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Silence may not always be golden

Failure to respond to entreaty from employee asked to take on new role amounted to affirmation of dismissal, court says

BY DANIEL LUBLIN

At the age of 66, Kathleen Fisher found herself in a pickle. Believing she was being forced to retire, she turned to her company president, Keith Andersen, looking for answers. Anderson may not have agreed, but he offered her no solution. As a B.C. appeal court recently concluded in finding Fisher was dismissed: his silence spoke volumes.

CONSTRUCTIVE DISMISSAL

A staffer for 18 years, Fisher had been performing general office administration work for B.C. lumber manufacturer Lakeland Mills Ltd. Visitors to the office knew Fisher and often raised her retirement date in conversations. When these inquiries lost their entertainment value to Fisher, she spoke with Anderson, seeking an assurance her job wasn't in jeopardy. Andersen's response was swift: There was no concern and Fisher could hang on as long as she wanted.

Trained for new duties

When a fellow employee resigned, Lakeland's office manager went looking for solutions to fill the labour void. The answer became obvious: Fisher would be trained to work as a backup shipping clerk. Despite steps taken to train Fisher, she couldn't master the new duties and she was uncomfortable with her changing role.

Fisher spoke with the office manager, who told her if she was planning to retire soon, the company would get along with her in the backup role. But if Fisher planned to retire in the distant future, another employee would have to be hired who would ultimately take on some of Fisher's old responsibilities.

Discussed concerns with president

Believing she either had to learn the new job or Lakeland would take steps to hire someone to take over her former role, an upset Fisher met with Andersen, telling him she felt she was being forced to retire because she could not handle the shipping relief work. Andersen may have been sympathetic to Fisher's concerns but he said nothing to correct her perception of things.

The doctrine of constructive dismissal provides that, once employment begins, material and adverse changes to the job are prohibited without proper advance notice or employee consent. If serious changes are unilaterally imposed, the employee may reject them and sue for wrongful dismissal damages. In this case, Fisher argued Andersen's silence was an affirmation that she was obliged to take on the shipping relief duties or her only other option was to pack up and leave. Recently, the B.C. Court of Appeal agreed, finding what started as an innocent staff reorganization ultimately amounted to Fisher's constructive dismissal.

This case highlights the challenges both employers and employees face as the Canadian workforce ages.

Recent legislation has caused companies in most Canadian jurisdictions to discard their mandatory retirement policies. Consequently, if employers wish to free themselves from long-term employees, the customary employment law principles regarding the amount of severance to provide, such as age, tenure, classification and the availability of comparable employment, will have to be considered and then provided.

Changes for older employee could be constructive dismissal

Although there is no legal distinction between an older employee and a younger counterpart, both the duty to accommodate under human rights legislation and the common law of constructive dismissal may require employers to consider workplace changes through the lens of an older employee's ability to adapt. In this case, the changes to Fisher's job, however minor, were magnified when her age limited her ability to respond to the new work or her employer's efforts to train her.

Employers may have an obligation to propose alternatives or at the least correct an employee's misconception, in the face of a suggestion that a job has changed. Otherwise, the failure to react may be deemed an affirmation the change has actually occurred. ■

For more information see:

■*Fisher v. Lakeland Mills Ltd.*, 2008 CarswellBC 183 (B.C. C.A.).

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