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PAPER 7.1

The Overtime Game: Select Issues in Working Past the Clock—Part I

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THE OVERTIME GAME: SELECT ISSUES IN WORKING PAST THE CLOCK—PART I

I. Introduction

The purpose of this paper is to provide an explanation of the various overtime provisions in the *Employment Standards Act* and Part 3 of the *Canada Labour Code*, and to provide an overview of the ways overtime and hours of work has been dealt with the case law, from the plaintiff's point of view. This paper does not apply to workers who are covered by a collective agreement. Part II of this paper will focus on select issues in overtime, and best practices for defendants' counsel.

II. Legislative Overview

A. The Employment Standards Act, RSBC 1996, c 113 (the "ESA") and Employment Standards Regulation, BC Reg 396/95 (the "ESA Regs")

1. Exclusions

There are many categories of workers to whom Part 4 – Hours of Work and Overtime does not apply (*ESA Regs,* s 34). These include (but are not limited to) fishing, hunting, and wilderness guides, teachers, school bus drivers, municipal recreation workers, managers, police officers, fire fighters, university faculty members and professors, residential care workers, and live-in camp workers. Student nurses and volunteer firefighters are also excluded from this part (*ESA Regs,* s 33).

The entire *ESA* does not apply to 16 different professions, including (but not limited to) lawyers, engineers, architects, insurance agents or adjusters, physicians, naturopathic physicians, accountants, optometrists, real estate agents, and veterinarians (*ESA Regs,* s 31).

2. Maximum hours of work

The basic format under the *ESA* is that an employee must be paid 1 ½ x their regular wage for any hours worked over 8 hours in a day, and 2 x their regular wage for any hours worked over 12 hours in a day (*ESA,* s 40(1)).

Similarly, an employee is owed 1 ½ x their regular wage for any hours worked over 40 hours in a week (*ESA*, s 40(2)).

An employee must have 8 consecutive hours free from work in a day, and must have 32 consecutive hours free from work in a week (*ESA*, s 36). Beyond the requirement that employees have 8 consecutive hours free from work between shifts and 32 consecutive hours free from work in a week, there is no hard limit on how many hours an employee can work in a given day or week. The 8 free hour requirement does not apply in emergencies (*ESA*, s 36(3)).

The only limit is on "excessive overtime". Specifically, s 39 of the *ESA* says that "[d]espite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety."

Despite the "or" in the above provision, the Employment Standards Tribunal has held in at least one case that in order to prove excessive overtime, a worker must establish that there has been a detrimental impact to their health of safety. Specifically, in BC EST # D071/10 (Kenneth Johnston), the Tribunal held that the use of word "detriment" in the provision necessitates evidence of an objectively demonstrated adverse effect to health or safety. The Tribunal also determined that "excessive" means "exceeding what is proper or necessary", and that breaches of this provision must be determined in the context of the particular facts of each case, accounting for the employment circumstances and the nature of the work performed, the period of time over which the work lasts.

Employers will only be liable for wages owing six months back from the date of the complaint (or termination, if applicable), plus interest (*ESA*, s 80(1)(a)).

3. Overtime Banks

At an employee's written request, an employer can establish a time bank in which they credit time for overtime hours worked at the rates set out in the *ESA*, instead of paying the employee in the applicable pay period (*ESA*, ss 42 (1) – (2)).

At any time, an employee can ask their employer to pay out all or part of the wages credited to the bank, request time off with pay for some mutually agreed period, or request in writing that the bank be closed. Upon receiving an employee's request to close the bank, the employer must pay the outstanding balance to the employee (*ESA*, s 42 (3)).

An employer can unilaterally close an employee's time bank upon giving the employee one month's written notice. Within six months of closing an employee's time bank, the employer must:

- pay the employee all of the overtime wages credited to the time bank;
- allow the employee to use the credited overtime wages to take time off with pay; or
- pay the employee for part of the wages credited to the time bank and allow the employee to use the remainder of the credited overtime wages to take time off with pay (*ESA*, ss 42(3.1) – (3.2)).

Overtime must be used or paid out at the rate it was earned. For example, an employee who banks two hours at 1 ½ x their hourly rate is entitled to three hours off or three hours' pay (*ESA*, s 42 (5)).

