

**UNILATERAL CHANGES TO EMPLOYMENT CONTRACT WITH TWO YEARS' NOTICE  
FOUND TO CONSTITUTE WRONGFUL DISMISSAL**

*Wronko v. Western Inventory Service Ltd.*, [2008] O.J. No. 1589 (C.A.)

by R. Lance Ceaser

**Introduction**

A recent decision of the Ontario Court of Appeal raises concerns for employers, after the Court decided that an employee was constructively dismissed and entitled to damages, although the employer provided him with two (2) years' notice of changes to the terms of his employment contract. In *Wronko v. Western Inventory Service Ltd.*, *supra*, the Court of Appeal found that the employer provided notice of the change, but did not suggest prior to the expiry of the notice period that failure to accept the changed terms would result in termination. Accordingly, the Court concluded that the employer actually terminated the plaintiff's employment after the notice period had expired when it advised him that there was 'no job' for him unless he accepted the changed severance provision.

**The Facts and the Trial Decision**

The plaintiff, Darrell Wronko, was a Vice President of national sales and marketing with the defendant employer at the time of his termination. He was employed under a series of written employment contracts, one of which (executed in 2000) provided him with two (2) years' severance pay (rather than the maximum 20 weeks' severance pay provided under his prior contract) in the event that the employer terminated his contract without cause. The employer alleged that this "sweetheart deal" had been negotiated with a former President of the company, but was unable to muster any evidence of this allegation. When a new President was appointed in 2002, he conducted a review of the existing employment contracts and offered the plaintiff a new contract which provided a maximum of thirty (30) weeks' severance pay (as opposed to the twenty (20) weeks' provided in the contract which preceded the 2000 contract). The plaintiff brought the two-year' termination provision to the President's attention.

In response, the company provided the plaintiff with two years' notice that the new termination provision would become effective in September 2004. The plaintiff objected to the change, asserting that the employer could not implement the new contract without his consent. In September 2004, the employer advised the plaintiff that the terms of the new contract were now effective, and that if he did not accept these terms and conditions, "then we do not have a job for you". By the time of this e-mail, the period of notice had already expired. The plaintiff questioned whether he was being fired, but the employer failed to clarify the comment, stating only that it was not terminating him. The plaintiff e-mailed the employer accepting his "termination" and requesting the severance package under his former contract (i.e., pay in lieu of two years' notice).

At the time of the trial decision in the *Wronko* case ((2006), 54 C.C.E.L. (3d) 50 (Ont. S.C.J.)), the law on constructive dismissal was accepted as being reflected in the decision of the *Farber v. Royal Trust Co.* (1997), 145 D.L.R. (4<sup>th</sup>) 1 (S.C.C.). In that case, the court adopted the following definition of a constructive dismissal:

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 (emphasis added). 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 (emphasis added).

Applying this approach to the circumstances in the *Wronko* case, the trial judge concluded that, although the employer had instituted a fundamental change to the contract, it had provided the agreed upon "reasonable notice" for such a change. The employee was free, having received two years' notice, to either accept or reject the change to the terms and conditions of employment. Having continued his employment after the effective date of the new contract, the employee was taken to have accepted a new contract, and his subsequent refusal to work under the new terms and conditions was consistent with resignation. Accordingly, the action was dismissed.

### **The Court of Appeal Decision**

On appeal, the Court focussed on the nature of the notice that was provided to Mr. Wronko, and whether it could be concluded that he had accepted the changed terms of his employment by continuing to work after the two years' notice had expired. The Court of Appeal considered the exchange of email between Wronko and his employer shortly after the end of the notice period, whereby the company failed to advise Wronko unequivocally whether his employment would or would not be terminated for failure to execute the new employment agreement.

The Court considered the general law on constructive and wrongful dismissal, but characterized the issues differently than the trial Judge had. Jennings J. had questioned whether the employer had the right to unilaterally change a fundamental term of the employee's contract and whether it had given reasonable notice of the proposed change. Where these qualifications were met, the Judge had been satisfied that there was no constructive dismissal. The Court of Appeal, on the other hand, looked primarily to the exchange of email between the parties after the end of the notice period, and found that there were clear indications that the employer had intended to, and had effectively, terminated the employment relationship at that time.

In its analysis of the issue, the Court of Appeal relied heavily on the decision of the Ontario Court of Appeal in *Hill v. Peter Gorman Ltd.*, (1957), 9 D.L.R. (2d) 124, where the Court stated that there were three (3) potential outcomes where an employer unilaterally amended a fundamental term of an employee's contract. The employee could (1) accept the changed terms of employment, in which case the parties would enter into a new contract on those terms; (2) reject the change and commence an action for constructive dismissal, if the employer insists on

the changed terms; or (3) he/she could continue to work for the employer, while making it clear that the new terms and conditions are not being accepted. In the third scenario, if the employer insisted on the altered arrangement, it must terminate the employee with notice or pay in lieu thereof. If the employee was permitted to continue working, then the terms of the original bargain would prevail.

Interestingly, the Court of Appeal rejected the notion that providing a reasonable period of notice of a change to a fundamental term should take the *Wronko* case outside of these three (3) scenarios. The Court found that this was not a case where an employee rejected a change to his or her terms of employment and sought damages for constructive dismissal; instead, the plaintiff had alleged wrongful dismissal, based on the exchange in September 2004, which the Court found contained an “ultimatum” to either accept the changed terms or to face being without a job. The notice provided to the plaintiff was treated by the Court as an announcement of a future “repudiation” or “anticipatory breach” of the contract, which the employee never accepted. In these circumstances, the Court found that the employee could not be taken to have resigned his position. The company permitted him to keep working after the end of the notice period, and then told him (in effect) that he was fired.

The Court of Appeal found that in telling Wronko that “we do not have a job for you” when he would not sign the new contract, the company brought his employment to an end. Unlike cases where the employer had given notice of a change and then insisted on its implementation after a period of notice, the Court of Appeal found that Wronko had expressed his resistance to the change in the termination provision throughout the notice period, and could not be found to have accepted the altered terms and conditions of employment simply by continuing in his employment. In these circumstances, the Court concluded that the employer had, in fact, terminated the employment of Wronko without notice or cause. In the result, the plaintiff/appellant was entitled to damages equivalent to two years’ salary (i.e., the amount of notice provided in the 2000 contract), less his mitigation income.

### **Important Lessons**

The Court of Appeal’s decision in *Wronko* suggests that employers must be more careful in making substantial changes to the employment contract, even when they do so with a substantial period of notice. Based on the Court of Appeal’s decision, employers should try to provide reasonable notice to an employee before implementing what may amount to an amendment to a fundamental element of the employment contract. Further, where an employee objects to the change, the employer may also need to provide the employee with notice of termination effective at the expiry of the reasonable notice period together with an offer of re-employment based on the new terms and conditions of employment.