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## **Promoting, Demoting and Lateral Employee Changes: Successfully Avoiding Legal Pitfalls and Morale Erosion**

**by Warren Rapoport and Luke Field, November 2011**

As businesses strive to align their employees' positions in order to properly focus upon the market needs of their industry, flexibility within the workplace ranks as a top priority for many employers. However, perceived roadblocks to achieving such flexibility remain, due to concerns over the potential fallout (both operational and legal) that can arise when employees are not pleased with such changes. This can be a particular concern where employees perceive that such changes represent a demotion or career limiting move, even if, from an objective perspective, they are not.

As such, management is often reluctant to move employees to what they consider to be optimal positions due to fears of potential constructive dismissal claims and operational fallout. With proper planning however, these concerns can be eliminated fully, or at least reduced to a manageable level, so that employers may move on with their organizational changes, with relatively smooth results.

Broadly speaking, employee job changes fall into 1 of 3 categories:

- a) a promotion;
- b) a demotion; or
- c) a lateral move to a reasonably comparable but different position.

Sometimes it is difficult to categorize a change, particularly when an employer is flattening its hierarchy structure such that levels or positions are combined. Generally speaking however, so long as there is no reduction in total remuneration that the employee will receive in the new position, it is unlikely that it will be considered a demotion, unless the new position is clearly an inferior one.

### **Promotions**

Promotions are obviously the easiest situations to deal with as most employees are happy to be provided with a promotion and are generally eager to accept. However, if a corresponding increase in remuneration is not given along with an increase in professional duties, then a charge of constructive dismissal could actually be brought for an added workload without increased pay.

However as in most cases when there is an increase to the employee's compensation, employers should ensure there are certain ground rules that will protect the employer in the event the promotion does not work out as planned. In particular, an employer should ensure that the promotion is provided in writing with the specific terms and expectations of the new position laid out, acceptance of which is a condition of the promotion. The employer should ensure these terms provide the employer with a right, in its sole discretion within a limited period of time (e.g. 6 months), to return the employee to his or her original position or a reasonably comparable one. This period allows the employer to assess whether the promotion has been a success or failure.

An employer may also use a promotion as an opportunity to obtain desired changes to other terms of the employment relationship. This is because a promotion (if it includes monetary improvements) is considered appropriate consideration for such changes. Any such agreements should be put in writing so that it is clear that the changes were in consideration of the promotion. Should an employee refuse the promotion with these added conditions, the



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employee may remain in the original position with the same terms as before. Refusing a promotion does not provide appropriate grounds for termination of an employee with cause.

### **Demotions**

The Supreme Court of Canada has defined a demotion as a loss of prestige and status as well as a substantial change to the essential terms of an employment contract that warrants a finding that an employee has been constructively dismissed. Therefore, in the absence of previous written warnings that; without improvement of the employee's performance in his present position - with specifics as to what needs to be improved, and a failure of the employee to do so within a reasonable time - demotions in general provide an opportunity for an employee to claim constructive dismissal particularly where, as is usually the case, there is a remuneration reduction as part of the demotion.

Even with such written warnings, the employer will have to objectively demonstrate (should the employee take legal action) that the demotion was warranted under the circumstances.

In rare circumstances, an employee will agree to a demotion where the employer's reasons are considered acceptable by the employee. In these situations, an employer is well advised to have the employee provide written confirmation of the acceptance of the demotion so that it will not later be used against the employer if the employee thereafter is terminated or changes his mind as to the appropriateness of the demotion.

Without the employee's consent or a properly documented performance deficiency trail, an employer can still demote employees as it considers appropriate by providing appropriate notice of the demotion. In many respects, this is similar to the type of notice an employer would give when terminating an employee without cause. The employee is effectively being given an amount of time, taking into account appropriate

factors including: the employee's age, years of service, salary reduction and nature of demotion in order to determine how much notice is appropriate before the demotion takes effect. Each situation is unique and accordingly, legal counsel should be sought for guidance as to the appropriate notice period. When appropriate notice is given and the employee still refuses to consent to the transfer, discharge becomes lawful.

While less than ideal, a demotion may be effected immediately from a job position standpoint so long as the employee's remuneration is not immediately affected. This however does entail more risk than when appropriate notice is given of both the change in position and the remuneration reduction, as a constructive dismissal claim can arise in rare circumstances where the position demotion is so drastic as to objectively warrant a lack of trust on the part of the employee.

### **Lateral Changes**

Ontario courts have generally held that an employee is entitled implicitly under their employment contract to insist that he or she continue to be assigned work that is substantially similar in terms of job duties, responsibility and status to that which he or she was hired to perform. Therefore, a change in job function could create a potential constructive dismissal claim even when the change is not a demotion, but rather a lateral move within the company.

The operative question an employer must consider is whether the adjustments to the employee's job functions or status represents a fundamental change. As long as an employer has reserved the right in its employment agreement to change the job functions of the employee, a lateral change without a reduction in level or remuneration can generally be made upon short notice, as the employer is not fundamentally changing the employee's job position. However some employees may not be happy with the



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change notwithstanding the employer's legal right to do so. As a matter of practice therefore, it is always prudent for an employer to discuss the expected change and hear the employee's concerns before taking any unilateral action. This will allow the employer to gage the likelihood of the success of the move as well as whether an employee (with or without good legal reason) will challenge such a lateral move.

Further, there always remains the possibility that although an employer considers a move to be a lateral one, the employee may consider it to be career limiting in certain respects, and therefore represents a fundamental change akin to demotion. Though the courts will not take an employee's views at face value, if the employee can demonstrate that a reasonable person would view the change as a reduction in status, a constructive dismissal claim could succeed. For example, does the new position have the same ability to earn bonuses or commission if applicable? Does the new position have a flatter career path within the organization? These types of issues could be raised by employees to suggest that a perceived lateral move is in reality a demotion. Accordingly, an employer should be sensitive to these potential concerns and perhaps consider providing notice for a lateral move that may be objectively considered a demotion.

**Summary**

Employers should not allow fears about legal ramifications to prevent them from achieving the best internal organization for their business. In each of the 3 types of employee changes discussed above, the key to avoiding a valid claim of constructive dismissal is proper planning and advance consultation with legal counsel. With promotions, by having counsel provide the terms of the promotion in writing, including one allowing the employer to cancel the promotion within a reasonable period of time, an employer can prevent future legal claims by an employee should the employer be forced to move them back

to their original position. Before demoting an employee, an employer should do its best to accumulate evidence of the employee's deficiencies that may later be used to rebut claims the demotion was unwarranted. It should also strongly consider providing notice to the employee of the upcoming move, similar to the notice they would give if terminating. If considering a lateral move, the employer should question whether it could represent a fundamental change in the employee's status or function within the organization. Unless the need to make the change is urgent, prudence would also favour giving notice to the employee of the upcoming change, as if it were a demotion. For both demotions and lateral changes, where notice is required, counsel should be consulted to determine how much notice is appropriate.

In this regard should you require any assistance with such potential changes to your organization, we would be please to assist.



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