4. Averaging Agreements

An employer and employee can agree to determine overtime based on an average of the employee's hours over a period of 1, 2, 3, or 4 weeks (*ESA*, s 37). If an employer wants to average hours over a longer period, they must apply for a variance (see below).

Under an averaging agreement, an employer does not have to pay overtime as long as the employee's hours over the period specified in the agreement average to 40 hours/week (s 37(3)). An employee must be paid 1 ½ x their regular hourly wage for any time worked beyond the 40 hour/week average, calculated at the end of the averaging period (*ESA*, s 37(5)).

Additionally, if any employee works more than they were scheduled to in a given day, they must be paid 1 ½ x their regular wage rate for time worked beyond 8 hours (*ESA*, s 37(6)). They must also be paid 2 x their regular hourly wage rate for any time worked over 12 hours in a given day, whether scheduled or unscheduled (*ESA*, ss 37(4), (6)(d)).

The *ESA* requires that employees have 32 free consecutive hours in a week and 8 free hours in a day free still apply to an averaging agreement if the average is a period of 1 week (*ESA*, s 37(8)).

If the averaging period is more than one week, the employer must ensure that for every week worked, the worker has 32 consecutive free hours for every week of the agreement at some point during the averaging period, and must pay a premium of 1 ½ x the worker's hourly rate for any time worked that ought to have been free (*ESA*, s 37(9)).

An averaging agreement under the *ESA* must:

- Be in writing;
- Be signed by both the employer and the employee before the start date in the agreement;
- Specify the number of weeks over which the agreement applies;

- Specify the work schedule for each day covered in the agreement;
- Specify the number of times the agreement may be repeated; and
- Provide the start date and expiry date for the period specified (*ESA*, s 37(2)).

A copy must be provided to the employee prior to the start date of the agreement (*ESA*, s 37(2)).

5. Variances

Employers can apply to the Director for a workplace variation on the minimum and maximum hours of work, the limits on the number of weeks over which work can be averaged, and to the overtime requirements (*ESA*, s 72).

A variance to the s 40 overtime requirements for employees who are not covered by an averaging agreement would propose a work schedule where it is not beneficial to implement an averaging agreement (*Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations* (the "*Interpretation Guidelines Manual*").

Variances give employers and employees the flexibility to establish work schedules that do not strictly meet the requirements of the *ESA*, but are not inconsistent with the intent of the *ESA*.

Variances of overtime will not normally be granted for employees who work fewer than 30 hours when averaged over the proposed schedule, or for temporary employees as according to the *Interpretation Guidelines Manual*, these employees do not generally benefit by a work schedule that extends the hours of work in a day for extra time off during the week.

Under the *Interpretation Guidelines Manual,* if a variance is granted, it may include the following, as applicable:

- a schedule of working hours, showing the shift cycle and the actual hours and days to be worked in the shift schedule;
- identification of the group of employees (by occupation, classification, etc.) or classes of employees covered by the schedule must be clearly stated (any specific employees who are not covered by the variance should be identified by name);
- mandatory statutory holiday entitlement subject to the requirement that employees have been employed at least 30 days;
- requirement that any employee must work or earn wages for a full shift cycle (with the exception of termination of employment) or the overtime provisions of s 40 apply;
- mandatory statement that overtime provisions of s 40 of the ESA apply to weeks where there has been a contravention of the requirements of the variance;
- mandatory statement that any work outside scheduled times of work must be paid in accordance with the overtime conditions in the variance;
- a minimum of 30 hours of work a week, or an average of 30 hours of work in a multiple week schedule;
- overtime rates of 2 times for any hours worked in excess of 12 in a day; or 1 ½ x for an average of 40 hours worked in a week; and
- any work outside the shift schedule must be paid at overtime rates.

A variance to the overtime requirements in s 40 may be granted for a limited period of time (ie: a seasonal variance) (*ESA*, s 73(3)(b)).

