

You Raise the Issue

AYLA AKGUNGOR

Question: I want to make changes to my employee's employment contract. Can I do this? What do I need to know?



Ayla Akgungor

Employers need to be careful about making any unilateral changes to an employee's contract of employment. Generally speaking, once a contract of employment has been formed, neither the employer nor the employee has the right to unilaterally change a fundamental term of the contract unless both parties agree to the change. That doesn't mean that an employer can never make changes to a contract of employment. However, as a recent case from the Ontario Court of Appeal illustrates, caution must be exercised to ensure that the proper approach is taken.

In *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, the employee, Darrell Wronko, had an employment contract that provided him with two years of severance if he was terminated without just cause. In September 2004, Western's new president provided Wronko with a different contract, which reduced his entitlement on termination from two years to thirty weeks of salary. Not surprisingly, Wronko refused to sign the new contract. In response, Western purported to give Wronko reasonable notice of the change to the termination provision in his contract and advised him that the termination provision would take effect in two years time.

When the two years passed, Wronko again refused to accept the change to his employment contract and took the position that forcing this change on him amounted to constructive dismissal. Western was willing to have Wronko continue working, but only under the new contract terms. In analyzing the issue, the Court of Appeal set out three options that are available to an employee where an employer attempts to unilaterally change a fundamental term of employment:

- (1) The employee may accept the change, either expressly or impliedly through acquiescence, in which case the employment continues under the new terms;
- (2) The employee may reject the change and if the employee persists in implementing the change, the employee may treat themselves as having been constructively dismissed; and
- (3) The employee may make it clear to the employer that he or she is rejecting the change. In response, the employer may terminate the employee on proper notice and offer re-employment on the new terms. If the employer does not do this and permits the employee to keep working, then the employee is entitled to insist on the original terms of his or her contract and the employer will be regarded as acquiescing to the new contract terms.

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

The Court of Appeal concluded that the second scenario was what had transpired in the Wronko case. Accordingly, Western's insistence on the new contract terms

amounted to constructive dismissal and Wronko was awarded two years of salary in damages, which was consistent with the termination provision in his original contract of employment.

If employers are considering fundamental changes to an employee's contract of employment, they are well advised to seek the employee's voluntary consent to the changes. If such consent is obtained, the employer can proceed with the changes to the employment contract. If the employee's consent is not forthcoming, given the outcome in the Wronko case, employers should provide reasonable notice of termination to the employee concurrently with the advice that the employee will be offered re-employment on the new contract terms at the end of the period of reasonable notice.

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The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

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