



What's New in HR Law

The “Death” of an Appeal: Court of Appeal Dismisses Funeral Home’s Appeal, Upholding \$1.274 Million Damages Award for Constructive Dismissal

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Bottom Line

In a [recent decision](#), the Court of Appeal for Ontario upheld the lower court’s decision awarding a former employee over \$1.274 million as a result of the employer unilaterally imposing a number of changes to the terms of employment. The employment relationship was governed by a 10-year fixed term contract with no termination provision. This is one of the highest damage awards ever issued in a Canadian wrongful dismissal case. It serves as a stark reminder to employers that using fixed-term contracts can be extremely costly if they are not carefully and properly drafted.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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Background

The respondent, Grant McGuinty, sold his family's funeral home to the appellant employer and entered into a 10-year transitional services consulting agreement ("TSCA"). Pursuant to the TSCA, the respondent held the position of General Manager of the funeral home and was entitled to an annual salary of \$100,000, commission payments, the use of a company vehicle and fuel, group benefits, and other fringe benefits. The TSCA did not contain an early termination provision. Without one, an employee who is dismissed part-way through a fixed-term will generally be entitled to compensation through to the end of the contractual period.

Soon after the employee commenced employment, a lack of trust developed between the employee and the new owner of the funeral home. This resulted in the employee's activities being closely tracked by a subordinate employee of the funeral home. The employee's use of the company vehicle and gas reimbursement was then abruptly removed by the employer. The employer also stopped paying the employee the commissions he was entitled to under the TSCA. Eleven months into the relationship, the employee commenced a medical leave of absence as a result of stress brought on by the workplace conflict. After going on sick leave, the employee discovered that the employer had changed the locks of the funeral home without notice and without providing him with a new set of keys. The employee also discovered that his workstation had been moved to a desk in the basement and that his picture had been removed from the wall which had photographs of the historical ownership of the funeral home.

The employee never returned to work. There was very little communication between the parties until almost two years later, when the employee sued the funeral home for constructive dismissal.

Superior Court Declared Plaintiff was Constructively Dismissed and Ordered Funeral Home to Pay \$1.27 Million in Damages

At trial, the judge found that the employee had been constructively dismissed. The trial judge found the employer's course of conduct would have led a reasonable person in the employee's position to conclude that the employer no longer intended to be bound by the terms of the TSCA. Absent any termination provision in the TSCA, the plaintiff was entitled to damages equivalent to the remaining nine-year term of the TSCA, which were not subject to mitigation efforts. Other damages were also awarded including commission payments, vehicle and gas allowance and the value of his group benefits over the remaining nine-year duration of the TSCA. In total, the employer was ordered to pay the plaintiff \$1,274,173.83 in damages, plus his legal costs. The employer appealed the decision arguing what it believed to be several errors in the trial judge's decision.

Court of Appeal: Appeal Dismissed

On appeal, the appellant's principal argument was that the respondent had condoned or "acquiesced" to the appellant's course of conduct. Specifically, the appellant argued that the

extended period of time during which the respondent was on sick leave without notice should have been understood as condoning the appellant's conduct.

The case law recognizes that when an employer unilaterally changes a fundamental term of the employment contract, the employee must make an election within a reasonable period of time. The employee may either accept the change and continue working under the altered terms, or treat the breach/conduct as bringing the contract to an end and sue for constructive dismissal. If an employee consents to or "acquiesces" in the change, it will not amount to a constructive dismissal. Condonation may also be inferred if the employee waits too long before making an election. The burden is on the employer to establish condonation.

The appellant argued that the two year delay in issuing the statement of claim was unreasonable and, therefore, the respondent must be taken to have condoned the appellant's actions.

The Court of Appeal rejected this argument. It stated that whether an employee acts within a reasonable period of time is a fact-specific determination that must be made on consideration of a number of factors. In the ordinary course, a finding of condonation occurs where an employee has continued to work or resumed work despite the employer's actions. However, this is not determinative. Employees must have a reasonable period of time to attempt to resolve workplace problems short of litigation. Their unique personal circumstances must also be taken into account. For example, an employee's health, including his or her mental health, may be a relevant consideration in determining whether his or her conduct implies condonation.

While the period of time taken by the respondent to make his election was lengthy, the Court held that condonation could not be established where the employee was unable to work due to the very conduct of the employer that caused him to suffer from anxiety and depression and leave the workplace. The cumulative effect of the appellant's actions went to the heart of the respondent's role as the General Manager of the funeral home. A reasonable person in the respondent's position would have concluded that the appellant no longer intended to honour the TSCA. The respondent did not accept the appellant's course of conduct. He left the workplace and did not, and could not, return to work due to the depression and anxiety caused by that very conduct. That is irreconcilable with the defence of condonation.

Furthermore, the Court of Appeal stated that the respondent's delay must be viewed in light of the personal circumstances of his employment. Prior to selling the funeral home, the respondent had worked for his family business for over 30 years. He was 55 years of age when he sold the family business to the appellant. He had entered into the TSCA with the hopes of working at the funeral home until he reached the age of retirement. He was also subject to a non-competition clause that prevented him from working in his community in the only profession he had known – again, until he reached retirement age. The Court held that the time taken by the respondent to make his election needed to be understood in this context.

The Court of Appeal held that the trial judge had correctly found that the respondent could not be taken to have accepted the new situation because he "did not and could not return to work during that period of time due to depression and anxiety" caused by the appellant employer.

The Court of Appeal upheld the trial judge's finding that a constructive dismissal had occurred. The appeal was dismissed.

Check the Box

The Court of Appeal's decision highlights the risks of altering the terms of an employee's employment contract without prior consent or proper notice. The employer's course of conduct, which included the removal of the company vehicle and the changing of the locks without prior notice, proved to be detrimental to its defence. The employer could not justify its actions with the defence of condonation, given the finding that it was the employer's own conduct that caused the employee to leave the workplace in the first place. It is imperative that employers consult with their legal counsel before making fundamental changes to terms of employment.

The decision further emphasizes the perils of entering into a fixed-term contract with no termination provision. It is also yet another recent appellate-level ruling that highlights the importance of having well-drafted termination provisions, both in fixed-term and indefinite contracts alike. Had the contract contained a termination provision that met the applicable minimum employment standards, the employer's damages would have been capped at a few thousand dollars – nowhere near the million dollar price tag that was awarded in this case.

Need more information?

For more information regarding the preparation of employment contracts, strategic advice regarding employee dismissals, or for representation in wrongful dismissal litigation, please contact [Sara Yousefi](#) at 416-993-4987, or your regular lawyer at the firm.



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