As stated above, an employer and employee can agree to average hours of work over a period of 1, 2, 3, or 4 weeks under s 37(1). The number of weeks can be increased beyond 4 weeks only by a variance approved by the Director. The Director can vary no other provision of s 37 of the *ESA* (*Interpretation Guideline Manual*)

To apply for a variance, the employer must deliver a letter to an Employment Standards Branch that is signed by the employer and a majority of the employees who will be affected by the variance and includes:

(a) the provision of the *ESA* the director is requested to vary;

(b) the variance requested;

(c) the duration of the variance;

(d) the reason for requesting the variance;

(e) the employer's name, address and telephone number;

(f) the name and home phone number of each employee who signs the letter (*ESA,* s 73(1), *ESA Regs* s 30)

Majority support is not sufficient to guarantee that any variance will be granted. The Director must still be satisfied that the variance is not inconsistent with the purposes of the *ESA* and Regulations, and that on balance the employees benefit from the variance (BC EST D089/14 (GoodLife)).

B. Canada Labour Code, Part III, RSC 1985 c L-2 (the "CLC") and Canada Labour Standards Regulations, CRC, c 986 (the "CLS Regs")

1. Maximum Hours of Work

Like the *ESA*, standard hours of work under the *CLC* are 8 hours/day, and 40 hours/week (s 169(1)).

However, the *CLC* establishes a hard limit of 48 hours on the maximum hours an employee can work in a week. The *CLC* contemplates that the *CLS Regs* can establish a lower maximum number of hours per week for specific workplaces (*CLC*, s 171 (1)).

The overtime wage rage under the *CLC* is 1 ½ x an employee's regular hourly wage (*CLC*, s 174).

Employees must have at least one full day of rest in the week, and prescribes that "wherever practicable, Sunday shall be the normal day of rest in the week" (*CLC*, s 173).

The professions excluded from the application of these professions do not warrant their own heading under the *CLC*, as they are much more limited than the exclusions under the *ESA.* The Division I – Hours of Work does not apply to managers (s 167(1)) or doctors, lawyers, dentists, architects and engineers (*CLS Regs*, s 3).

Complaints for unpaid overtime must be made six months from the day the employer was required to pay wages (*CLC*, s 251.01(2)(a)).

2. Established Work Practices

The requirement to pay overtime does not apply in circumstances where there is an established work practice that:

(a) requires or permits an employee to work in excess of standard hours for the purposes of changing shifts;

(b) …

(c) permits an employee to work in excess of standard hours as the result of his exchanging a shift with another employee. (*CLS Regs*, s 7)

3. Averaging

In some circumstances, employers may average the standard and maximum hours of work over a period of two or more weeks (*CLC*, ss 169(2), 171(2)), such that the average weekly hours worked are no more than 40/week (*CLS Regs,* s 6(6)(a)). The maximum hours of work cannot exceed an average of 48 hours/week (*CLS Regs*, s 6(6)(b)), and employees must be paid overtime at a rate of at least 1 ½ x for all hours worked beyond the 40 hour/week average (*CLS Regs*, s 6(6)(c)).

Employers can only average work schedules where there is operational necessity: specifically, "the nature of the work in a workplace necessitates irregular distribution of the hours of work of an employee" (*CLC*, ss 169(2), 171(2)), and the irregular distribution of hours results in either a) no regularly scheduled hours, or b) regularly scheduled hours where the number of hours differ (*CLC*, s 6(1)).

The "no regularly scheduled hours" requirement applies where it is common practice to require an employee to check to see whether work is available at specified times (eg: furniture moving companies). If work is available, the employee is assigned to a job. If work is not available, the employee does not come in to work, or if already at the workplace, goes home. These employees have scheduled reporting times but they do not have regularly scheduled daily or weekly hours. Consequently, their employer may average whatever hours the employees actually work.

For employees who do not have regular weekly hours but are called in as required, averaging is also appropriate.

The "regularly scheduled hours where the number of hours differs" requirement applies where employees work for different lengths of time on different days. A workplace does not qualify for averaging under the *CLC* where workers are scheduled for regular hours (eg: Tuesday – Saturday, 10 am – 6 pm), but the number of hours actually worked varies (due to, for example, an unusually heavy workload, late customers, traffic, etc).

Averaging periods cannot exceed the number of weeks necessary to cover the period in which employees' hours fluctuate (*Regs,* s 6(2))

Before an employer can begin averaging or change the number of weeks in the averaging period, they must post a notice of intention to average hours of work or change the number of weeks in the averaging period and provide a copy of the notice to the regional director[1] at least 30 days prior to the date on which the averaging or change is to start (*CLS Regs,* s 6(3)). This notice must remain in place as long as the averaging plan is in effect (*CLS Regs,* s 6(4)).

