

FTR Now

There is Nothing Common About a Constructive Dismissal

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In the first case of its kind, the Ontario Superior Court of Justice has denied a motion for certification of a class action for constructive dismissal on the basis that it lacked the essential element of commonality. The decision has very significant implications for employers, particularly in the context of employers' approaches to managing and implementing changes. The plaintiffs had alleged that the employer's restructuring of their compensation and office environment fundamentally changed the terms of their employment, resulting in constructive dismissal and liability under the *Employment Standards Act, 2000*. This *FTR Now* discusses the April 12, 2011 Court decision and its implications for employers.

BACKGROUND

The issue arose when Allstate Insurance Company of Canada developed a new model for the distribution of its insurance products which included changes in the compensation structure for its sales employees.

Prior to implementing changes in its operating structure, Allstate employed sales agents who were geographically dispersed in neighbourhood offices. Allstate reimbursed the agents, wholly or partially, for leasing, equipment, advertising, staffing and other expenses through its office expense allowance program.

The agents were responsible for selling insurance to new and existing customers, collecting premiums, processing renewals of insurance and generally maintaining Allstate's book of business.

The insurance market became increasingly competitive, with pressure from new competitors and the introduction of more flexible distribution models with multiple delivery channels for insurance products. In response, Allstate reviewed its business model and concluded that the location and structure of its existing neighbourhood offices were not effectively responding to the changing environment.

Allstate determined that moving to consolidated and more conveniently located offices, to be corporately managed and staffed with specialized roles, would relieve agents of the responsibility and expenses associated with office management and better position Allstate to compete and grow in the evolving and highly competitive marketplace for insurance products.

Consistent with the changing office structure, Allstate redesigned its compensation system to provide a shared office level bonus plan to reflect growth, retention and profitability as well as renewal business. Allstate also increased the maximum payable commission rate on new business and introduced individual performance bonus plans to focus agent effort on new business generation.

On July 24, 2007, Allstate delivered an advance general announcement and notice letter to all of its active agents advising that it would be implementing a revised product distribution model and amendments to agent compensation. Agents were further advised that this new model, including pending consolidation in office locations and deployment of specialized staffing roles, would be phased in over the period September 1, 2007 through September 1, 2009. They also were advised that the new compensation system under the new model would not be implemented until September 1, 2009.

All of Allstate's active agents were advised that they were being given 24 months' notice to adjust to the new model, during which period they would receive **the greater of** a guaranteed amount of income based on the agent's previous year's earnings, or the actual income generated by the agent under the ongoing old model or the new model, once the agent moved into a new office location.

Allstate also provided each agent with an individual letter outlining his or her ongoing role and compensation and organized follow up meetings with the agents to address the changes and provide support.

Each of the three proposed representative plaintiffs responded differently to the change and resigned at different points in time. A very substantial percentage of the proposed class did not resign until after September 1, 2008, and many of those did not resign until 2009.

The plaintiffs brought a proposed class action claiming termination and severance pay pursuant to the *Employment Standards Act, 2000*, as well as punitive damages for the manner in which Allstate implemented its new model.

THE CLASS PROCEEDINGS ACT (“CPA”) COURT DECISION

The central question for determination by the Court was whether an action alleging constructive dismissal was suitable for common treatment within a class action proceeding. The plaintiffs argued that the question could be determined by looking at the “big picture”: that is, broad based restructuring affecting a particular group of employees. Allstate argued that such an approach was contrary to the fundamental principles of constructive dismissal which required “an individualized inquiry.”

The Court reviewed the legal framework of constructive dismissal and assessed the changes resulting from the adoption of the new model. The impact of the changes to compensation and office location varied by agent and depended upon a variety of factors including the agent’s compensation profile (having regard to the size, nature and distribution in the book of business serviced by the agent), expenses under the former neighbourhood office, what role the agent was offered in the new model, when such role was assumed, local market conditions, staff competency and other variables. The Court also observed that the members of the proposed class were subject to individualized and different employment contracts.

In reviewing the certification requirements of section 5(1) of the *CPA*, the Court found that while certain elements of those requirements were met in this case (a cause of action was disclosed and there was an identifiable class), the plaintiffs failed to meet the remaining part of the test under sections 5(1)(c), (d) and (e).

With respect to section 5(1)(c) of the *CPA* and the plaintiffs’ first claimed common issue that the new model made “substantial” material changes constituting constructive dismissal, the Court found this proposed common issue ignored the nature of the individual inquiry that the Court must undertake to decide if an employee has been constructively dismissed. The Court found that the proposed second common issue, whether “substantial” material changes could be made with two years’ notice, also could not be assessed on a common basis as the issue of reasonable notice of a change requires an individual inquiry, having regard to each agent’s age, length of service, position and other relevant factors.

The third claimed common issue, whether the employment contracts permitted the employer to impose “substantial” material changes, also lacked commonality as the contractual language and history of other amendments varied by agent. There was also no commonality to the fourth claimed common issue of condonation, i.e. whether agents were obligated to express disagreement and/or resign at any time prior to September 1, 2009 and if so, when.

The question of mitigation, set out in a claimed seventh common issue, also was one that needed to be considered on a case-by-case basis. With respect to the remainder of the common issues, no liability issues were common, nor did the “some evidence” test establish that Allstate’s conduct somehow warranted punitive damages.

In sum, the Court found no common issue that would significantly advance the litigation for the class: “[i]nstead, an individual inquiry is at the heart of every liability issue.” The Court further found that a class action was simply not the preferable procedure for resolution of these issues under section 5(1)(d) of the *CPA* and nor was there a workable litigation plan as required under section 5(1)(e) of the *CPA*.

CONCLUSION

The Court's decision affirms that the principles of constructive dismissal require an individual assessment that is not amenable to common treatment through the class proceedings process.

The manner of implementation of changes, including notice and transitional income protection, will continue to be an important consideration for managing the risks associated with any restructuring. Significantly, the Court's decision included favourable observations on the deployment of Allstate's restructuring initiative, including the fact that each active agent was provided with continued employment and that Allstate had valid business reasons for adopting a new model.

[Kafka v. Allstate Insurance Company of Canada, 2011 ONSC 2305 \(CanLII\)](#)

For more information on this decision and its implications for employer restructuring initiatives, please contact either [John C. Field](#) at 416.864.7301, or your regular [Hicks Morley lawyer](#).

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