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CONSTRUCTIVE DISMISSAL

advance notice may not be enough

Employers may believe that they have the right unilaterally to impose significant changes in employment terms so long as reasonable advance notice is provided. A recent Ontario Court of Appeal decision confirms that this is not always the case, at least in the face of an employment contract providing for a fixed severance payment upon termination and without any obligation to mitigate. In *Wronko v. Western Inventory Services Ltd.*, an employer was found to have wrongfully dismissed one of its executives when it sought to impose a change in the employment contract notwithstanding that it had provided two-years' advance notice of the intended change. Joe Conforti reviews this decision and its implications. 858

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the scope of the duty to accommodate

The scope of the duty to accommodate, and the lengths to which employers must go before it becomes an undue hardship, is one of the most challenging questions faced by employers. The recent Supreme Court of Canada decision in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* clarifies the duty to accommodate to the point of undue hardship. As Robert Bonhomme and Joelle Hamilton explain, the Supreme Court took the opportunity to explain the standards to which employers must go to satisfy their duty, as well as the scope and purpose of the duty and the point in the relationship at which the duty is measured. 863

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Federated Press

CONSTRUCTIVE DISMISSAL

Employer-initiated Changes to Employment Contracts: Advance Notice May Not Be Enough

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Absent an agreement to the contrary, an employer generally has the right to dismiss its employees, even without just cause, so long as reasonable advance notice of termination or payment in lieu of notice is provided.

As with express dismissals, employers may believe that they have the right unilaterally to impose significant changes in employment terms – that is, to dismiss constructively – so long as they provide reasonable advance notice of the changes.

A recent decision of the Ontario Court of Appeal, *Wronko v. Western Inventory Services Ltd.*,[1] has confirmed that this is not always the case. Depending on the course of action taken by the employer and the employee and the specific contractual provisions negotiated between the parties, any advance notice provided by the employer may have little or no impact on the employee's entitlement to severance or other wrongful dismissal charges and, in any event, the employer may be precluded from imposing the change without consent.

In *Wronko,* the Court of Appeal ruled that an employer, Western Inventory Service ("WIS"), wrongfully dismissed its executive, Darrell Wronko, when Mr. Wronko refused to accept a fundamental change in his contract, this notwithstanding that WIS had provided a full two-years' advance notice of the impending change. Relying on the specific provisions of the parties' employment contract, the Court of Appeal determined that an employer in the position of WIS could not unilaterally amend the terms of an employment contract even with advance notice and, further, if the employer permits the employee to continue working in the face of the employee's refusal to accept the changed terms of employment, then the original employment contract remains in force.

The Facts

The facts in *Wronko* are straightforward:

- Mr. Wronko became employed by WIS in 1987, working continuously for approximately 17 years and progressing through the ranks.
- By 2000, Mr. Wronko was promoted to the executive position of Vice President of National Accounts and Marketing.
- In 2000, WIS and Mr. Wronko agreed to and signed an employment contract (which was prepared by the lawyers of WIS). The employment contract included termination/severance provisions requiring the payment of two-years' compensation – base salary plus bonus – in the event of a termination of Mr. Wronko's employment. Any termination/severance payment was required to be paid by WIS on a lump sum basis within two weeks following the end of the month in which the termination occurred.[2]
- In June 2002, following a change in its executive ranks, the new President of WIS delivered a revised employment contract to Mr. Wronko purporting to reduce Mr. Wronko's termination/severance entitlement from two-years' compensation to a formula capped at 30 weeks. WIS asked Mr. Wronko to "Please initial, sign and return original to me as soon as possible."

[1] (2008), 65 C.C.E.L. (3d) 185, additional reasons at (2008), 66 C.C.E.L. (3d) 135 (Ont. C.A.) ("*Wronko*").

[2] The fact that the termination/severance payment was to be made on a lump sum basis shortly after the date of termination appears not to have been brought to the attention of the trial judge nor, initially, the Court of Appeal. As stated by the Court of Appeal in its additional reasons, at 136, this contractual provision "amounted to a waiver by [WIS] of any obligation on the part of [Mr. Wronko] to mitigate."