In order to alter the number of weeks in the averaging period or stop averaging, an employer must post a notice of the change and provide a copy to the regional director 30 days before making the change (*CLS Regs*, s 6(12)). If an employer ends an averaging plan before the end of the averaging

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1 "regional director" means the director of a regional office of the Department of Employment and Social Development or the their designated representative

period, they owe employees overtime for any hours worked in excess of the average of 40/week (*CLS Regs*, s 6(13)).

There are further *Regulations* respecting calculating the average where employees take time away from work, are hired in the middle of an averaging period, or are terminated or laid off in the middle of an averaging period (*CLS Regs,* ss 6(7) – (11)).

An averaging plan can last for a maximum of three years (*CLC*, s 169 (2.1)(b))

4. Work Schedule Modifications

Where an employer does not qualify for averaging because they do not meet the "operational necessity" or "irregular hours of work" criteria, they can modify the standard hours of work. Some frequently seen examples of such modifications are flex schedules, or compressed work weeks.

A modified schedule must still provide for an average of 40 hours/week over two or more weeks. Further, as opposed to individual agreements as in the *ESA*, a super majority (70%) of employees must agree to a modified schedule (and to alteration or cancellation of the same)(*CLC*, s 170 (2)).

An employer can also modify the 48 hours/week maximum, where the average maximum hours worked/week over a period of two weeks or more is 48 hours/week (*CLC*, s 172(2)). Again, 70% of employees must agree to the modified schedule (and to alteration or cancellation of the same) (*CLC*, s 172(2)).

In order to establish, modify, or cancel a modified work schedule,[2] an employer must post a notice of the new schedule (or modification or cancellation) in an accessible place where it is likely to be seen by the affected employees for at least 30 days before the new schedule takes effect (*CLC*, ss 170(3), 172(3), *CLS Regs*, s 4).

Notice of the modified work schedule must remain posted for the duration of its effect (*CLS Regs*, 5(2)).

Where a modified schedule is adopted, altered, or cancelled, an affected employee has 90 days from the time the new schedule takes effect to request that an inspector conduct a vote to determine whether 70% of the affected employees approve the new schedule (*CLC*, s 172.1). The vote is conducted by secret ballot and is confidential (*CLC*, ss 172.1(2) – (3)). If 70% of the employees do not approve of the modified work schedule, the employer has 30 days to comply with the result of the vote (*CLC*, s 172.1(6)).

A modified schedule can last up to three years (*CLC*, s 172.2(2)).

5. Exceptional Circumstances and Emergencies

In exceptional circumstances, an employer can apply to the Minister for a permit authorizing a class of employees to work in excess of the maximum hours of work. In issuing such a permit, the Minister must have regard to the conditions of employment and the welfare of the employees (s 176(1)).

The employer must satisfy the Minister that there are exceptional circumstances to justify the working of additional hours, and that the employer had posted a readily accessible notice of the application for a permit for at least 30 days before its proposed effective date (*CLC*, s 176(2)).

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2 For the record, the author appreciates and is annoyed by the redundant legislative use of the word "modify".

Permits for exceptional circumstances are issued for specific periods, lasting only as long as the exceptional circumstances are anticipated to continue (*CLC*, s 176 (3)). The permit can specify either the additional hours that may be worked in any day or week, or the total number of hours in excess of the maximum that may be worked under the permit (*CLC*, s 176(4)).

Within 15 days of the permit period expiring (or by another deadline fixed in the permit), the employer must report, in writing, the number of employees who worked in excess of the maximum hours specified and the number of additional hours each of them worked (*CLC*, s 176(5)).

An employee can exceed the maximum hours of work to the extent necessary to prevent serious interference with the ordinary operation of a workplace, in cases of

- accident to machinery, equipment, plant or persons;
- urgent and essential work to be done to machinery, equipment or plant; or
- other unforeseen or unpreventable circumstances (*CLC*, s 177(1)).

