

DOCTRINE OF CONSTRUCTIVE DISMISSAL IN LABOUR/EMPLOYMENT LAW IN NIGERIA: A REVIEW OF THE DECISION IN *MODILIM v UNITED BANK FOR AFRICA PLC**

Abstract

The terms and conditions of a contract of employment must be respected and obeyed by both the employer and the employee. Situations, however, arise when these terms are explicitly or implicitly breached by the employer. This may give rise to claims for constructive dismissal. In Labour/Employment law, constructive dismissal¹ occurs when an employee resigns as a result of the employer creating a hostile, intolerable, or unfavourable work environment. Because the resignation is not truly voluntary, it is, in effect, a termination. Generally, a constructive dismissal leads to the employee's obligations ending and the employee acquiring the right to make claims against the employer. Thus, an employee can successfully make a claim for constructive dismissal when an employer commits a breach of the fundamental terms and conditions of the contract of employment, or where an employer makes a unilateral change to the terms and conditions of the contract of employment without notice to the employee or the latter's consent. In this article, the author reviews the decision of the court whilst x-raying the scope and applicability of the doctrine in Nigeria as well as instances that may give rise to claims for constructive dismissal.

Keywords: *Constructive Dismissal, Labour/Employment Laws, Modilim v United Bank for Africa PLC. Nigeria*

1. Introduction

The Honourable Justice Benedict Bakwaph Kanyip of the National Industrial Court of Nigeria, sitting in Lagos, on 19 June 2014, delivered a well-considered judgment in *Mr. Patrick Obiora Modilim v United Bank for Africa Plc*². The claimant sought the following reliefs in the suit against the defendant:

- (a) A declaration that the defendant confirmed the claimant as General Manager on 5 August 2008 via the confirmation letter of 27 August 2008;
Or in the alternative to relief (a) supra
- (b) A declaration that the defendant's failure to confirm the appointment of the claimant as a General Manager was a breach of his contract of employment contained in the offer letter and letter of commitment both dated 23 November 2007;
- (c) A declaration that the defendant's failure to upgrade and/or review the claimant's emoluments to General Manager's level amounted to a breach of his contract of employment contained in the offer letter and letter of commitment both dated 23 November 2007;
- (d) A declaration that the defendant constructively and wrongfully terminated the claimant's employment; and
- (e) A declaration that the loan agreement between the claimant and the defendant is vitiated by the defendant's breaches of the agreements.
Or as an alternative to relief (e) supra
- (f) A declaration that the defendant cannot unilaterally impose any default interest rate on the claimant's facility with the defendant based on the agreement between the parties via the letter of 20 July 2010 wherein they both agreed that no interest rate shall apply; and

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¹This is also referred to as "Constructive discharge" or "Constructive termination."

²Suit No. NICN/LA/353/2012.

- (g) An order for special damages for unpaid emoluments due to the claimant after his confirmation as General Manager by the defendant, particularized as follows:

Particulars of Special Damages

- (i) ₦75,535,128.00 being the total sum the claimant ought to have been paid as his emolument for the 20 months he worked for the defendant after his confirmation (excluding the total emoluments he received as Deputy General Manager), at ₦3,776,756.40 per month.
- (ii) ₦6,833,333.40 being the total cash value for the 2 status cars which the claimant ought to have been given if he had been confirmed as General Manager, for the 20 months that he worked with the defendant after his confirmation.
- (h) The sum of ₦150,000,000.00 as general damages for breach of contract;
- (i) The sum of ₦10,000,000.00 as damages for wrongful termination of the claimant's employment;
- (j) Interest on the above sums at the commercial rate of 21% per annum from 31 March 2010 until judgment and thereafter at 10% per annum until the judgment sum is finally liquidated; and
- (k) Costs of ₦1,500,000.00.

