An analysis of constructive dismissal in the context of a business acquisition

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The Courts have considered the concept of constructive dismissal on many occasions. Generally, the expression “constructive dismissal” refers to situations in which an employee does not agree to a substantial change made unilaterally by his employer to one or more essential terms of his employment contract, and leaves his employment for this reason.

In the case of *St-Hilaire* v. *Nexxlink inc.*,[1] The Quebec court of appeal analyzed the concept of constructive dismissal in the specific context of a business acquisition.

***ST-HILAIRE* V. *NEXXLINK INC*.**

When he began his employment in June 2004, the Plaintiff, Louis St-Hilaire, held the position of vice-president, business development with Nexxlink Inc. (hereinafter “Nexxlink” or the “employer”). Mr. St-Hilaire was responsible for major accounts and his contract provided for, in particular, a base salary of $170,000, a $40,000 bonus plan and 20,000 stock options of Nexxlink.

On December 9, 2004, Mr. St-Hilaire was notified that Bell PME, a subsidiary of Bell Canada, had acquired all the shares of Nexxlink. On December 24, 2004, Mr. St-Hilaire and all the other stock option holders learned that their stock options were cancelled as a result of this transaction.

On January 31, 2005, the senior executives were informed of the functions that would be assigned to them in the new business. Mr. St-Hilaire’s new position was as vice-president, infrastructure equipment sales (responsible for the purchase and sale of infrastructure equipment).

On February 4, 2005, less than two months after the transaction was completed, Mr. St-Hilaire notified the employer that he was leaving his employment because he felt that the conditions of his employment had been substantially changed. He blamed the employer for having excluded him from the integration committee, contrary to most of Nexxlink’s other senior executives. He also asserted that his new position was unrelated to his skills, that his responsibilities had been substantially reduced, and that he had not originally been hired for this type of position. He claimed that he had been constructively dismissed.

In response, the employer indicated that the acquisition had no effect either on Mr. St-Hilaire’s role in the business, his responsibilities, compensation, benefits or client accounts. Since no changes to his responsibilities had been under consideration, the employer felt that Mr. St-Hilaire did not have to participate in the integration committee. Finally, the employer regarded Mr. St-Hilaire’s departure as a resignation.

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In June 2005, Mr. St-Hilaire filed a motion to institute proceedings in the Superior Court alleging that he had been constructively dismissed by Nexxlink and claimed $525,600 in damages[2]. The Superior Court dismissed this claim on the grounds that Mr. St-Hilaire had failed to show that the essential terms of his employment contract had been substantially changed, although there had been some changes to his employment conditions in certain respects.[3] Mr. St-Hilaire was dissatisfied and appealed the decision.

THE COURT OF APPEAL'S DECISION

To begin with, the Court referred to the criteria developed by the Supreme Court of Canada in the case of *Farber* v. *Royal Trust Co.*[4] to define the concept of constructive dismissal: [translation] "(1) a unilateral decision of the employer, (2) substantial changes to the essential terms of the employment contract, (3) the employee's refusal of the changes, and (4) the employee's departure."[5] In its analysis, the court must ask itself whether a reasonable person in the same situation as the employee would have considered there to have been a substantial change to the essential terms of his employment contract.[6].

The court added that in order to distinguish between the employer's management rights and a unilateral and substantial change to an essential term of the employment contract, one must consider all the circumstances and specific features of the situation. In the context of a transaction involving two businesses, it is neither surprising nor unusual that some of the employee's responsibilities will be modified.[7].

The Court then analyzed the various changes raised by Mr. St-Hilaire.

Change in his title, target market and responsibilities

The Court acknowledged that the demotion or loss of prestige and status of an employee within a business may be regarded as a substantial change to the essential terms of his employment contract. Mr. St-Hilaire complained that he was subjected to such treatment and referred, in this regard, to the promotion obtained by one of his colleagues and the additional responsibilities assigned to another colleague. The Court found that Mr. St-Hilaire could not claim, in the context of the sale of a business, that there was a right to maintain the entire organizational structure of the business prior to the acquisition, and that the changes made to the company's organization were within the management rights of the employer. According to the Court, unlike the situation in the *Farber* case, Mr. St-Hilaire had not been demoted per se. Other employees obtained promotions due to their good work, and these changes did not amount to a substantial change to Mr. St-Hilaire's conditions of employment.