- Mr. Wronko did not sign the revised employment contract, instead stating that he would not agree to forego or reduce his then existing termination/severance entitlement.
- After further discussions between Mr. Wronko and WIS – during which Mr. Wronko was pressed to but refused to sign the revised employment agreement – WIS delivered a memorandum dated September 9, 2002 to Mr. Wronko that provided him with 104 weeks' (that is, two years') advance notice that the termination/ severance provisions in his employment contract would be changed so as to provide that upon termination of his employment, other than for just cause, Mr. Wronko would be entitled to a maximum of 30 weeks' notice or pay in lieu thereof.
- Mr. Wronko reiterated to WIS that he opposed the revised employment contract and its proposed changes to the termination/severance provisions.
- Notwithstanding that there was a certain level of tension between them, the employment relationship between Mr. Wronko and WIS continued thereafter until September 13, 2004 when, just days after the two year anniversary of the WIS memorandum to Mr. Wronko giving him notice of the change in the termination/ severance provision, WIS sent Mr. Wronko an e-mail attaching the memorandum and an employment contract – described as a "go forward agreement" – containing the reduced termination/ severance provisions. The e-mail expressed the view of WIS that, since two years had passed, the revised employment contract was in effect and Mr. Wronko was asked to sign and return it. Significantly, WIS advised Mr. Wronko: "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 next day, Mr. Wronko replied confirming that he understood his employment to be terminated; while Mr. Wronko did not report to work, he offered to come in to assist with the transition. In turn, WIS stated that Mr. Wronko was not terminated but that "[i]n the absence of your signature on the new employment agreement (which remains entirely optional and voluntary) your existing employment agreement remains in place with the amended termination provisions as amended by the company ... after giving you 104 weeks' notice of their impending change."
- In a final communication, Mr. Wronko stated that he considered WIS to have terminated his employment and Mr. Wronko requested his severance package of two-years' compensation. As WIS refused to make any termination/severance payment, litigation ensued.

The Trial Judgment

At trial, Mr. Wronko's wrongful dismissal claim was dismissed.[3]

The trial judge identified the critical issue as whether WIS, as employer, had the unilateral right to vary a fundamental term of employment – in this case, the termination/ severance provisions in the Wronko employment contract – so long as it provided reasonable advance notice of that change to Mr. Wronko, its employee. The trial judge ruled that WIS had the right to do so.

The trial judge relied on a decision of the Supreme Court of Canada, *Farber v. Royal Trust Co.*[4] where, in the context of a constructive dismissal claim, the following authority was quoted with approval:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

The trial judge determined that the two-years' advance notice provided by WIS – which coincided with the period represented by the contractual termination/severance provisions – was reasonable in all of the

[3] *Wronko v. Western Inventory Service Ltd.* (2006), 54, C.C.E.L. (3d) 50 (Ont. S.C.J.).
[4] [1997] 1 S.C.R. 846, at paragraph 34.

circumstances and that, therefore, WIS had complied with its legal notice obligations. Finally, and notwithstanding that Mr. Wronko had no intention of resigning and believed that he had been dismissed unilaterally, the trial judge concluded that it was, in fact, Mr. Wronko who had ended the employment relationship; consequently no termination/ severance pay was owing.

The Court of Appeal Judgment

The Court of Appeal reversed the trial judgment.

The Court of Appeal's analysis began by noting that the basic premise underlying any individual contract of employment is that it continues so long as both parties agree; that is, the employment is "at will" so that either the employer or the employee may terminate the employment relationship without just cause. However, the employer's right to terminate an employee without just cause is "a breach of contract that carries with it consequences for the employer, both under statute and at common law;" likewise, "an employer's unilateral change to a fundamental term of an employment contract constitutes a repudiation of the contract ... [which] carries consequences, which depend on how the employee responds to the repudiation."[5] The general principle can be expressed as follows: "Once a contract of employment has been formed, neither party has the right to unilaterally change a significant term of the contract, unless both parties agree to the change."[6]

In its analysis of the facts, the Court of Appeal identified two critical issues:

Firstly, did the September 13, 2004 memorandum constitute a termination of the employment relationship by WIS, the employer?