2. Summary of Facts of the Case

The claimant averred that he was a Deputy General Manager with Zenith Bank Plc., when he was offered employment by the defendant as a Deputy General Manager via a letter of employment dated 23 November 2007 with effect from 3 December 2007, subject to the terms and conditions contained in the letter of employment and a letter of commitment also dated 23 November 2007. The claimant further averred that the defendant undertook to confirm his appointment as a General Manager after a period of six months subject only to the condition that the claimant would meet certain set targets contained in a Performance Contract duly executed by the parties. The claimant also contended that he accordingly worked assiduously towards meeting the set targets, and that by a letter dated 27 August 2008, the defendant confirmed his employment with effect from 5 August 2008, which according to him, indicated that he had met all the set targets that were preconditions for his confirmation. In spite of the above, the defendant continued to pay him the salaries of a Deputy General Manager for the 20 months he worked after his confirmation despite repeated demands by the claimant that his employment be reviewed to that of a General Manager. He further contended that the defendant did not accord to him the perquisites of office that he was entitled to, such as the non-provision of two (2) status cars to the claimant. Thus, as a result of the defendant's recalcitrant failure to review his emoluments to that of a General Manager after his confirmation, the claimant averred that he made repeated demands for his salaries to be appropriately reviewed. Following his repeated demands, the defendant, through one of its officers (the then Executive Director, Resources) and in the presence of one other person, forced the claimant to resign his employment. Following the defendant's attitude, the claimant was forced to resign his employment via a letter of resignation dated 31 March 2010. To the claimant, he was compelled and/or cajoled into tendering his resignation letter following the defendant's forceful demand for him to resign. The defendant purportedly accepted the claimant's resignation via a letter dated 30 March 2010 (pre-dating the date of the claimant's resignation).

The claimant contended that the totality of the defendant's attitude and the defendant's acceptance letter which had already been typed and signed a day before his forceful resignation letter was tendered clearly showed that the defendant constructively and wrongfully terminated his employment. According to the defendant, it offered the claimant employment as a Deputy General Manager subject to the terms and conditions of the offer of employment dated 23 November 2007. It, however, denied that the letter of commitment was a contract of employment between the parties and that it never promised or undertook to confirm the claimant's employment as a General Manager. The defendant further contended that it confirmed the claimant's employment as a Deputy General Manager after the probationary period in line with the terms of his contract of employment. It further averred that the performance contract was neither an appointment of the claimant as a General Manager nor a confirmation of the claimant's appointment as a General Manager in the employment of the defendant. The defendant maintained that the claimant resigned his appointment,

did not work as a General Manager and therefore cannot be paid salaries of a General Manager. It also denied that the claimant was entitled to the 2 status cars with cash value of ₦16,400,000.00 as he was never a General Manager whilst in the employment of the defendant.

3. Issues Submitted for the Determination of the Court

The claimant submitted the following issues for determination by the court.

- (a) Whether by the confirmation letter of 27 August 2008 (Exhibit E), if taken together with the offer of employment letter (Exhibit A) and commitment letter (Exhibit B), the defendant did in effect confirm the claimant's appointment and promoted the claimant to General Manager?
- (b) If the answer to issue (a) is in the negative, whether the defendant was not in breach of the claimant's contract of employment as contained in the offer letter and letter of commitment (both dated 23 November 2007) when the defendant failed to promote the claimant to the position of General Manager upon confirmation?
- (c) Whether the defendant constructively and wrongfully terminated the employment of the claimant?
- (d) Whether the defendant is not liable to pay to the claimant all his unpaid entitlements either as a General Manager or as special damages for the breach of the contract to promote him as a General Manager from the date of confirmation to the date of the constructive termination of his employment by the defendant?
- (e) Whether the defendant can unilaterally impose any default interest rate on the claimant's staff loan with the defendant with regard to the agreement between the parties via the letter of 20 July 2010?
- (f) Whether the loan agreement has not been determined by the defendant's breaches?

