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THE EMPLOYEE DOTH PROTEST THE RIGHT AMOUNT: IMPLEMENTING CHANGES TO EMPLOYMENT CONTRACTS

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In the recent decision of *Lionel Polard v. ARO Inc.*[1], the Supreme Court of British Columbia revisited the issue of determining if an employee's conduct resulted in the acceptance of altered terms and conditions of employment. The Court was clear that an employer must proceed with caution if an employee objects to proposed changes to the terms and conditions of employment.

Background Facts

Polard had an employment agreement with Aro Inc. ("Aro") that included a provision that the agreement could only be modified by a written agreement between both parties. The agreement also stated that a waiver of a provision of the agreement would not be effective unless it was in writing and signed by the party waiving the right.

Aro proposed to Polard that he reduce his hours for a period of 6 months. After the 6 month period, Polard would return to his full-time position with full pay under the original terms of the employment agreement. Polard advised that he was prepared to accept the proposal, but his acceptance of the proposal was conditional on his employment agreement being suspended or extended for six months to make up for the lost income. With the discussions ongoing, Polard modified his work schedule, as directed.

Polard stressed several times over the six month period that he required the modified terms of his employment to be reduced to writing as required under his employment agreement. However, after six months of the new schedule, and with no written agreement governing the changes, Aro advised Polard that it would not authorize his return to full-time hours.

The Court's Decision

Aro argued that Polard, by his words or conduct, had agreed to the amendments to the employment agreement and that because Polard acquiesced to the proposed changes, he was estopped from claiming damages for the period of reduced hours and pay. The Court rejected these arguments and found that at no time did Polard give an unambiguous promise that he accepted the new terms. The Court found that while

Polard agreed to work reduced hours and receive less pay, he was clear he was doing so on the express condition that his employment agreement would either be deferred or extended for 6 months to compensate him for the lost income. The Court emphasized that Polard consistently maintained his position that he wanted the proposed changes in writing, as well as an agreement to make up the lost income and Aro chose to not respond.

The Court ultimately sided with Polard and awarded him damages for lost income for the period during which Polard's hours and pay were reduced.

What Employers Should Know

Changing the terms of an employee's employment can be a difficult task, from both a legal and employee relations standpoint. A significant and detrimental change to a fundamental term of employment can result in a constructive dismissal claim, even while the employee continues in his or her employment, so employers must tread cautiously when contemplating changing an employee's terms and conditions of employment.

When contemplating such a change, employers have to start with the written employment agreement, if one exists, to see if the agreement addresses the employer's ability to change terms and conditions (either on notice or without notice). The employer then has to consider whether it is going to seek the employee's consent to the change (i.e. will the change take place immediately and the employer needs the employee's buy-in to proceed) or if it is going to provide proper notice of the change (thereby eliminating the consent issue, but potentially giving rise to employee relations issues).

If an employer attempts to make the change but encounters a protesting employee, the employer may need to reset and provide notice of the change in order to not wind up on the wrong side of a constructive dismissal claim.

If you have any questions regarding this decision or how to avoid constructive dismissal claims, do not hesitate to contact a member of our labour and employment group.

by Dave J.G. McKechnie and Mikolaj Niski, Student-at-Law

[1] *Polard v Aro Inc*., 2016 BCSC 2277.[ps2id id='1' target=''/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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