

CALL IT WHAT YOU WANT, IT'S STILL CONSTRUCTIVE DISMISSAL

Posted on January 19, 2015

Categories: [Insights](#), [Publications](#)

Actions that would otherwise be justification for an employee to claim constructive dismissal cannot be transformed simply by "requiring" an employee's relocation to another office or demanding that the employee accept an offer of alternative work.

In [Shirbigi v. JM Food Services Ltd.](#) (2014 BCSC 1927), the B.C. Supreme Court found that an employer could not mask the fact that it had constructively dismissed the plaintiff simply by relocating her place of work.

In Shirbigi, the plaintiff was hired by the defendant pizza franchisor as a district manager ("DM") and made responsible for overseeing, initially, 16 franchise locations. The plaintiff was required to travel regularly between the various locations to check up on their operations, and later lodged a complaint with the defendant's senior management after having the number of franchises which she oversaw jump from 16 to 23.

Not long after the plaintiff made her complaint, she was advised that she would be training a group of new DMs and then put into the position of Store Manager at one of the franchise locations. Prior to that point, her work was based out of the corporate head office. As a result, and in view of the "opportunity" being a demotion, she refused and sued for damages based on constructive dismissal. The Court did not accept the defendant's contention that this change was made at the plaintiff's request.

Another factor in the decision to relocate the plaintiff was an extramarital affair which she had with the defendant's CEO. The CEO appears to have thought it would have been awkward to have the plaintiff working out of the head office after their affair ended, particularly since the CEO's wife also worked in that location. Ultimately, the Court concluded that the defendant's CEO wanted the plaintiff out of sight and mind and, thus, made the decision to improperly change her workplace and position. However, the Court found that these changes amounted to constructive dismissal, despite the defendant's claims that they were allegedly necessary, including for reasons of the plaintiff's job performance.

The Court also ruled that the plaintiff was not under an obligation to accept the Store Manager position in order to mitigate her damages. Terminated employees are generally expected to mitigate damages resulting from a dismissal. This can include accepting a different position with the same company, so long as the salary is

the same, working conditions are not substantially different, and where the personal relationships involved are not acrimonious. However, in *Shirbigi*, the Court found that the plaintiff was not obligated to accept the changed position for two main reasons: first, the new position came with substantially diminished responsibilities, and second, the franchise which the plaintiff was to manage was owned by the brother of the CEO with whom she had the extramarital affair that led to the constructive dismissal. As a general rule, it is rare that a court will obligate an employee to continue a work relationship that is so clearly strained.

by Kyle M. Lambert and George Waggott

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2015