4.0 Judgment of the Court

After hearing counsel for the parties, considering all the processes filed and evidence led in support of their respective cases, the honourable court delivered, in my humble view, its well-considered judgment on 19 June 2014. In arriving at its decision, the court adopted the sole issue formulated by the defendant, to wit; *whether the claimant is entitled to the reliefs claimed against the defendant?* According to the court, the entitlement of the claimant to the reliefs sought rested on the determination of three key issues, namely:

1. What actually is the exact character or nature of the employment contract between the claimant and the defendant?
2. Was the claimant forced to resign in order to claim for constructive dismissal?
3. Was the loan agreement between the claimant and the defendant actually a staff loan as to entitle the claimant to the reliefs he seeks in that regard?

Accordingly to the court, the determination of issue No. 1 herein was necessary in order to ascertain whether in confirming the claimant, the claimant was thereby promoted or ought to have been promoted to the position of a General Manager in order to enjoy the perquisites of that office.

Relying on the Court of Appeal decisions in *Fakunde vs. Obafemi Awolowo University Teaching Hospital*³ and *NITEL vs. Jattau*⁴, the court agreed with the claimant's counsel and held that the claimant's letter of employment, the letter of commitment and the performance contract, among other relevant documents, constituted the contract of employment between the claimant and the defendant. The court, however, resolved the claimant's issue No. 1 against the claimant and held at page 27 of the judgment that the claimant's confirmation was not coterminous with his promotion. The court further held that: 'what the defendant committed for was that at confirmation it will be willing to review the claimant's position to the level of General Manager', adding that 'to commit to be willing to do something is not the same as doing that thing; and if that thing is not done, it does not indicate a presumption that the thing has been done'.

³ (1993) 5 NWLR (Pt. 291) p. 47

⁴ (1996) 1 NWLR (Pt. 425) p. 392

With respect to issue 2, the court resolved it in favour of the claimant and held at pages 28 to 33 of the judgment that the defendant's failure to review the claimant's level to General Manager upon confirmation was a breach of his contract of employment contained in the offer letter and letter of commitment both dated 23 November 2007. The court, thus, held the defendant liable to the claimant for breach of its commitment and accordingly awarded the sum of ₦75,535,128.00 in favour of the claimant. According to the court, this sum represented the total sum the claimant ought to have been paid as his emolument for 20 months, had the defendant reviewed the claimant's level to General Manager upon confirmation.

5. Doctrine of Expectation Interest and Claim thereof

Although this article is limited to discussions on the doctrine of constructive dismissal, it is pertinent to state that the decision in the case under review is also important as it touches on a novel area of the law which is not yet fully appreciated in Nigeria; that is, the doctrine of expectation interest and claim thereof. It suffices to reproduce the decision of the court here. Thus, in upholding the claimant's relief (b), the court held at page 28 of the judgment as follows:

Having therefore breached the contract of employment and so entitling the claimant to relief (b) as indicated, the next question is what the remedy of the claimant is. The commitment on the part of the defendant to be willing to review the claimant's position to the level of General Manager gave rise to an expectation interest on the part of the claimant. The rule, by *Tadduggoronno v. Gotom* [2002] NWLR (Pt. 757) 453, is that there cannot be a vested right when an exercise is made subject to the fulfillment of some conditions and acceptance of those conditions at the discretion of the affirming body.

And in *Medical and Health Workers Union of Nigeria & Ors v Federal Ministry of Health* unreported Suit No. NICN/ABJ/238/2012, the judgment of which was delivered on July 22, 2013, this Court acknowledged that the practice of skipping of salary grade levels by Government can create an expectation interest, which in turn is capable of creating an entitlement or vested right in favour of the complainants who have all this while been beneficiaries of the practice. In the instant case, the conditions for the exercise of the commitment on the part of the defendant were all met. In fact, in *University of Jos v. Dr. M. C. Ikegwuoha* [2013] 9 NWLR (Pt. 1360) 478, the Supreme Court ordered that the respondent's appointment be confirmed once the conditions for confirmation were met. In the instant case, the claimant is no longer in the service of the defendant, so the question of ordering that he be confirmed does not arise. The claimant in the instant case is accordingly entitled to a remedy regarding the loss of the expectation interest in terms of the breach of the defendant's commitment to be willing to review his position to the level of General Manager. The court further queried: 'What then is the measure of damages for this loss of expectation interest?' And, after the computation and determination of the difference in salaries between the Deputy General Manager and that of the General Manager, the court awarded the sum of ₦75,535,128.00 as the measure of damages in expectation interest that the claimant would have earned had the defendant kept to its commitment to review the employment of the claimant from the position of a Deputy General Manager to that of a General Manager upon confirmation as agreed.

