



What's New in HR Law

Superior Court Finds Employer's Attempt to Reverse Remote-Work Arrangement was Constructive Dismissal

January 21, 2025 | By Mark Van Ginkel

Bottom Line

In [*Byrd v Welcome Home Children's Residence Inc.*](#), the Ontario Superior Court of Justice – Small Claims Court (the “Court”) held that the Plaintiff was constructively dismissed from her employment after her employer demanded that she return to in-person work following more than a year working remotely from Europe. The Court reasoned that remote work from Europe became an accepted part of the Plaintiff's job, and that the right to recall the Plaintiff to in-person work was never established nor communicated. This meant that the employer's requirement that she return to Canada amounted to a repudiation of the employment contract.

Background

The Plaintiff was employed by the Defendant, a care home, since April 2018 in the role of Manager. There was no written contract of employment.

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In May of 2020, the Plaintiff advised her Employer that her husband was being posted by the Canadian Forces to Europe. Discussions ensued regarding how the Plaintiff might be able to continue to work for the Defendant while abroad, but nothing was reduced to writing. The Employer permitted the Plaintiff to work remotely, and during the first year of her husband's posting to Europe, the Plaintiff continued to work full-time for the Defendant without issue. Meanwhile, the Plaintiff also started working a second job, but did not advise her Employer.

Following a year of remote work, the Defendant posted and hired for an on-site Manager position. Upon the new manager commencing his role, the Defendant advised the Plaintiff that her hours of work were to be reduced to not more than 15 hours per week and that the majority of her responsibilities were to be assigned to the new manager. The Plaintiff was upset by this news and direct communication between the parties broke down. The Defendant's lawyer then contacted the Plaintiff and offered two options: re-attend physically at the workplace in Canada or resign. The Plaintiff then commenced an action alleging constructive dismissal.

Analysis

The Court accepted the Plaintiff's position that, in the circumstances, she was constructively dismissed. The Court found that providing the Plaintiff with an ultimatum (i.e. return in-person or resign) amounted to a repudiation of the employment agreement and was, at law, a termination of employment.

The Court's conclusion was based on two key facts: (1) the ability to work remotely from Europe became an accepted part of the Plaintiff's contract of employment; and (2) the Employer never established nor communicated a right to recall the Plaintiff to in-person work. In concluding that remote work became an accepted part of the Plaintiff's job, the Court did not give weight to alleged oral conversations between the parties (which were disputed) and instead relied on the fact that the Plaintiff had worked remotely for more than a year without interruption and without complaint. The Court then noted that a fundamental term such as the right to recall an employee from Europe to work in-person in Ottawa calls out for clear and timely notice to the employee, which was not provided.

The Court rejected the Defendant's argument that the employment contract required the Plaintiff to work exclusively for the Defendant. However, the Court did consider a portion of the Plaintiff's earnings from her second job as mitigation income, and deducted that portion from the award of damages.

Takeaway

When allowing an employee to perform work remotely, employers should ensure that they set out the terms of the arrangement in writing to minimize the risk of liability. The right to recall an employee to in-person work will likely be considered a "fundamental term" of the employment relationship once a remote work arrangement is established. To be effective, this right should be clearly and expressly communicated, in writing, to any employees who are permitted to work remotely.

Employers who regularly permit hybrid or remote work arrangements for their employees may wish to review their standard employment agreements accordingly. Where an employee requests a hybrid or remote work arrangement, if granting that request, the employer should consider entering into a remote work agreement that reflects the employer's expectations and specifically sets out the right to recall the employee to in-person work. As constructive dismissal claims are highly fact-specific, we recommend consulting counsel about the best approach in each situation.

Need More Information?

For more information or assistance with employment issues related to remote or hybrid work arrangements or recalling an employee to in-person work, contact [Mark Van Ginkel](#) at mvanginkel@filion.on.ca or your [regular lawyer](#) at the firm.



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