The Court of Appeal disagreed with the trial judge and concluded that WIS clearly intended to terminate Mr. Wronko in its communication to him that, if he did not accept the revised employment contract with the reduced termination/severance provisions, "then we do not have a job for you." This was a clear ultimatum and, in response, it was reasonable for Mr. Wronko to consider himself to have been terminated.

Secondly, what consequences, if any, flow from the termination by WIS of Mr. Wronko's employment?

Where an employer attempts a unilateral change to a fundamental term of an employment contract, the Court of Appeal identified three possible options that are available to an employee:

- *Acceptance/amendment of employment contract*: The employee may accept the change in the terms of employment, expressly or implicitly, in which case the employment will continue under the altered terms.
- *Constructive dismissal*: The employee may reject the change in the terms of employment and sue for damages if the employer persists in treating the employment relationship as subject to the varied term.
- *Employer's acquiescence to the employee's position*: The employee may make it clear to the employer that he or she is rejecting the proposed new terms of employment. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course of action but instead permits the employee to continue to fulfil his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if an employer permits to discharge his or her obligations under the original employment contract, then – unless proper notice of termination is given[7] – the employer is regarded as acquiescing to the employee's position. As the Court of Appeal stated: "I cannot agree that an employer has a unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."[8]

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[5] *Wronko*, supra note 1 at 190.

[6] *Wronko*, ibid. at 195, quoting Mole, *Wrongful Dismissal Practice Manual*, Vol. 1, 2nd ed., at 3-1.

[7] Given its decision, the Court of Appeal must have meant that proper notice of termination or any termination/severance payment required in accordance with the employment contract must be given.

[8] *Wronko*, supra note 1 at 193, quoting with approval *Hill v. Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124 (Ont. C.A.), at 132 (per Mackay J.A.).

The Court of Appeal distinguished the facts faced by it from those before the Supreme Court of Canada in *Farber v. Royal Trust Co.* In the latter case, the employer advised the employee that he had to accept the demotion or resign within one month; the employee refused to report to his new position, instead ceasing employment and commencing an action – successfully – for wrongful/constructive dismissal. According to the Court of Appeal, such circumstances reflect the "constructive dismissal" option (that is, the second option) described above. In contrast, the Supreme Court of Canada in *Farber v. Royal Trust Co.* "was not purporting to outline the rights and obligations of the parties in circumstances where an employee registers an unequivocal rejection of an intended fundamental change to the terms of his employment and where the employer permits him to continue work according to the existing terms without giving notice that refusal to accept the new terms will result in termination"[9] – very different from the circumstances in *Wronko*.

As such, according to the Court of Appeal, the trial judge erred by treating this case as one where the employee had chosen to pursue the second, constructive dismissal option. Although this is the route chosen by many employees because the change imposed would likely have an immediate and undesired impact, the change sought to be imposed by WIS did not have such an immediate impact and Mr. Wronko had actually chosen the third option with a view to maintaining his existing employment contract.

As analyzed by the Court of Appeal, the advance notice provided by WIS in September 2002 of its intention, effective two years afterwards, to amend the termination/severance provisions of the employment contract, constituted a repudiation of the contract; it was an anticipatory breach of contract, in effect, declaring that WIS had no intention of performing its future obligations. In response, Mr. Wronko gave clear, unequivocal and repeated notice that he refused to accept the proposed new termination/severance provisions. In the words of the Court of Appeal: "[H]e did not choose to accept the employer's repudiation of the contract and sue for damages, as would be the case in a constructive dismissal situation."[10] Instead, Mr. Wronko relied on his right to insist on full contractual performance by WIS – that is, payment of two-years' termination/severance compensation on a lump sum basis.