With respect to issue 2 as framed by the court, the court queried whether the claimant had made out a case for constructive dismissal in order to entitle him to the relief sought. The court answered the question in the affirmative, resolved the issue in favour of the claimant and awarded the sum of ₦1,120,221.60 as damages for the wrongful termination of the claimant's contract of employment in terms of his constructive dismissal by the defendant. The judgment of the court on issue 2 as framed by the court (which is the claimant's issue 3) provoked the authors' intention to review the court's decision vis-à-vis the doctrine of constructive dismissal from employment in Labour/Employment Law.

6. Applicability of the Doctrine of Constructive Dismissal in Labour Law

In answering the question posed by the court on whether the claimant was forced to resign in order to claim for constructive dismissal, the court, at page 29 of the judgment, quoted and reproduced the earlier decision of the court in *Miss Ebere Ukoji vs. Standard Alliance Life Assurance Co. Ltd*⁵ as follows:

Globally, and in labour/employment law, constructive dismissal, also referred to as constructive discharge, occurs when an employee resigns because his/her employer's behavior has become so intolerable or heinous, or such behaviour has made life so difficult that the employee has no choice but to resign. Given that the resignation was not truly voluntary, it is in effect a termination. In an alternative sense, constructive dismissal or constructive discharge is a situation where an employer creates such working conditions (or so changes the terms of employment) that the affected employee has little or no choice but to resign. Thus, where an employer makes life extremely difficult for the employee, to attempt to have the employee resign, rather than outright firing of the employee, the employer is trying to create a constructive discharge. The exact legal consequences differ from country to country, but generally a constructive dismissal leads to the employee's obligations ending and the employee acquiring the right to seek legal compensation against the employer. The employee may resign over a single serious incident or over a pattern of incidents⁶.

According to the English Court of Appeal in *Western Excavating (ECC) Ltd vs. Sharp*⁷,

Constructive dismissal means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the employer is guilty of a breach going to the root of the contract of employment where he has evinced an intention no longer to be bound by the contract. In such a situation, the employee is entitled to regard himself as being dismissed and walk out of his employment.

Further, in the leading Canadian case of *Farber vs. Royal Trust Company*⁸, the Supreme Court of Canada described constructive dismissal as follows: 'A constructive dismissal occurs where an employer makes a unilateral and fundamental change to a term or condition of the employment contract without providing reasonable notice of that change to the employee'. The above quotations/decisions of courts from different jurisdictions capture vividly the true nature, character, and extent of the applicability of the doctrine of constructive dismissal in labour law.

7. Instances When Claims for Constructive Dismissal May Succeed

Constructive dismissal from employment may occur in the following instances:

- (a) Where an employer commits a fundamental breach of the terms and conditions of the contract of employment⁹; for example, where an employer transfers an employee from a managerial position to an administrative position or any position below the managerial position. If the employee rejects the position, he can successfully claim for constructive dismissal.

⁵Unreported Suit No. NICN/LA/48/2012, delivered by the National Industrial Court on 26th March 2012

⁶This quotation was culled from the English court decision in *Western Excavating (ECC) Ltd vs. Sharp (1978) 1 All ER 713*

⁷See also the Supreme Court of Malaysian decision in *Wong Chee Hong v. Cathay Organisation (M) SdnBhd (1988) (1) MLJ p. 92*, which adopted the decision in the English *Western Excavating (ECC) Ltd's case*

⁸(1997) 1 S. C. R. 846 ("Farber")

⁹In *Lewis v. Motorworld Garages Ltd (1985) IRLR p.465*, the Claimant was demoted to an unfair position. His actual pay was reduced and he was criticized persistently over eight (8) months by the employer and threatened with dismissal if his performance did not improve. The Court held that the Claimant was entitled to treat the conduct of the employer as amounting to a breach of the implied obligation of mutual trust and confidence and thereby enabling the Claimant to complain that he had been constructively dismissed.

