THE CONTINUING EVOLUTION OF CONSTRUCTIVE DISMISSAL PRINCIPLES, POST SHAH
A SUPPLEMENTAL PAPER TO THE JUNE 2004 EDITION

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**POST – Shah CASE LAW**

The following cases evolve from the main principal in *Shah*, namely that constructive dismissal can be found without breaching a specific provision in a contract if an employer has acted in a way that repudiates the entire employment contract. I have focused my research on cases that have been overlooked by the June 2004 Edition or which have been released after the June 2004 Edition to avoid redundancy. Furthermore, I have used the overlapping themes that were developed by the authors as a guideline for this research.

**Personality Clash with Employer**


These cases illustrate that the threshold regarding the conduct of an employer must render employment intolerable for the employee. Nonetheless, the courts seem to be using an employer’s conduct towards an employee as a factor that assesses whether constructive dismissal should be found regardless of whether it has reached that standard (for example, see *Johnston v. Household Financial Corp.*, [1997] O.J. No. 2368 [“Johnston”] (at para. 24)). By contrast, the courts have also taken into consideration supportive conduct by an employer to negate a constructive dismissal claim. In *Hussey v. Canadian Pacific Hotels Corp.*, [2004] N.J. No. 152 (S.C.) [“Hussey”], the plaintiff, a hotel receptionist, based her constructive dismissal claim on allegations of humiliating and demoralizing conduct by the defendant employee at three particular meetings in May, June and July 2001. However at trial, the plaintiff admitted that she had made several clerical errors in the past, which resulted in her being sanctioned at those meetings. Contrary to the allegations of the plaintiff, the evidence at trial illustrated that she was treated with respect by management and they constantly encouraged her to provide better quality service. As a result, the court held that their discipline was not excessive and constructive dismissal could not be found (at para. 29).

**Performance-Related Discipline**

As in both *Shah* and *Menard*, the courts interpreted employers’ issuance of unjustified performance reviews as a factor that leads to constructive dismissal. In *Marshall v. Newman*, [2002] O.J. No. 4952 [“Marshall”], the plaintiff Marshall worked as a customer service representative for the previous employer insurance company and was retained when the defendant employer bought the business in 1999. The employer unilaterally decided that Marshall should be transferred to their Colburne office, which was a longer commute. When Marshall objected to the transfer, the defendant employer issued a memorandum critiquing her computer skills. Marshall did not report to work and brought an action for wrongful dismissal claiming she had been constructively dismissed.
The Divisional Court held that the place of work was not an essential term in the contract thus, constructive dismissal could not be found (at para. 16).

The Court of Appeal [2004] O.J. No. 172 [C.A.] overturned the Divisional Court decision and re-instated the trial court judgment, finding that Marshall had been constructively dismissed. The court reasoned that when the insurance business was sold and the new employer offered positions, the employee could have refused the offer of employment and received severance from her previous employer (para. 8). The court commented that the performance review was not justified because it was only issued after she refused the transfer (para. 6). Although the transfer was the focal point for finding constructive dismissal, the court assessed the unjustified performance memorandum as evidence of unfair and unreasonable treatment by the employer leading to the constructive dismissal.

In Zorn-Smith v. Bank of Montreal, [2003] O.J. No. 5044 [“Zorn-Smith”], the plaintiff employee’s position at the defendant Bank was eliminated due to downsizing. As a result, the Bank explained that her salary would be frozen for 24 months while the Bank looked for another job. The Bank offered her a job working in a position where she had no experience or training, namely Financial Services Manager. Zorn-Smith had previously applied for this position and had been rejected because the Bank did not think she could complete the course with three young children at home. When she reminded the Bank’s district manager, Neil Graham, of the previous application and interview, Graham “went from pleasant to unfriendly” (at para. 11). He told her that she had to take the position in order to remain at the same salary level and that she was not entitled to have the salary freeze of 24 months.

In April 1999, Zorn-Smith accepted the position. By February 2000, she was diagnosed with work stress and burnout due to her long hours and heavy workload. In March 2000, the Bank forced her to accept a demotion to a less stressful position but she resumed the Financial Services Manager position when her replacement went on maternity leave. Zorn-Smith repeatedly informed management that she was overworked and that there was not enough people working on the files. The Bank responded by telling her to “hang in there until the end of the RRSP season” (at para. 43). By February 2001, her physician diagnosed Zorn-Smith with total mental impairment (at para. 56). The physician requested the Bank’s Medical Advisor to contact him to discuss the matter. The Bank’s Medical Advisor ignored the request and on May 17, 2001 reported that Zorn-Smith’s illness was not totally disabling and that she should return to part-time (at para. 57). The Bank informed Zorn-Smith that her short-term disability would not be extended beyond May 27, 2001 and offered her a full or part-time position in her previous or lesser position at half the salary. Zorn-Smith refused these positions and on June 28, 2001 both her position and her benefits were permanently terminated. Zorn-Smith brought a claim for wrongful dismissal alleging constructive dismissal.

