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## **Ontario Court of Appeal rules on an employer's unilateral changes to the employment agreement – reasonable notice may not be enough**

The recent Court of Appeal decision in *Wronko v. Western Inventory Services Ltd.* (April 29, 2008) gives employers valuable guidance when they are considering changes to the fundamental terms of their employment agreements. In this case, even though the employer gave two years' notice of the impending change to the employment contract, the employee's repeated rejection of the change required the employer to take additional actions in order to implement the change. The employer failed to take these actions. Ultimately its attempt to unilaterally change the employment contract led to a successful wrongful dismissal claim.

The employee was hired straight out of university. He worked for 13 years before being promoted to Vice-President of Western Inventory Services in February 2000. His employment agreement included a severance provision that required the employer to pay two years' salary if he was terminated. In June 2002, the employer gave the employee a new contract with a severance provision that provided for three weeks' notice per year of service, up to a maximum of thirty weeks. The employee noted the change to his severance entitlement and refused to sign the new agreement.

In September 2002, the employer informed the employee that it was providing two years' notice that the proposed severance change would be implemented. As a result, should his employment be terminated, the employee would receive up to a maximum of thirty weeks' notice, or pay in lieu of notice.

The employee continued to reject the change and in September 2004 – two years and four days after receiving notice of the unilateral change – the employee was again asked to sign the new contract with the reduced severance pay. The employee was told "if you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you."

The employee considered himself dismissed and requested the original severance package of two years' pay. After the employer refused, the employee sued for wrongful dismissal. The employee's claim was dismissed at trial on the basis that he was given two years' notice of the change and, although the employee did not intend to resign, it was nevertheless he who ended the employment relationship.

### **THE COURT OF APPEAL**

The Court of Appeal laid out the three options that are available to an employee when an employer makes a unilateral change to a fundamental term of the employment contract:

- the employee may accept the change and the employment will continue under the altered terms;
- the employee may reject the change and sue for damages if the employer treats the relationship as subject to the new term (this constitutes constructive dismissal); or
- the employee may clearly reject the new term, in which case, in order to implement the change, the employer must terminate the employee with proper notice and offer re-employment on the new terms.

The Court of Appeal stated that mere continuance by an employee in employment does not amount to an acceptance by an employee of a unilateral change to the employment contract. The employee may still insist on the employer's adherence to the original terms of the contract. Such situations fall within the third category above. In those situations, in order to make the change, the employer must terminate the employee's contract and offer re-employment on the new terms.

The Court of Appeal found that Wronko clearly rejected the employer's change to the severance package. In light of that, the employer could either have accepted the rejection (and therefore accepted that there would be no new agreement), or it could have informed the employee that the refusal to accept the new contract would result in termination (with notice), and that re-employment would be offered on the new terms.

The employer did not provide notice that it intended to treat the rejection of the new contract as grounds for dismissal. By failing to do so, the employer was found to have accepted that the terms of the original contract would remain in effect. The Court of Appeal held that it was the employer that terminated the employment relationship. This constituted a wrongful dismissal which triggered the severance provision in the original contract.

The employee was awarded damages in the amount of the two years' termination pay he was entitled to under the original terms of the employment agreement: \$286,000. The employee was also awarded his legal costs on a substantial indemnity basis, fixed by the Court of Appeal at \$50,000 at trial and \$50,000 on appeal.

### **In Our View**

The decision is consistent with the principle that employers may make unilateral changes to employment agreements, provided they give reasonable notice of those changes. In spite of this, where an employee clearly refuses to accept the changes, an employer's insistence on the new terms may be considered to be a constructive dismissal (a rejection by the employer of the contract of employment allowing the employee to treat the contract as wrongfully terminated). In order to avoid the risk of liability for notice damages, an employer must notify its employees that refusal to accept the new terms will result in termination with notice, and then offer re-employment on the new terms.

Western Inventory Services Ltd. is seeking leave to appeal to the Supreme Court of Canada. We will keep readers advised of any developments.

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