- (b) Where an employer makes unilateral changes to the terms and conditions of the contract of employment without notice to the employee and/or without the consent of the employee.
- (c) Where changes made in the contract of employment are substantial and disadvantageous to the employee and the employee does not acquiesce in the changes made.
- (d) Where an employer, by conduct, terminates the employee's employment, or makes life difficult for the employee to continue in his employment; or
- (e) Where an employer unilaterally reduces the employee's salaries and/or other allowances/bonuses without the employee's consent.
- (f) Where an employer changes the job contents/descriptions of the employee, for example, by demoting or reducing the employee's responsibilities, or by promoting the employee and unilaterally adding extra responsibilities without increased compensation.
- (g) Where there is a reduction in an employee's status or prestige, for example, where an executive is required to report to a lower level within the corporate hierarchy.
- (h) Where an employer creates a humiliating, embarrassing, or hostile work environment, or knowingly allows such an environment to continue, where another creates it. General harassment and sexual harassment¹⁰ are good examples and can ground a claim for constructive dismissal.
- (i) Where an employee is transferred from one branch/region/place to another, and where such transfer is deemed a demotion, unfair labour practice, or an act of victimization; or where there is no provision for transfer in the contract of employment, or where the provision exists but used in bad faith by the employer. For example, in the Malaysian case of *Amatuer Photo Stores (M) SdnBhd v. Peter Ouek*¹¹, the Court held that the Company had no right to force the Claimant to accept a transfer which he deemed as a demotion. The Court found that the transfer was probably mooted in sequel to the Claimant being a prime suspect for the theft of the Company's files and subsequently having been interviewed by the police. The dubious circumstances in which the transfer was imposed on the Claimant and the Company's loss of confidence in the Claimant were sufficient grounds for the Claimant to conclude that he was driven out of his job and therefore constructively dismissed.
- (j) An employee is also likely to succeed in a claim for constructive dismissal where an employer suspends him without pay, as an alternative to termination. This, however, will depend on the facts and circumstances of each case.
- (k) Where an employee is forced to resign, a claim for constructive dismissal may lie. Thus, where there is evidence to show that there was some kind of threat, coercion or negative persuasion made by the employer and as a result of which the employee is compelled to submit his letter of resignation, the employee is entitled to complain that his resignation was not voluntary and that he was constructively dismissed. It must, however, be established that the pressure employed by the employer is repudiatory in nature in order to entitle the employee to resign and sue for constructive dismissal.
- (l) A claim for constructive dismissal can also be successfully maintained in situations where the employer dismisses an employee and does nothing to communicate the position to the employee, but from the totality of the conduct of the employer, the employee feels that he has been dismissed.

The above instances are by no means exhaustive. Therefore, when an employer unilaterally makes any substantial change(s) to the essential terms of the contract of employment, the employer tends to withdraw

¹⁰ See Order 14 Rule 1 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017.

¹¹(1995) 1 ILR p.384. Also, in *Kangaroo Route SdnBhd v. LokeKok Cheong (1994) 1 ILR p.124*, the Claimant held the position of an Assistant Production Manager and was later transferred to another branch where he was given duties of general services equivalent to a charge man. Whilst recognizing that the transfer of employees was a management prerogative, the Court held that such prerogative is not absolute and unfettered and that it cannot be exercised unreasonably and arbitrarily to the detriment of the employee. The Court further held that the work given to the Claimant was unsuitable/unbefitting the Claimant's position and to insist on him performing them amounted to a fundamental breach of the contract of employment.

from its/his contractual obligations and is therefore terminating the contract¹². In other words, where the employer's conduct is such that it constitutes a significant or fundamental breach of the terms and conditions (express or implied) of the contract of employment and it shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, an employee is entitled to walk out on his employer and to treat himself as being discharged from any further performance of his obligations under his/her contract of employment, on the ground that he/she has been constructively dismissed. Put differently, a constructive dismissal leads to the employee's obligations ending and the employee acquiring the right to make claims against the employer. Where also the employer makes life miserable or difficult for the employee, so that a reasonable man in the shoes of the employee will not be expected to continue in the employment, a claim for constructive dismissal can succeed. Here, it is possible, without identifying any specific fundamental term of the contract of employment that has been breached, where the employer's treatment of the employee makes continued employment intolerable.