In these cases, the employer must report the nature of the circumstances in which the maximum was exceeded, the number of employees who worked in excess of the maximum and the number of additional hours each of them worked to the regional director, within fifteen days after the end of the month in which the maximum was exceeded (*CLC*, s 177(2).

III. Overtime—The Plaintiff's Point of View

When an has been required to work unmanageable hours, or has been tasked with an impossible workload, what are their options?

A. Statutory Remedies

Of course, if the worker is excluded from Part 4 of the *ESA* or from the hours of work provisions of the *CLC*, their statutory options are limited.

Otherwise, if the worker has developed an injury or disability due to the long hours, they could file a complaint for a breach of the excessive overtime provision of the *ESA*, provided they have evidence of a detriment to health or safety.

According to the *Interpretation Guideline Manual*, when the director is satisfied that an employee's health or safety is at risk, excessive hours may be restricted and terms and conditions may be imposed pursuant to s 79(3) of the *ESA*. Where a determination is issued under s 79 (3), an escalating monetary penalty will be imposed.

Under s 81(2) of the *ESA*, where a determination has been issued limiting hours of work, the employer must display a copy of the determination in each workplace where affected employees can read it.

Federally, the worker can submit a complaint for a breach of the maximum hours of work provisions.

If the individual's injury or disability is physical, they may be able to successfully make a claim for benefits from WorkSafe BC, provided they can obtain medical evidence connecting the injury with the hours. For example, in WCAT-2014-02611, the Tribunal relied on and adopted a doctor's opinion that it was probable that the worker's long hours and repeated heavy lifting were a significant cause of a low back injury. However, the nature of the lifting task itself seemed to carry

more weight[3] in the Tribunal's decision than the amount of time for which the worker was engaged in that activity daily.

If the injury or disability is mental, however, the *Workers Compensation Act* is structured such that it will be harder to successfully obtain benefits. Specifically, s 5.1(1)(c) contains a "labour relations exclusion", which renders mental disorder claims not compensable if the disorder was caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions. Policy C3-13.00 lists other employer decisions that preclude compensation for a mental disorder, including: decisions of the employer relating to workload and deadlines, work evaluation, performance management, transfers, changes in job duties, lay-offs, demotions and reorganizations.

For example, in WCAT-2014-02112, the worker made a s 5.1 claim for a mental disorder, which was unsuccessful at least in part because she claimed that her mental disorder was caused by long hours at work and excessive unpaid overtime, and that her employer refused to accommodate her request (supported by a doctor's note) to limit her hours to 40 hours per week.

In this case, the Tribunal found on a preliminary basis that there was no diagnosis of a mental disorder by a psychologist or psychiatrist. Nonetheless, the Vice Chair went on to engage in a lengthy discussion of harassment under the *Workers Compensation Act*, and to consider whether the employer's conduct had risen to that level, ultimately finding that it did not. The Tribunal also found that the events to which the worker attributed her mental disorder fell within the "labour relations exclusion" of s 5.1(1)(c).

The Tribunal noted, however, that there may be some exceptions to s 5.1(1)(c). Specifically, the Vice Chair wrote that this exclusion would not apply to circumstances which:

> involved extremely egregious conduct, that is, circumstances which fell within the definition of harassment for the purposes of this Act. The "labour relations exclusion" allow (sic) employees to manage their workplaces, acknowledging that management can also be ineffective, difficult, or challenging. These instances of management can also be emotionally or psychologically difficult for workers. If that management crosses the line into harassment of the worker, entitlement to compensation could follow. However, in this circumstance, I do not find the management decisions of the employer to be harassment of the worker. (emphasis added)

B. Human Rights Complaints

The BC Human Rights Tribunal has held that a refusal to reduce hours as part of accommodation can be discriminatory. In *Stackhouse v Stack Trucking Inc*, 2007 BCHRT 161, the worker was a garbage truck driver who worked four days a week, never less than 10 hours/day. She testified that her days averaged about 11.5 hours/day, and had been as long as 16 hours/day.