The court held that the Bank’s letter to Zorn-Smith regarding the termination of her disability benefits on May 18, 2001 was a repudiation of the employment contract (at para. 109). Aiken J. explained that the Bank’s options to re-instate her at the same
position that had lead to her burnout or to a lesser position that paid half her salary “amounted to constructive dismissal” (at para. 108). As in Marshall, the defendant employer attempted to discredit the employee’s skills at the time of her termination. The Bank alleged that Zorn-Smith’s problems arose from her own inabilities to handle the work and the workload. Furthermore, the Bank suggested that Zorn-Smith had poor time management skills and focused too much on customer service. Aiken J. rejected this allegation citing Zorn-Smith’s perfect performance appraisals by clients and chastised them for trying to divert the court’s attention from the real issues (at para. 95).

**Duty to Assist in Disability**

One of the principals that has evolved throughout the post-Shah constructive dismissal cases is the duty to assist an employee who is disabled. In Menard v. Royal Insurance Co. of Canada, [2000] O.J. No. 2202 (Sup. Ct.) [“Menard”], Henessey J. found that the defendant Royal Insurance had constructively dismissed the plaintiff Menard because they failed to assist her in accessing disability benefits. Henesney J. explained that Royal had continuing obligations to Menard as her employer even after she had wrote her resignation letter. Royal knew that Menard had been under considerable stress and had been diagnosed with depression and that was the cause of her resignation. Consequently, Henessey J. found that Royal had a duty to inform Menard of the benefits to which she had access and the time limits for making a claim (p. 1-13 of 6-minute).

In Zorn-Smith, the court overlooked the fact that Zorn-Smith did not appeal the Bank’s termination of her disability benefits before pursuing a claim for wrongful dismissal. Although the Bank informed Zorn-Smith of her right to appeal their terminating her benefits, the Bank fell short in discharging their duty to assist their employee regarding benefits. Aiken J. cited that the Bank failed to: inform Zorn-Smith of the process involved, provide her with the documents necessary to contest the decision, assist her with the appeal procedure (at paras. 98-103). Consequently, the court found it was appropriate for Zorn-Smith to seek relief through the courts without exhausting the internal appeal mechanism regarding her benefits.

While the courts have allowed constructive dismissal to be found where the employer fails to assist an employee’s access to benefits, the courts have also determined the threshold for discharging this burden. In McAlpine v. Econotech Services Ltd., [2004] B.C.J. No. 389 [C.A.], the appellant McAlpine was terminated after a lengthy medical leave. After working at the defendant Econotech’s pulp and paper laboratory for 19 years, McAlpine suffered from depression and went on medical leave in November 1992. After completing the short-term benefit time period, McAlpine went on long-term disability benefits for two years. After two-years on long-term disability, Econotech agreed with McAlpine to commence a gradual return to work scheme in early January 1995. Econotech also allowed McAlpine to work on a per fee basis as opposed to hourly and allowed her to work at home to relieve the pressures of work. However, by July 17, 1995, Manulife discontinued McAlpine’s disability benefits even though Econotech attempted to have them re-instated. In October 1996, McAlpine asked Econotech for an early
retirement package because she was still unable to work (at para. 11). Econotech refused to provide her with a retirement package and McAlpine brought a claim for wrongful dismissal alleging that she had been constructively dismissed. Saunders J.A. rejected the claim explaining that Econotech had discharged their duty to assist. He stated that constructive dismissal had not been established because Econotech had provided disability benefits for a long period of time and tried to rehabilitate their employee through different job options, namely their gradual return to work schemes (at para. 24).

CORPORATE RE-ORGANIZATION

Failure to Consult in Major Decisions

Constructive dismissal has been found in post-Shah cases where an employer fails to consult an employee regarding corporate re-structuring (see p. 2-2 6-minute; Schumacher v. Toronto Dominion Bank, (1999) 44 C.C.E.L. (2d) 48)). In Lane v. Carsen Group Inc., [2002] N.S.J. No. 428 [“Carsen”], the plaintiff Lane was hired to handle sales in all four Atlantic Provinces and for all product lines of the defendant, Carsen Group Inc. In April 2000, Carsen advised Lane that he was no longer responsible for the Province of Newfoundland and Cape Breton Island, which resulted in a significant reduction of income for Lane. Lane continued employment with Carsen until they hired a new salesperson for those regions at which point he considered himself constructively dismissed. Prior to these changes, Carsen and Lane were having disagreements regarding whether or not he should continue to be paid travel expenses for his trips to Newfoundland. Although Lane vigorously opposed the changes, Carsen alleged that he agreed to the changes because he gave them an ultimatum regarding servicing Newfoundland. The court held that Lane had not been consulted regarding the reduction of his sales territory, which resulted in a constructive dismissal (at paras. 30-31). This case illustrates the employer’s requirement to include employees in their decision-making when re-organizing their company. An interesting side note is that this court emphasized that conversations around the subject essential to the decision will not be considered sufficient to discharge an employer’s duty to consult (at para. 19).