8. Effect of Successful Plea of Constructive Dismissal

In a claim for constructive dismissal, the employee is responsible for proving that he/she has been constructively dismissed, for he who asserts must prove¹³. A successful plea of constructive dismissal amounts to, and has the same effect as, a wrongful termination, which in essence means that the wrongfully terminated employee will be compensated in appropriate damages. Holding in line with this submission, the Nigerian Court of Appeal in *Nigeria Airways Ltd v Okutubo*¹⁴ had this to say: '...If the dismissal is in breach of a fundamental term of the contracts, the servant has firstly to appreciate that the contract stands repudiated, whether rightly or wrongly is another matter; and secondly, that his remedy for the breach lies in suing for wrongful termination of his contract of employment...' Thus, in *Shell Petroleum Development Company Ltd v Olarewaju*¹⁵, in determining the measure of damages for wrongful dismissal of employee, the Supreme Court held as follows: 'In cases of wrongful dismissal of an employee, the measure of damages is, prima facie, the amount the employee would have earned had the employment continued according to the contract of employment, subject to the deduction in respect of amount accruing from any other employment which the employee in minimizing damages either obtained or should reasonably have obtained...'

Similarly, in *Isievwore v NEPA*¹⁶ whilst also holding on the remedy available to an employee who establishes wrongful termination of his appointment, the Supreme Court held thus: 'Where an employee is able to establish that his appointment was wrongly terminated, he would be entitled to damages. And this would be what was due to him for the period of notice'.

In the case under review, the honourable court, in my humble view, correctly computed the damages payable to the claimant when it awarded the sum of ₦75,535,128.00 being the total sum the claimant ought to have been paid as his emolument for twenty (20) months, had the defendant reviewed the claimant's level to the position of a General Manager upon confirmation. The court was also right when it awarded the sum of ₦1,120,221.60 as damages for the wrongful termination of the claimant's contract of employment.

It must be noted that the contract of employment between the claimant and the defendant stipulated three months as the period of notice required in the event of termination of the employment by either party, or payment of three months' basic salary in lieu of such notice. Thus, the sum awarded by the court as damages for the wrongful termination of the claimant's contract of employment represented the claimant's basic salaries for three months which was put at ₦373,407.20 per month. This represented the sum the defendant

¹²*Farber v. Royal Trust Coy*, supra, at para. 24

¹³See Section 131(1) of the Nigerian Evidence Act 2011

¹⁴(2002) 15 (Pt. 790) pages 379 at 393, paras. B-C.

¹⁵(2008) 18 NWLR (Pt. 1118) 1 at 27

¹⁶(2002) 13 NWLR (Pt. 784) 417 at 437-438

ought to have paid to the claimant as per the contract of employment, in lieu of three months' notice, in order to lawfully terminate the claimant's employment.

9. Evidence of Acts of Constructive Dismissal in the Case under Review

It was the contention of the claimant in the case under review that he was forced to resign by the defendant. According to the claimant, following the defendant's recalcitrant failure to review his appointment and emolument to that of a General Manager after his confirmation, he repeatedly demanded that his appointment and salaries be reviewed appropriately. This did not go down well with the defendant, who persistently refused to perform its own part of the contract, the claimant having met his set targets as contained in the letter of commitment and the performance contract both duly executed by the parties. The claimant averred that as a result of his repeated demands, on 30 March 2010, the defendant, through one of its officers (the then Executive Director, Resources) and in the presence of one other person, shouted angrily at him and requested him to resign. Owing to the totality of the defendant's attitude, the defendant was forced to tender his resignation letter to the defendant on 31 March 2010. The claimant's resignation letter reads thus: 'As directed, I hereby tender my letter of resignation of appointment with UBA Plc. Thanks for opportunity to serve'.

