



Matthew B. Lerner
416-865-2940
mlerner@litigate.com

August 9, 2017

Resignation or Termination? New Guidance on Navigating Constructive Dismissals

In most cases, an employee who resigns voluntarily from employment is not legally entitled to damages. However, the line between resignation and constructive dismissal has become increasingly blurred and is a common issue of contention in employment litigation. In the recent case of *Persaud v Telus Corporation*, the Ontario Court of Appeal provides useful guidance regarding the effect of conduct in determining whether a resignation is actually a constructive dismissal.

Ms. Persaud was an employee at Telus for seven years before her resignation in 2004. Soon after resigning, she asserted that she was constructively dismissed and sought damages for bad faith termination and intentional infliction of mental suffering. She also sought aggravated and punitive damages in relation to a workplace investigation Telus conducted after Ms. Persaud's departure. The investigation concluded that Ms. Persaud had accessed and sabotaged a Telus server after her departure.

The Ontario Superior Court of Justice rejected all of Ms. Persaud's allegations. Justice Glustein affirmed that in a successful constructive dismissal claim, the reason for resignation must relate to either a unilateral change to an essential term of employment, or a series of acts evidencing the employer's intention to no longer be bound by the terms of the employment contract. The evidence before the court pointed to Ms. Persaud's resignation being motivated by solidarity with her former co-worker's dissatisfaction with management, and not because of a change in her working conditions.

Justice Glustein also rejected the constructive dismissal claim on the grounds that Ms. Persaud condoned the changes to her working conditions, particularly with respect to increased working hours. Since Ms. Persaud did not complain about the increased work hours, did not seize transfer opportunities made available to her, and admitted that she would have stayed at Telus if her supervisor had not left, the constructive dismissal claim was dismissed.

In dismissing all grounds of appeal, the Court of Appeal found that the trial judge made no errors of law and no palpable and overriding errors in the assessment of the evidence.

Regarding the constructive dismissal claim, the Court held that the trial judge was correct in requiring a causal link between the breach of contract and the damages suffered by the plaintiff. Notably, the Court of Appeal emphasized that if an employee consents or acquiesces to changes to an essential term of their employment contract, the changes will not amount to a constructive dismissal. As Ms. Persaud remained silent as to an increase in working hours, and, on her own evidence, would have stayed if her supervisor had not resigned, her claim was dismissed.

This decision lends employers some clarity on whether their workplace alterations will be found to amount to a constructive dismissal subject to litigation from employees. The Court of Appeal firmly rejects the suggestion that an employer needs to read the minds of their employees when altering working conditions. If an employee is not willing to remain in the altered position, that reluctance needs to be made explicit to their employer. Otherwise, they are tacitly condoning or accepting the alteration to the employment relationship.

With notes from Samantha Hale