Cassels

Ontario Superior Court Confirms that Employers Can Impose Changes in Terms of Employment Upon Provision of Reasonable Notice

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In *Lancia v. Park Dentistry*, 2018 ONSC 751, the Ontario Superior Court found that an employee who resigned after her employer provided 18 months' notice of changes to certain terms of her employment and a signing bonus had not been constructively dismissed.

Background

In August 2014, Park Dentistry Professional Corporation (Park) decided to introduce written employment contracts for all its employees. Accordingly, Park provided the plaintiff, Michele Lancia (Lancia) with a letter advising that her employment with Park would be terminated in 18 months, and offering her new employment on terms set out in an attached employment contract. The new contract significantly reduced Lancia's entitlement to annual vacation pay and included a clause that limited her entitlement on termination to the minimums prescribed by the *Employment Standards Act, 2000* (the ESA).

The letter accompanying the new contract confirmed that Lancia had until January 2016 to return a signed copy of the new agreement and receive a $2,000 signing bonus. It also specifically advised Lancia that, regardless of whether or not she signed the new contract of employment, her old agreement with Park would terminate 18 months from the date of the letter. The letter stated clearly that if Lancia accepted the signing bonus and signed back early, the new employment agreement would apply as of the date of her acceptance.

Despite being provided with 18 months to consider whether to sign the new employment contract, Lancia signed and returned the new employment contract two days later and collected the signing bonus. She did not raise any objection to the new contract or try to negotiate its terms. As such, the change to her vacation pay entitlements were effective as of the date of signing and not at the end of the 18 month notice period.

Lancia continued to work at Park until February 2016, at which time she delivered written notice of resignation. In her resignation letter, she took issue with the vacation pay she had received since signing the new employment contract 18 months earlier. She subsequently brought an action seeking damages for constructive dismissal and unpaid vacation pay. Lancia also claimed that she had been sexually harassed at Park.

Park brought a motion for summary judgment.

Decision

The Ontario Superior Court granted summary judgment substantially in favour of Park, finding that the new contract of employment was binding on Lancia and that Lancia's allegations regarding sexual harassment were unfounded. It found that Lancia had freely chosen to resign from her employment and had not been constructively terminated by Park.

The Court's discussion of the impact of the new employment agreement and the 18 month notice period offered by Park is instructive. In argument, Lancia had attacked the new contract in two different ways. First, she alleged that the signing bonus of $2,000 was not sufficient to compensate her for the losses she would incur as a result of the change in Park's vacation pay practices. Lancia argued that since the consideration she received was deficient, the contract was invalid. The Court rejected this argument, noting that it is not the role of judges to second guess the consideration parties provide to one another in exchange for entering into an agreement. Lancia was offered and accepted $2,000 in exchange for her signature to the new employment agreement. She could have chosen to reject the signing bonus and retain her rights under the old agreement until its expiry date but freely elected to receive the cash payment.

Second, Lancia alleged that she had not, in fact, received the benefit of the 18 month notice period because the terms of the new employment agreement were imposed on her as soon as she accepted the signing bonus and returned a signed copy to Park. As a result, Park had not actually given her reasonable notice of termination of her old agreement. The Court also rejected this argument, noting that Park provided 18 months of notice of termination of Lancia's old employment agreement. Lancia could have elected to have her existing terms and conditions of employment continue to apply during the 18 month notice period. Instead, she chose to accept the signing bonus and have them apply immediately. This was her choice to make.

The Court stated that an employer has the right to impose fundamental changes to an employment contract, provided that the employee receives reasonable notice of such changes. Although the terms of the new employment contract did result in a reduction in Lancia's compensation, this was permissible by law and did not nullify the new contract's enforceability. Park was "not required to offset the reduction in compensation by providing monetary consideration of an equal amount."

The Court also distinguished the situation in *Lancia* from the Ontario Court of Appeal's 2008 decision in *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, which had also dealt with the issue of constructive dismissal flowing from a change in the terms of employment. In *Wronko*, an employee had refused to sign an agreement that would have reduced his severance entitlement from two years' notice to a maximum of 30 weeks' notice. The employer advised the employee that even if he refused to execute the amending agreement, the change would take effect in two years. However, unlike Ms. Lancia, the plaintiff in

Wronko stated clearly that he did *not* accept the change to his employment agreement. Since his employer acquiesced to that statement and did not make its position clear until the end of its two year notice period, the Court found that the employer had failed to provide reasonable notice of termination of the old employment agreement. In contrast, Lancia received and accepted notice of termination of her employment agreement.

The Court also noted that the plaintiff's delay in asserting her claim of constructive dismissal was "illuminating." The Court confirmed that if an employee decides to treat a change in the terms of their employment as a constructive dismissal, they must communicate that decision to the employer in a reasonable time, and that Lancia had failed to do so.

In the result, the Court issued summary judgment in favour of Park. Park was, however, required to pay Lancia the sum of $3,763 plus interest for vacation pay that had been wrongfully deducted from her salary.

Commentary

The Ontario Court of Appeal's decision in *Wronko* created uncertainty as to whether employers were still entitled to impose fundamental changes to an employment contract by providing the employee with reasonable notice of such changes. The decision in *Lancia* confirms that an employer may do so, *without providing consideration*, so long as the employee receives clear, unambiguous reasonable notice of termination of their existing employment and is offered re-employment on the new terms. This is true even where the change in the terms of employment includes or results in a reduction in the employee's compensation.

For further information, please contact Laurie Jessome, Kristin Taylor, Maria Constantine or any other member of the Employment & Labour Group.

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