It must be noted that the defendant accepted the claimant's resignation through its acceptance letter duly signed and dated 30 March 2010 (a day before the claimant tendered his resignation letter). What does this imply? Undoubtedly, the defendant's action gives credence to the claimant's assertion that he was directed or forced to resign as indicated in his resignation letter. The claimant's contention that he was forced to resign was also corroborated by the testimony of the claimant's second witness who testified under cross-examination as follows:

The circumstances under which the claimant left UBA that I know is that I was at a discussion the claimant had with the Executive Director Resources where the claimant agitated that he was promised an elevation to General Manager, but which was not fulfilled. The Executive Director Resources complained of the noise level of the claimant in terms of his continual agitation for the elevation to General Manager. The Executive Director Resources then asked the claimant to resign and after another bout of agitation, the claimant resigned.

From the above testimony, the following salient points can be deduced. First, there was a meeting involving the claimant, the Executive Director, Resources of the defendant bank, and one Kevin Ugwuoke, a banker with Mainstreet Bank, who testified as the claimant's second witness (CW2). Secondly, the claimant made another demand that he be elevated to the position of a General Manager as promised by the defendant. Thirdly, the defendant's Executive Directive Resources complained of the noise level made by the claimant following the claimant's repeated demands that he be elevated to the position of a General Manager. Fourthly, the Executive Director Resources requested the claimant to resign. Fifthly, the claimant resigned his appointment as a result of the surrounding circumstances and the request to resign by the defendant.

It can readily be seen from the above analysis of the situations that the claimant was forced to resign. There is evidence to show that the defendant employed some kind of coercion as a result of which the claimant was compelled to submit his letter of resignation. Significantly, the fact that the claimant resigned his appointment on 31 March 2010 but the defendant's acceptance was communicated in an acceptance letter dated 30 March 2010 (a day preceding the claimant's resignation) gives credence to the fact that the claimant was indeed forced to resign. It further shows that the defendant had made situations intolerable or difficult for the claimant to continue in his employment and had already prepared its acceptance letter in anticipation that the claimant would have no option but to resign his appointment.

Thus, the defendant committed a fundamental breach of the terms and conditions of the contract of employment between it and the claimant when it refused, failed and/or neglected to review the claimant's

employment from the position of a Deputy General Manager to that of a General Manager. Also, by its conduct and from the entire surrounding circumstances, the defendant made life difficult for the claimant, so that a reasonable man in the shoes of the claimant would not be expected to continue in the employment. The court was, therefore, right when it held at page 31 of the judgment as follows:

I accordingly believe the evidence of the claimant that he was forced to resign by the defendant. At least CW2 corroborates this fact in stating that he was present when the Executive Director Resources asked the claimant to resign. On the authority of *Miss Ebere Ukoji vs. Standard Alliance Life Assurance Co. Ltd*, I find and hold that the claimant has made out a case for constructive dismissal against the defendant. Accordingly, the claimant is entitled to relief (d), which is for 'a declaration that the defendant constructively and wrongfully terminated the claimant's employment.

10. Concept of Mitigation in Constructive Dismissal

An employee may be advised to remain in his present job with a reduced pay, or to accept an alternate position with less prestigious benefits, offered by the employer. This usually arises when a company is experiencing hard times in its business and the employer has notified the employee of the position it/he is taking towards terminating or otherwise dealing with the employee's employment. In such circumstances, it will be advisable for a dismissed employee to mitigate his/her damages by returning to work for the same employer and/or collecting reduced pay, until the employee finds acceptable employment elsewhere. Requiring an employee to mitigate his loss, therefore, by taking lesser or temporary work with reduced pay and/or benefits is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself¹⁷. Where an employee accepts such offer in good faith, no claim for constructive dismissal shall thereafter lie against the employer.

