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Feature

Changes to Compensation: 15 Business Days to Acquiesce? Not so Fast!

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Employers should not assume employee's silence is always sufficient for implied consent.

With economic and technological conditions changing rapidly in today's market, employers often have to make changes to their employee's terms of employment to adapt to such changes. The risk for employers is that unilateral changes to terms of employment can potentially trigger constructive dismissal, resulting in the employer owing termination notice to the employee. However, if the employee does not object to the changes within a reasonable time, a claim for constructive dismissal may be defeated. A recent Alberta Court of Appeal decision suggests that objections to such changes need to be made known to the employer within 15 business days; however, more recent decisions disagree with such a bright-line test.

Unilateral Changes and Constructive Dismissal

In *Kosteckyj v Paramount Resources Ltd,* 2022 ABCA 230, the Alberta Court of Appeal summarized the current state of the law regarding constructive dismissal. There are two situations where constructive dismissal will result. The first is where the employer fails to substantially discharge an essential obligation in the employment contract to the detriment of the employee, and the employee, within a reasonable time declines to accept the new terms of employment. The second is where the employer treats an employee in a disrespectful manner and makes the employment relationship intolerable.

The *Kosteckyj* decision focuses on the first situation, and outlined the test for whether constructive dismissal has occurred, being: (1) whether an express or implied term of the employment contract had been breached, (2) whether the breach substantially altered an essential term of the contract, and (3) whether a reasonable person in the employee's situation would feel that an essential term of their employment contract had been substantially changed.

In *Kosteckyj*, the employee's base salary was reduced by 10%, their bonus was delayed or cancelled, the employer RRSP contributions of 6% of their salary was suspended, and access to seminars or training were stopped. Justice Wakeling on behalf of the Court of Appeal agreed with the trial judge that the reduction in compensation in the range of 16% to 20% constituted substantial changes to the essential obligations the employer had in the employment agreement. However, Justice Wakeling did not agree that the employee did not accept or acquiesce to the new terms of employment.

Consent and Acquiescence

The law states that if the employee either consented or acquiesced to the change by not making their objections known, the change would not be unilateral and constructive dismissal would not be established.

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In *Kosteckyj*, Justice Wakeling found that it would be a rare case that a reasonable period would exceed fifteen business days for an employee to make an informed decision regarding the change and object, and having such a bright-line test would be useful for both employers and employees, because it provides for certainty to both parties.

Justices Pentelechuk and Ho concurred in the result, and agreed that the employee's decision to keep working for 25 days strongly suggested that she acquiesced to the realities of her employment situation. However, they hesitated in accepting a specific time period for objections that would apply generally to all employees.

Appropriate Period for Consideration Determined by Reasonableness Standard

In a more recent decision, *Rooney v GSL Chevrolet Cadillac Ltd,* 2022 ABKB 813, one of the reasons for the employee's claim for constructive dismissal was the reduction in the employee's compensation by more than 31%. The change was explained in clear terms to the employee on March 22, 2010, but the employee did not assert constructive dismissal until May 6, 2010. In response to Justice Wakeling's 15-business day rule, the Court in *Rooney* agreed that this rule may be appropriate for employees who are professionals with the means to be informed of and have the ability to assert their rights, but such a bright-line rule for all employees is inappropriate given varying degrees of sophistication and agency of employees. The Court preferred determining acquiescence by considering all the relevant circumstances of the case and on a reasonableness standard.

The Court ultimately found in *Rooney* that the changes to compensation (in addition to arguments regarding unpaid suspensions) constituted a substantial change to the essential obligations the employer had in the employment agreement and that the employee did not acquiesce on the basis that the changes to the employee's terms of employment were not clearly explained to him until March 22, 2010 and the financial impact of the changes remained unclear until the employee received their pay statement in mid-April, particularly when monthly variations in the employee's compensation was common prior to 2010. As a result, constructive dismissal was established.

Key Takeaways

If an employer plans to make changes to an employee's terms of employment, particularly when those changes are significant and/or involve changes to compensation, employers should not assume that an employee's silence is always sufficient for acquiescence or implied consent to defeat a constructive dismissal claim. Employers should consider these two recent Alberta cases, particularly the *Rooney* decision which cautioned against a bright-line rule. Employers are recommended to seek legal advice on how best to manage such changes, especially when the changes will be company-wide, and when it is unclear whether employees will object to such changes.

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