Benz continued to experience problems with its accounts payable and receivable management, aggravated by poor staff training and the improper use of the new computer system. The plaintiff began to experience episodes of depression and marital, work-related stress and alcohol dependency problems.

On March 15, 1998, the plaintiff sent a memo to Benz indicating his extreme unhappiness with the change in his salary and his responsibilities. He revealed his

depression and his medical treatment for it. He asked that Benz “reconsider and reinstate [his] responsibilities and authority” and that his compensation package be returned “to a level in keeping with [his] competence”. Benz did not respond.

In June 1998, the plaintiff sought payment of the \$25,000 bonus for having completed the installation of the computer system. However, Benz refused the plaintiff’s request on the basis that the computer was not functioning satisfactorily. Benz offered to pay part of the bonus, with the balance to be paid in installments as the system improved. In response, the plaintiff went on sick leave, and subsequently received short term and long term disability payments. The balance of medical opinion indicated that he would likely remain on long term disability until he reached age 65.

The plaintiff commenced an action alleging that he had been constructively dismissed from his employment. Benz responded that the plaintiff had resigned from his employment and, in the alternative, it had just cause to dismiss him. The Court found in favor of the plaintiff.

The Court found that there were “no evil-doers in this piece”, noting that the “tragedy in the piece” was that the plaintiff was “promoted beyond his capabilities and certainly to an income level... vastly beyond anything that he had hitherto experienced”.

The Court determined that the plaintiff “simply could not handle” the management of the Quebec subsidiary. However, regardless whether the removal of his management responsibility constituted constructive dismissal, the plaintiff was found to have “clearly accepted” the new job description given to him at the end 1996.

On the other hand, the Court found that the “unilateral and traumatic” reduction in the plaintiff’s salary (from \$110,000.00 to \$75,000.00), job description and other compensation at the end of 1997 amounted to constructive dismissal.

The Court was of the view that the various accounting problems that Benz endured in 1997 and 1998 were attributable to start up glitches in the new computer system and probably a lack of adequate staff training. Under the circumstances, the Court was of the view that the plaintiff deserved a warning and a co-operative effort to resolve the problem, rather than instant demotion.

The Court found that there was not cause, in these circumstances, for a constructive dismissal.

Although the plaintiff waited several months after his demotion before commencing his legal action against Benz, the Court found that it was not unreasonable for him to “postpone his decision”. The plaintiff did not, therefore, acquiesce to the demotion, notwithstanding that he continued to work for Benz for some months following the demotion.

Given that, on the date of the termination of his employment, the plaintiff was age 59, had completed 9 ½ years of employment and other factors, the Court found that the plaintiff was entitled to 15 months of salary in lieu of notice. The Court found that there was no element of bad faith present in the termination, and therefore refused to increase the notice period awarded.

The Court found, however, that the plaintiff was entitled to the \$25,000 bonus for having completed the installation of the computer system, notwithstanding its failure to properly perform. In the result, the plaintiff received an award of damages in excess of the sum of \$80,000.00, in addition to disability benefits that he had already received.

What potential steps could Benz have taken to avoid a finding of constructive dismissal? Among other things, any of the following steps may have protected Benz from that finding:

1. Benz could have attempted to negotiate with the plaintiff for consensual amendments to his terms and conditions of employment, rather than forcing changes on him unilaterally.
2. Benz could have given working notice of the changes in his terms and conditions of employment. If the plaintiff didn’t like the changes then he could use the working notice period to seek employment elsewhere. There are competing authorities as to whether or not notice of unilateral, fundamental change is a defence to such changes. Furthermore, in the circumstances of this case, it may not have been practical for Benz to provide the plaintiff with working notice of the changes, especially since it probably wished to make the changes immediately. However, working notice may have been an effective solution at law.

3. At the time of the original promotion, Benz could have proactively documented the term of the promotion, including a term for reductions in the plaintiff's duties, responsibilities and remuneration package in the event that he did not succeed. Admittedly, it would appear that Benz had every confidence that the plaintiff would succeed at the time of his promotion, and it may not have been

palatable to Benz from a business perspective to attach such a term to the promotion offer at the time. Also, in this case the "demotion term" would have probably been time limited to a period well before the date of the actual demotion. However, employers should give consideration to documenting promotions and including provision for subsequent demotion of the over-promoted employee, in case it is needed.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, counsel should be consulted.

Should you require further information or advice as to your obligations under the proposed PPIA, please feel free to contact any member of our Labour and Employment Group.

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