When the worker became pregnant, she continued to work long hours. Approximately 3.5 months into her pregnancy, her doctor advised her to limit her work to 10 hours/day. The second day after she attempted to leave work after 10 hours, her employment was terminated. The employer argued that it had a strict rule that drivers must start and finish their days as a team, and that the employer alone decided when workers were done for the day. The employer argued that the worker had been insubordinate by leaving work early against explicit instructions. However, the Tribunal found that because the worker left early on her doctor's advice, and the doctor had told her to limit her work

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hours because of her pregnancy, that the worker's pregnancy and the restrictions arising from it were a factor in her termination. The Tribunal further found that in that case, there was no evidence the employer was unable to accommodate the request, or that such an accommodation would result in undue hardship.

C. Constructive Dismissal

This paper does not require a full revisiting of the test for constructive dismissal. Suffice it to say that as rearticulated in *Potter v New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, the test for constructive dismissal has two branches. Under the first, an employee has been constructively dismissed where the employer unilaterally and substantially breaches an essential term of the employment contract. Under the second, constructive dismissal consists of conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract.

The test makes it clear on its face that an employee is unlikely to be constructively dismissed where they work very long hours, and have done so since they began working in their position.

However, the calculus may be different when the employer makes a substantial change to an employee's hours of work. In *Merliees v Sears Canada Inc.* (1988), 24 BCLR (2d) 172 (BCCA), the BC Court of Appeal approved the principle that a change in the days of work can, though not necessarily will, amount to a substantial breach of an essential term. In that case, the worker had worked for Sears for 9 years, and over the course of her employment had moved from part-time clerical work to becoming a full-time assistant manager. Her work was scheduled variably from Monday – Saturday, including two evening shifts a week. In 1984, Sunday opening became legal in North Vancouver, and Sears decided it had to open on Sundays to remain competitive. The worker was asked to work Sundays from time to time. She refused, and was dismissed. While the case was about whether Sears had cause to dismiss the worker upon her refusal to work Sundays, the Court discussed the role of hours of work in an employment contract.

In her characteristically spirited way, Madame Justice Southin recounted the following exchange with counsel in her trial-level judgment:

> 14 Mr. Hunter says the term was that the plaintiff would work on whatever days and hours the store was open and which were required of her.
>
> 15 I put to Mr. Hunter a question to this effect: Suppose Messrs. Russell & DuMoulin decided to open their law offices for 24 hours a day 7 days a week. Could a 64-year-old secretary who had worked for the firm for 30 years be required to work the midnight to 8:00 a.m. shift and, if she refused, be taken to have repudiated her contract of employment? With his usual candour, he answered "Yes".
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> 16 (I hasten to add that I do not think Mr. Hunter's firm would be guilty of such meanness of spirit).
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> 17 But the secretary would say, "I never consented to work such hours. It was not in my contemplation or yours and you cannot order me to do so".
>
> 18 I am mindful in considering this case that there are many jobs which require the working of rotating shifts and week-ends. But those that do such work — policemen, nurses, bus drivers and others — go into the work knowing that they must accept these hours (so must those who now take employment in stores). The miserable hours are a part and parcel of the job.

> 19 It is only in recent years that the public has decided it is right to exploit persons in non-essential occupations (especially low-paying non-essential occupation) by having them work while the more affluent members of society take their ease.
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> 20 As Sunday openings were unlawful and the defendant was opposed to them when the plaintiff first entered into her contract of employment with the defendant, it is plain that neither party contemplated Sunday work. What they contemplated was work on Mondays to Saturdays.
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> …
>
> 29 I conclude that when the plaintiff took employment on the sales floor with the defendant, the hours and days of store opening, as they then were, were part of the contract of employment. The change to include Sunday as a day of work is not a trivial alteration; it is a material alteration.

This case has since been relied on for the principle that a work schedule can be an essential term of an employee's contract, though at least one Court has noted the probability that "the special place of Sundays in western culture influenced the thinking of the various judges involved"[4], a conclusion supported by the fact that the *CLC* still prefers Sundays as the day free from work "wherever practicable" (*CLC,* s 173).

Unilateral attempts to demand that an employee move from part-time to full-time hours can amount to constructive dismissal. In *Corey v Dell Chemists (1975) Ltd*, [2006] OJ No 2302, Cavarzan J of the Ontario Superior Court found that a unilateral demand that an employee move from part-time hours (23 hours/week over 4 days, starting at 9:00 am, which she had specifically requested to take care of her son) and worked for some time, to full-time hours (30 hours/week over 5 days, starting at 8:00 am) was a substantial change to an essential term of her contract (paras 43 – 45). The claim for constructive dismissal was successful.