The test for determining whether or not an employee who has been constructively dismissed should take a position with his/her present employer is objective. The test is whether a reasonable person in the employee's position would have accepted the employer's offer. The test is not subjective; that is, whether the employee feels that he could not continue to work for the employer. In determining this, however, the court will consider whether, in taking the offered position, the employee would have been subjected to an atmosphere of hostility, embarrassment, or humiliation. If this is the case, the court will hold that the employee has been constructively dismissed; and, thus, award damages in favour of the employee.

11. Does Every Change in Employment Amount to Constructive Dismissal?

It is pertinent to note that it is not every change in the terms and conditions of a contract of employment that gives rise to a claim for constructive dismissal. For a change to ground a claim for constructive dismissal, it must be fundamental and substantially alters the essential terms of the employee's contract of employment¹⁸. The test for the conduct of the employer is objective. Would a reasonable person in the same position as the plaintiff reach the same conclusion as the plaintiff? As rightly noted by the Court of Appeal for Ontario in *Smith v Viking*¹⁹:

An action for constructive dismissal must be founded on conduct by the employer and not simply on the perception of that conduct by the employee. The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or a unilateral change of a significant term of that employment.

It must also be noted that even when an employer commits a breach of a fundamental term of the contract of employment but an employee explicitly or implicitly accepts the changes so altered, there will be no

¹⁷See *Onalaja v African Petroleum* (1991) 7 NWLR (Pt. 2006) 691

¹⁸*Farber v Royal Trust Coy*, supra, at para. 26

¹⁹(1989), 68 O.R. (2d) 228 (C.A.) at p. 231.

successful claim for constructive dismissal. Thus, if after the change, an employee continues to work without objections, he would be deemed to have acquiesced in, or condoned the change. Significantly, an employee who wishes to reject the change should do so promptly and within a reasonable period of time. Each case must, however, be decided based on their peculiar facts and circumstances. Thus, in the decision of the Court of Appeal for Ontario in *Belton v. Liberty Insurance Co. of Canada*²⁰, the reasonable period of time ‘is to provide to employees with the opportunity to assess their changed situation for a reasonable time, and decide whether they could accept it’.

Where, therefore, an employee unduly delays in his claim for constructive dismissal, he would be deemed to have accepted, or acquiesced in, the breach. Thus, in *Lesage v. Canadian Forest Products Ltd*²¹, the employee, Lesage, was hired as a Regional Controller; however, his position was eliminated and he was offered a position as Divisional Accountant. He accepted the position, and then waited too long in bringing his claim. The Court found that the plaintiff had delayed, and in so doing had accepted, or acquiesced, in the breach.

On the other hand, where an employer makes changes to the terms of an employee’s contract of employment and communicates the changes to the employee, who specifically rejects the changes in writing, an employer would be deemed to have acquiesced in the employee’s objection to the changes where such employer does not specifically react to the employee’s objections. An employer faced with this situation can legally terminate the employee’s existing contract of employment and thereafter offer a new employment based on new terms and conditions. This is because where an employee specifically objects in writing to the new terms of employment, the employer must consider the risk of inaction on its/his part and whether such inaction will be interpreted as acquiescence by the employer to the employee’s written objection. Where the employer fails to react specifically and positively to the employee’s objections, an employee would be deemed to be continued in his current terms of employment with the employer.

12. Conclusion

The claimant sufficiently proved his claim that he was forced to resign and the court was right when it found and held that the defendant constructively and wrongfully terminated the claimant’s employment. Where an employee proves any of the instances listed above (or other inexhaustible instances when a claim for constructive dismissal may succeed) which has the effect of changing a fundamental term of the contract or terminating the contract of employment, a claim for constructive dismissal or discharge can successfully be maintained. However, as earlier stated, it is not every change in the terms and conditions of a contract of employment that gives rise to a claim for constructive dismissal. For a change to ground a claim for constructive dismissal, it must be fundamental and substantially alters the essential terms of the employee’s contract of employment.

²⁰2004 Can LII 6668 (ON CA) at 27.

²¹2008 SCC 20 (Can LII) at 28.