Demotion: Loss of Status, Prestige or Salary


In Wilson, the plaintiff Wilson was hired as Marketing and Program Manager in July 1998 by the defendant Chamber of Commerce [“Chamber”] to promote and market it. In December 1998, Wilson advised the Chamber that she was looking for another position elsewhere because she did not get along with the manager at the time. Shortly afterwards, the manager was fired and the Chamber asked her if she was willing and
capable of being manager. The Chamber also told her to “get used to being manager” and increased her salary from $28,000 to $30,000. Moreover, they allowed her to change her business cards to “Manager” (at para. 28). Nonetheless, after Wilson had acted in that position for seven months, the Chamber informed her that they were hiring a permanent manager and that she could apply for the position. Subsequently, the Chamber did not hire Wilson as manager and told her she could have her old job back as “office coordinator”, with the previous salary. Romilly J. found that even if her manager position was only temporary, the Chamber had allowed Wilson to assume that it was a permanent position (at para. 28). Thus, Romilly J. found that Wilson was constructively dismissed at the time she was offered a chance to return to her previous position (at para. 30).

In Kieran, the Court of Appeal overturned the trial judge’s finding that Kieran had resigned from his position instead of being constructively dismissed. The appellant Kieran was a Senior Vice President of Purchasing from Ingram. In December 1996, Kieran informed the respondent Ingram Micro Inc. [“Ingram”] that if he was overlooked for president of Ingram Canada and his rival Gary Schofield received the position, he would require a transfer to an Ingram company abroad. Jeffrey Rodek, president of Ingram Worldwide, informed Keiran that if Schofield became president he would try to find him suitable employment. In June 1997, Schofield was named president and Rodek only found a position at a lower position and pay scale. Lang J.A. found that the offer of the lower position amounted to a constructive dismissal because the proposed employment was not a reasonable alternative (at para. 44).

It is interesting to note in both of these cases constructive dismissal arose because the employees did not receive the positions that the employer implied they would receive. Neither Wilson nor Keiran actually were promised their positions however, their employers’ made representations that they were in line to receive the positions. Consequently, it seems as though the court will allow constructive dismissal in certain factual situations where a company does not grant an employee a position they were lined up to receive.

Constructive Dismissal and Compensation

In Johnston v. Household Financial Corp. [1997], O.J. No. 2368, the defendant Household Financial Corp. underwent serious re-organization and the plaintiff Johnston’s position was changed from Vice-President, Treasurer to Vice-President Corporate Finance and another person took over the Treasury function in 1992. In August 1993, Johnston was informed another Vice-President Terry Cretney was named the new Treasurer and his tasks would focus on asset-backed securitization. Whereas Johnston was originally responsible for managing a substantial portion of assets, his involvement was reduced to zero and he was told that they were not prepared to make a long-term commitment to him or his securitization project work. Consequently, Johnston resigned and brought an action for constructive dismissal. Although he was successful with his claim, the court did not allow him to include a bonus in his damages. MacDonald J. found that Johnston was not entitled to a bonus because it was not an integral part of his remuneration package. MacDonald J. stated that allowing the bonus to be part of
damages would lead to unjust enrichment because Johnston “was given the exceptional raise in pay in August 1993, one month before he left” (at para. 36).

In *Kussmann v. AT & T Capital Canada Inc.*, [2002] B.C.J. No. 907, the plaintiff Kussmann negotiated the terms of his contract to receive $105,000 with bonuses calculated at 10% of gross profit in excess of $600,000 instead of the other option the defendant AT&T offered, namely a salary of $93,000 with a bonus calculated at 10% of gross profit in excess of $480,000. In December 1996, AT&T changed Kussmann’s compensation package to the second option at $93,000 thus reducing his salary. According to AT&T, this was the same salary as the rest of his team, which would result in payment higher than his original compensation package if he met his targets. The services of Kussmann’s administrative assistant were also gradually curtailed. Finally, AT&T had cancelled the commissions that Kussmann had been receiving from another employee Sandrelli because he was using Kussmann’s clients. Hall J.A. considered the “Sandrelli Agreement” a term of the employment contract even though it was not part of the original (at para. 25). The trial judge found that the reduction in Kussmann’s base salary on its own amounted to a breach of contract because it fundamentally changed the employment contract (at para. 58). Hall J.A. disagreed with these assertions claiming that it was the combination of the reduced salary, the elimination of his administrative assistant and termination of the “Sandrelli Agreement” that lead to constructive dismissal (at para. 27).