Similarly, in *Dechene v Dr. Khurum Ashraf Dentistry Professional Corp*, [2011] OJ No 4940 (Ont Small Cl Ct), Winny Deputy J issued a decision finding that a unilateral change to an employee's hours of work from 32 to a maximum of 48 amounted to constructive dismissal. In that case, the plaintiff had worked for the defendant at a 32 hour work week (which the worker classified as part time), and had resisted the office manager's attempts to get her to work Monday and Tuesday evenings in the past. When the employer drew up a contract of employment purportedly authorizing the employer to schedule the plaintiff for up to 48 hours a week at their complete discretion, the Court had no hesitation in concluding that this unilateral demand was a substantial breach of an essential term of the plaintiff's pre-existing employment contract (para 43).

Perhaps unsurprisingly, changes in hours or a work schedule amounts to constructive dismissal more often when that change is accompanied by other changes in duties and remuneration, including where employees are being asked to take on more responsibility than contemplated by their employment contract and are promoted. In *Knezevic*, when a worker who was a secretary and bookkeeper was gradually assigned to more dispatch duties during the week and on Saturdays, and was later told she would be exclusively transferred to dispatch, the court found this amounted to constructive dismissal. The Court wrote that "the case at Bar is not a constructive dismissal by way of demotion. It could more accurately be characterized as an unwanted promotion accompanied by changes in hours, days and nature of work" (para 30). The court went on to note that it is "well established" that substantial changes in hours of employment or the nature of the employment can

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4 *Knezevic v Rodger W Armstrong & Associates Ltd*, 32 CCEL (2d) 172, [1997] O.J. No. 3898 (Ont Small Cl Ct).

amount to fundamental breaches of fundamental terms depending on the facts (para 32). The court found that the proposed changes on balance amounted to fundamental changes of the contract's fundamental terms dealing with the nature of work, hours of work and days of work (para 34).

Similarly, unilateral changes to an employee's duties, hours and wages constituted a breach of a fundamental term in *Parks v Vancouver International Airport Authority*, 2005 BCSC 1883. In that case, as part of a reorganization of management employees, the employer told the worker he was being promoted, moving a new role as shift manager of airport operations, and the change was not optional. The employee declined the position and was terminated.

The Court wrote that:

> 29 It is apparent from the description that the job being offered to Mr. Parks was either a slight promotion or at worse a lateral transfer. The questions are: what are the terms of the contract; has there been a breach; and if there has been a breach of the contract, is it a fundamental breach? Employers must be free to reorganize and restructure but in doing so they must reach a new contract of employment with employees who are fundamentally affected by the reorganization, or give adequate notice to them. In each case it must be determined whether the changes proposed were a breach of the contract of employment that were not specifically permitted by the contract: *Hart v. Bogardus Wilson (1984) Ltd.* (1987), 13 B.C.L.R. (2d) 269 (B.C. C.A.).
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> …
>
> 32 … There is no evidence that Mr. Parks agreed that his job duties, hours and compensation could be changed without his consent, either at the time he originally took a position with the Airport Authority in 2000 or when his position was changed in 2002. The changes the Airport Authority proposed regarding Mr. Parks becoming a Shift Manager were without consultation or his consent. Mr. Parks says that the proposed change to his position from Superintendent, Airport South would have resulted in several fundamental changes to his contract of employment, including material changes to the compensation structure, the days and hours worked, and the imposition of additional duties.
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> 37 Finally, Mr. Parks says he would have had to work different hours than the hours he was working as Superintendent, Airport South. … In my view, it was reasonable for Mr. Parks to infer that there would be a requirement for shift or weekend work which would interfere with both his family and community life. Mr. Parks' evidence was that he was concerned that the changes to his work schedule would result in him incurring additional child care expenses and other family inconvenience he had not planned for.
>
> 38 A unilateral change to an employee's hours of work may constitute a fundamental breach of the employment contract. One must look at the changes objectively in order to determine whether the changes to Mr. Parks' duties, hours and wages were sufficient to constitute the breach of a fundamental term of its contract of employment. *Hanni*, at ¶ 58, 61 and 62.