Stringer Brisbin Humphrey
MANAGEMENT LAWYERS

Employment Law Dispatch

Take It Or Leave It: How NOT To Change Terms In An Employment Contract

Greg McGinnis and Jeremy Schwartz

Making significant changes to current employees' contracts has never been easy; but after a recent Ontario Court of Appeal decision it just got a lot more complicated.

In *Wronko v. Western Inventory Service Ltd.* ("Wronko")[1] the Court of Appeal awarded an employee damages for his full two-year contractual notice entitlement even though the employer gave him two years' advanced warning that his contract of employment was going to change.

Unless the Supreme Court of Canada overturns the decision, employers in Ontario cannot unilaterally alter fundamental terms of employees' contracts simply by giving reasonable advance notice.

The Facts in *Wronko*

Mr. Wronko was a 17-year employee and served as Vice-President of National Accounts and Marketing in his last four years with Western.

On assuming his VP position, Wronko signed an employment contract that guaranteed him two years' salary in the event he was terminated without cause. Then, two years into his term as VP, Western's new President asked Wronko to sign an amended contract that only provided him three weeks' notice (or pay in lieu) for each year of service, to a maximum of thirty weeks.

Wronko refused to sign the new contract. Western told him the contract would change in two years regardless.

On several occasions over the subsequent two years Wronko restated his objection to the new provision. When the two-year notice was up, Wronko received a "go forward agreement" with the new provision and was told that if he did not wish to accept the new terms, Western had no job for him.

Wronko demanded two years' severance as per the original contract. When Western refused, Wronko sued for constructive dismissal (a form of wrongful dismissal).

Decision at the Court of Appeal

The trial judge found that Western had the right to unilaterally alter the severance provision on providing reasonable notice, and concluded that two years' notice was sufficient. As a result, the trial judge dismissed Wronko's claim that he was constructively dismissed.

[1] 2008 ONCA 327 (CanLII) [Click here for the case].

The Ontario Court of Appeal unanimously overturned that decision, finding that Wronko had clearly and consistently refused to accept the new provision.

The Court of Appeal contrasted Wronko's situation with those where employees continue to work under new terms and conditions that are *already in effect*; in such cases courts often find employees have implicitly consented to the changes.

Lessons for Employers

Unless *Wronko* is overturned, for Ontario employers to be reasonably sure to avoid the risk of liability for constructive dismissal they must:

1. Provide employees "reasonable" written notice that employment under the current terms and conditions is ending effective on a certain date. (What is "reasonable" will depend on the circumstances)

2. Offer re-employment on new terms beginning on the effective date of the changes.

3. If employees refuse to agree to take employment on the new terms, terminate their employment effective the date given in the notice.

There are many possible methods for implementing changes to terms and conditions of employment. The appropriate choice of method will depend on a number of factors, including the nature of the change, the number of employees affected, and the risks of implementing the change.

For more information contact:

Greg McGinnis at
gmcginnis@sbhlawyers.com
416-862-1616 ext. 190

Jeremy Schwartz at
jschwartz@sbhlawyers.com
416-862-1616 ext. 160

Stringer Brisbin Humphrey
MANAGEMENT LAWYERS

Employment Law Dispatch is an electronic publication of
STRINGER BRISBIN HUMPHREY

110 Yonge Street, Suite 1100, Toronto, ON M5C 1T4
T: 416-862-1616 F: 416-363-7358

65 Cedar Pointe Drive, Unit 806A, Barrie, ON L4N 5R7
T: 705-727-0808 F: 705-727-0323

E: sbhevent@sbhlawyers.com I: www.sbhlawyers.com