In the face of Mr. Wronko's opposition, WIS had two choices. Firstly, it could have advised Mr. Wronko that his refusal to accept the revised employment contract would result in his dismissal and that re-employment would be offered on the new terms; if WIS were to take this position, the then existing two-year termination/severance provision would still be triggered albeit, sooner. Alternatively, WIS could have accepted that there would be no revised employment contract and that Mr. Wronko's employment would continue on the then existing employment terms. Despite Mr. Wronko's unequivocal refusal to accept the new termination/severance provisions, WIS permitted Mr. Wronko to continue with his employment according to the existing employment contract. As WIS did not choose the first option, it impliedly chose the second, that is, WIS must be taken to have acquiesced to Mr. Wronko's position and to have accepted that the terms of the existing employment contract remained in effect.

Consequently, the decision by WIS in 2004 to dismiss Mr. Wronko was wrongful and carried with it the consequence and triggered the two-year termination/severance obligation in the original, unamended employment contract.

Implications

Wronko is a significant employment law decision, outlining the distinction between an immediate act of constructive dismissal and of an anticipatory repudiation of contract and the consequences thereof. In doing so, the Court of Appeal has clarified employer and employee rights and obligations in the face of an employer-initiated change to terms and conditions of employment. In particular, parties will be held to their bargains and employers may not necessarily be able unilaterally to impose significant changes even if advance notice is provided to their employees.

On the facts of *Wronko*, the decision of the Court of Appeal makes eminent sense.

[9] *Wronko*, ibid. at 193.

[10] *Wronko*, ibid. at 194.

The parties freely negotiated termination/ severance provisions that very specifically provided for a defined payment amount – that is, two-years' compensation – and a method and timing of payment – that is, immediately following the date of termination on a lump sum basis and, by implication, without the obligation to mitigate or any deduction therefor. In the face of such an express agreement between employer and employee, it would have been manifestly unfair to permit WIS unilaterally to alter the terms and to impose a reduction in the severance – that is, down to 30 weeks – and to alter the methodology of payment – that is, by permitting termination upon providing working notice and/or to require mitigation. No matter how much advance notice was provided by WIS of the intended changes, this would not comply with Mr. Wronko's contractual termination/ severance entitlement. Put another way, even if two-years' advance notice constituted "reasonable" advance notice of termination for a constructive dismissal (at least in the absence of an employment contract), upon the effective date of such dismissal, Mr. Wronko would be still entitled to the entirety of his two-years' termination/ severance compensation on a lump sum basis and without deduction for mitigation – as he and WSI had expressly agreed.

If an employer such as WIS wants to reserve to itself the right to alter the employment contract after its execution and during the term of employment, it may attempt to do so explicitly. If the employer is unable to do so (or chooses not to), then it must bear the consequences. A lesson to all employers from *Wronko*, therefore, is to be ready to abide by any contractual obligation committed to. As a corollary, employers should anticipate that any changes to contractual obligations must, in normal circumstances, be negotiated with and consented to by employees.

The *Wronko* decision may have less impact in employer-initiated changes where there is no employment contract providing for fixed termination/severance payments or where such provisions are subject to the normal legal obligation to mitigate. In such cases, an employer may still be able to give advance notice of changes to be implemented; obviously, the more advance notice provided by the employer, the better. Alternatively, where an employee objects to the change, the employer may be able to provide the employee with notice of termination of employment effective at the end of the expiry of the reasonable notice period together with an offer of re-employment based on the new terms and conditions of employment.

To the extent the employee rejects continuing employment, then he or she may be determined to have failed to mitigate any damages and, as a result, may forfeit wrongful dismissal damages otherwise owing.[11]

The full implications of *Wronko* for employers and employees will develop over time. What is evident now, however, is the continuing judicial message that consensus is preferred and unilaterally imposed changes by the employer are discouraged.

[11] *Evans v. Teamsters Local Union No. 31*, [2008] S.C.J. No. 20.