Imposing Fundamental Changes to the Employment Relationship

Employers frequently wish to impose changes on employees during the course of their ongoing employment. You might think the law on a common topic such as this would be well settled, but there has been a debate in the courts about how the employer must go about making those changes to make them lawful and binding.

The Constructive Dismissal Risk

Imposing new terms of employment in an improper manner can amount to what is known as "constructive dismissal".

A constructive dismissal is a termination of employment by conduct rather than by words - the employer doesn't expressly state that the employee has been terminated but its actions amount to a rejection of the existing terms of the employment contract. Fundamental changes to the employment such as significant salary reductions, demotions, and indefinite (unpaid) layoffs are examples of significant changes that, if made *im*properly, create the risk of a claim of constructive dismissal.

A constructively dismissed employee is entitled to claim monetary damages (often referred to as "pay in lieu of notice" because the common law entitlement is the provision of reasonable working notice of termination). These damages could be as much as 24 months' pay.

The Role of "Consideration"

When the courts get involved in determining whether certain terms of employment are binding on the employee, the concept of consideration has traditionally been the all-important factor. That is because one of the key rules about employment contracts is that there must be consideration flowing to the employee in exchange for accepting the employer's terms.

At the outset of the relationship, the employer's offer of employment serves as consideration for the individual's acceptance of the terms of employment. During the course of the employment, some *new* or *enhanced* entitlement generally must be offered to the employee to serve as consideration.

The legal debate around imposing changes on the terms of employment has been whether simply providing reasonable advance notice of the change will *also* suffice. There have been court decisions suggesting that giving working notice of a fundamental change to the terms of employment is a lawful alternative to the provision of consideration. But not all of the case law has consistently supported this approach.

The Recent "Lancia" Decision

Recently, the Ontario Superior Court upheld the concept of issuing reasonable notice as an acceptable method of unilaterally imposing changes to the employment relationship.

Lancia worked for Park Dentistry Professional Corporation and was advised by Park that her employment would be terminated in 18 months and that she was being offered new employment – as of the end of the notice period - on terms set out in a contract which she would be required to sign. The proposed contract contained diminished vacation and termination entitlements.

Park gave Lancia the alternative of accepting the new contract right away, and being paid a substantial signing bonus. Lancia chose this option – she signed the new contract right away (and collected the signing bonus). Sometime later, Lancia resigned from her employment and sought damages for constructive dismissal and vacation pay.

The Court determined (in part) that Park had the right to impose fundamental changes to terms of employment, provided that the employee receives reasonable notice. Although the new terms imposed on Lancia resulted in a reduction of her compensation, this was permissible (upon provision of reasonable notice) and did not nullify the effect of the new contract.

In any event, as Lancia had accepted a signing bonus in exchange for signing Park's new contract, there really should never have been any doubt about whether the new terms had been accepted and were binding upon her.

So, How To Impose Changes Properly?

While the Lancia decision once again bolstered the legal premise that an employer can impose fundamental changes upon giving reasonable notice, the appropriate process for issuing that notice is a little tricky (and cumbersome).

What the employer must do is…

i. issue reasonable working notice of termination, making clear that the employment on the current terms *will* come to an end upon the expiry of the working notice, and

ii. make an offer of new terms of employment effective immediately after the expiry of the working notice period.

This two-pronged approach is a little cumbersome but is effective at achieving the employer's desired outcome – either the employee accepts the new terms of employment and they take effect after the expiry of the working notice or the employment comes to an end when the working notice period expires.

(A note about the Lancia scenario… one might ask, why bother with this cumbersome two-pronged notice process if giving the employee a signing bonus will achieve the same result? The answer is that almost nobody will accept a comparatively small signing bonus in exchange for giving away substantial employment rights. So, for the most part, the employer has *only* the two-pronged notice process at its disposal if it is determined to impose new terms of employment.)

The two-pronged approach set out above is the only reliable method for imposing substantial changes on the terms of employment without providing monetary (or other) consideration and without triggering a claim for damages for constructive dismissal. Just do it.

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