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BULLETIN

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FOCUS ON LABOUR RELATIONS AND EMPLOYMENT LAW

Risky business: Altering employment terms and constructive dismissal

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Businesses need change. As they do, employment relationships sometimes have to change as well. Can employers alter employment terms in midstream to meet these needs? Not without significant risk. Changes to terms of employment, when poorly planned or implemented, can lead to unintended and costly consequences.

Constructive Dismissal

A fundamental change in terms of employment, when imposed without the employee's agreement, is a "constructive dismissal." Typical examples of changes that have been found to constitute constructive dismissal include: salary reductions, demotions, relocations and temporary layoffs.

Where an employee is constructively dismissed, he or she is entitled to resign his or her employment and claim damages for wrongful dismissal in the same manner as though the employment had been terminated by the employer without cause and without notice. Constructively dismissed employees will be entitled to the termination payments required either by their written contracts of employment, or if there is no agreement setting out notice entitlements, to "reasonable" notice or payments instead. At common law, it is not unusual for wrongfully dismissed employees to be awarded one month's notice or pay for each year of service and the award may be greater.

So how can an employer impose significant changes without being sued for constructive dismissal?

Prior Notice

If you give an employee sufficient prior notice of termination (either the length of notice required by a written contract or a "reasonable" amount of time, as the circumstances require), then the dismissal is not "wrongful." Where an employee receives all of the notice or pay to which he or she is legally entitled on termination, there is no basis upon which to make a claim against the employer for wrongful dismissal.

Until very recently, this "prior notice" principle has also been applied by judges and employment lawyers in the area of "constructive" dismissal. In other words, it has been a commonly held view that fundamental changes to employment terms can be implemented by employers unilaterally, without the employee's agreement and without risk of a lawsuit, as long as the employer gives the employee *sufficient prior notice of the change.*

This would no longer appear to be safe advice, however, given an important recent decision of the Ontario Court of Appeal in the *Wronko* case.

The *Wronko* Decision

Darryl Wronko was a 17-year employee of Western Inventory Services ("WIS"). On accepting the position of Vice-President, National Accounts & Marketing, he signed a written contract of employment that entitled him to the payment of 24 months' salary on termination (a generous termination clause). WIS appointed a new president, who then presented Wronko with a new contract that would reduce his termination entitlement from 24 months' to 30 weeks' pay. Wronko

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refused to sign the new contract and objected to the proposed change in his employment terms.

WIS then gave Wronko two years' advance notice of the unilateral imposition of the new term (two years being the commonly accepted maximum "cap" on notice requirements, and co-incidentally the value of Wronko's existing termination entitlement). Wronko continued to object to the change. The two years passed and WIS informed Wronko that his new term of employment was in effect from that point. He was told that if he continued to refuse to accept the change, there was "no job" for him.

Wronko treated the employer's conduct as a termination and sued for wrongful dismissal. At trial, the judge found that WIS had the right to impose fundamental changes to the employment relationship unilaterally, as long as proper advance notice was given. The court found that Wronko had received sufficient prior notice of the imposition of the new term of employment, and the judge dismissed this portion of the case accordingly. This decision was viewed by many as confirmation of the common opinion that employers were safe in imposing change on adequate prior notice.

Wronko appealed the decision to the Ontario Court of Appeal and won. The Appeal Court did not agree that employers have the right to change fundamental terms of employment unilaterally in the face of an employee's objection, simply by giving the employee advance notice.

What are the Options?

According to the Court of Appeal, employees faced with a unilateral change to the conditions of their employment have basically three options:

1. To accept (agree to) the change, in which case employment continues under the altered terms;

2. To reject the change and sue for damages if the employer persists in treating the employment relationship as being subject to the varied term (a constructive dismissal);

3. To make it clear to the employer that the new term is being rejected. It is then up to the employer expressly to terminate employment (with sufficient notice) and then offer employment on the new proposed terms thereafter. Otherwise, "...if the employer permits the employee to discharge his obligations under the original employment contract, then – unless proper notice of termination is given – the employer is regarded as acquiescing to the employee's position."

This case is significant as it calls into question the traditional view that sufficient notice of new terms was good enough to avoid liability. The Court has made it clear that employers cannot rely solely on prior notice when implementing changes to terms of employment, unless that notice is clearly notice of "termination" of employment in the event that the changes are not accepted by the employee.

Proceed With Caution

Employers seeking to alter existing terms of employment should first consult with employment counsel familiar with this development in the law. Wise employers will seek an opinion on at least the following questions:

1. Whether the proposed change is significant enough to constitute a constructive dismissal;

2. If so, how best to introduce the change and to confirm either its acceptance or rejection;

3. Given the *Wronko* decision, what is the most prudent course of action in the face of rejection, in order to avoid unwanted exposure to damages for wrongful dismissal.

Note: The employer in the Wronko case has applied for leave to appeal the decision of the Court of Appeal to the Supreme Court of Canada. That Court has not yet decided whether it will hear the appeal. As always, we promise to keep you posted of any developments in future bulletins.

Peter Straszynski provides advice to clients in all aspects of labour relations and employment law and represents both private and public sector employers in a wide variety of legal settings.

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