With respect to the changes to his responsibilities and target market pleaded by Mr. St-Hilaire, the Court indicated that Mr. St-Hilaire's fears failed to materialize. In the context of a transaction, some of the senior executives' duties may be changed or clarified over time and [translation] "a period of uncertainty or adjustment is to be fully expected." Based on several elements in the file, it could be concluded that a reasonable person placed in the same context as Mr. St-Hilaire could have anticipated that he would have retained his client accounts, and that there would likely be various opportunities within the new business. The alleged substantial changes to the essential terms of the employment contract must be real and not only based on apprehensions. In the instant case, the Court held that a reasonable person would have concluded that he essentially retained, for the most part, the responsibilities he had previously held in his former position. Minor changes to a senior executive's responsibilities following the acquisition of a business by a new owner are insufficient to conclude that there was a constructive dismissal.

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Change in the criteria for awarding his annual bonus and cancellation of his stock options

The Court noted that Nexxlink had not terminated the bonus plan. However, Mr. St-Hilaire pleaded that the objectives contained in the plan had become impossible to achieve, particularly due to the changes to his responsibilities and position.

The Court dismissed this argument, adding that even if the criteria for awarding the annual bonus had actually been changed as a result of the transaction, these changes could not form the basis of Mr. St-Hilaire's action because his employment contract expressly provided that the bonus plan could be amended by approval of the board of directors alone.

As for the stock options, these were part of the variable compensation and had been negotiated by Mr. St-Hilaire as an integral part of his compensation package at the time he was hired. The stock option plan expressly provided for the fair and equitable compensation of the stock options in the event of an acquisition of the business. However, even if the cancellation of the stock options could be regarded as a reduction in his compensation, before he left Nexxlink, Mr. St-Hilaire never mentioned that he considered the cancellation thereof, without compensation, to be a substantial change to the essential terms of his employment contract. Since Mr. St-Hilaire had never voiced his disagreement with the changes, the Court therefore concluded that he probably did not regard the stock options as an essential term of his contract.

CONCLUSION

This case is interesting mainly because it provides perspective on the concept of constructive dismissal and analyzes it in the particular context of a business acquisition. In such a context, it is reasonable to expect that there will be uncertainty and instability for a number months and changes to the business.

In addition, the Court of Appeal drew an interesting parallel with the facts in *Corriveau* v. *Sedgwick Ltd.*[8], in which the resignation of an executive was found to be premature in the context of a business merger. Indeed, although Mr. Corriveau had been informed that his position would become redundant after the merger, his employment conditions had not yet been changed and the employer had assured him of the possibility of employment with the new business.

In the instant case, Mr. St-Hilaire was aware of what his role was intended to be in the new business and the structure he complained of was temporary and uncertain. The allegations of constructive dismissal in the context of this transaction were ill-founded.

The judgment in St-Hilaire should encourage employees affected by structural changes in a business to think twice before jumping to the conclusion that they have been constructively dismissed, lest they fail the test of the "reasonable person in the same situation".

Businesses, for their part, must ensure that the changes made to an employee's terms of employment and compensation meet the criteria of the test formulated by the Supreme Court of Canada in the *Farber* case.

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[1] *St-Hilaire* v. *Nexxlink inc.*, 2012 QCCA 1513 (C.A.).

[2] The damages claimed included his base annual salary, bonuses, allowances, pay in lieu of notice, severance pay and the loss caused by the cancellation of his stock options.

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[3] See the judgment of the Superior Court: *St-Hilaire* v. *Nexxlink inc.*, 2010 QCCS 2276 (S.Ct).

[4] [1997] 1 S.C.R. 846 (hereinafter "*Farber*").

[5] Para. 29 of the Court of Appeal's decision.

[6] *Farber*, para. 26, cited by the Superior Court in para. 81 of its decision.

[7] *Lemieux* v. *Marsh Canada ltée.*, 2005 QCCA 1080 (C.A.).

[8] D.T.E. 2003T-232 (C.A.).

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