Employment Law

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Changing the Terms of the Job

Over the years, I have discovered a myth – widely embraced by employees – that they are largely insulated from adverse changes to the terms and conditions of their employment. In other words, short of egregiously unforgivable conduct on the job, many employees believe that their hours of work, pay, and benefits cannot be reduced. Once, an employee told me that he knew he could "certainly" quit his job, but his employer could never terminate that same relationship. It seems that we don't much like change, but if there must be change, it can only be that which we prescribe. Such workers have an inaccurate, one-sided view of the relationship.

Now it is also true that employment law (collective labour relations is excluded from this discussion) has come a long way to protect and strengthen the employee position at work. The growth of so many worker rights and employer obligations misleads even some managers into the belief that they cannot reduce an employee's hours, pay rate, or benefits. So they hesitate to initiate downside changes to the employment contract.

Yet economic hardship may strike the employer in any number of ways, even temporarily. Employment can often be the most expensive input cost in a business, and the current level of payroll cost may become unsustainable. Maybe some workers have to be changed from full time to part time, or their wages reduced, or discretionary benefits cut. Reductions are not nearly as common as increases in these things; reductions can be legally achieved. They may not be acceptable to all employees, who will leave for other opportunities, but downward payroll flexibility is legally possible.

> Constructive dismissal has been described by the Supreme Court of Canada as:
> ...where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment...a change that violates the contract's terms... the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of notice.

The first, and perhaps preferable, method is to ***negotiate*** changes to the ongoing employment relationship. Employers might inform the employees that the business has slowed and hours and/or pay must be reduced in order to retain the current jobs. Employees might be agreeable to remain employed with the reductions. The key to this option is the legal doctrine called consideration.

Consideration basically means that if the employer asks the employee to give up something (eg. a pension plan or to accept lower wages), it must also give up

something – though not necessarily of equal value – in return. That could be a guarantee of a further period of employment, if the employment would clearly have been otherwise terminated. The Ontario Court of Appeal in *Wolda* wrote: "the employer cannot, out of the blue, simply present the employee with an amendment to the employment contract and say, 'sign or you'll be fired' and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter."

The new agreement with each worker could be put under seal. The employer's lawyer should be consulted in order to ensure that the new reductions in the workforce will be enforceable. This method is preferable because it engages both parties, builds commitment in the new arrangement and reduces any chance of a legal dispute. Working with the employees affected to come up with an effective solution going forward is sound employment relations. Those employees who do not "play ball" with this method, can attempt to negotiate terms of voluntary withdrawal.

The other lawful method of reducing employment terms and conditions, without the employee providing cause, is to unilaterally foist the changes on the employee(s) with ample ***notice*** of the changes. The length of notice is essentially the same as required at common law if the employer wanted to terminate the employee without cause. This makes sense because if an employee can be properly dismissed with reasonable notice, surely s/he should be able to have the terms and conditions reduced short of dismissal in the same way.

It is recommended that where many employees will receive reductions, it is a good practice for the employer to give everyone the most generous notice period to which any employee in the group would have been entitled. In that way, the notice will be reasonable and ample for all and the changes can take effect at the same time. The disadvantage of this method is that the notice period could be months or years, which is a long time to wait for the change to take effect.

The longer the employment service already rendered to the employer, the harder it will be for the employer to make such downside changes. Long term employees are entitled to deference and respect in the negotiations under the first option, and a long notice period under the second option.

Despite the myth to the contrary, it is possible for employers to affordably downsize their payroll. Employees should know their rights in such circumstances. The new contractual arrangement must not only be legally enforceable, but the continuing, renewed workforce should also be satisfied and committed to the future success of the reorganized business.

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