CITATION: Wronko v. Western Inventory Service Ltd., 2008 ONCA 327
(See also Addendum 2008 ONCA 479)
DATE: 20080429
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COURT OF APPEAL FOR ONTARIO

WINKLER C.J.O., MacPHERSON AND ROULEAU JJ.A.

BETWEEN:

DARRELL WRONKO

Appellant (Plaintiff)

and

WESTERN INVENTORY SERVICE LTD.

Respondent (Defendant)

Michael W. Kerr and M. Christine O'Donohue, for the appellant Darrell Wronko

P. Christopher Lloyd, for the respondent Western Inventory Service Ltd.

Heard: March 10, 2008

On appeal from the judgment of Justice J.J.R. Jennings of the Superior Court of Justice dated October 11, 2006, with reasons reported at (2006), 54 C.C.E.L. (3d) 50.

WINKLER C.J.O.:

Introduction

[1] The appellant, Darrell Wronko, pursued a wrongful dismissal claim against his employer of seventeen years, the respondent, Western Inventory Service Ltd. In Wronko's last four years at Western, he served as Vice-President of National Accounts and Marketing. After assuming this position, Wronko signed an employment contract dated December 2000. His contract included a termination provision that provided for the payment of two years salary in the event he was terminated.

[2] In September 2002, Western's new president, Sean Davoren, sent to Wronko a different contract, which would reduce his entitlement on termination from two years to thirty weeks pay. Wronko refused to sign the new contract. Western took the position that the termination provision in the new contract would come into effect in two years time. Wronko continued to object to the amended termination provision over the ensuing two years.

[3] Wronko's employment with Western ended in September 2004 after Western wrote to Wronko advising him that the amended termination provision was now in effect. Wronko replied that he understood his employment to be terminated and did not report to work. He sued for wrongful dismissal and claimed damages for breach of contract, as well as damages for bad faith, punitive and exemplary damages, and damages for unpaid vacation pay.

[4] The central issues at trial were whether Western had the right to unilaterally amend the termination provision in Wronko's employment contract; whether the end of Wronko's employment constituted a resignation, a constructive dismissal, or a termination; and what, if any, Western's notice obligations were as of September 2004.

[5] The trial judge concluded that Western was entitled to unilaterally amend the contract and that Wronko had ended the employment relationship when he refused to continue to work. He held that the employer had no further obligations to Wronko after he ended the relationship. The trial judge thus dismissed most of Wronko's claims, except for his claim relating to unpaid vacation pay in the amount of $6,977. Based on Wronko's partial success at trial, the trial judge awarded him costs in the amount of $10,000.

[6] Wronko appeals from the order dismissing most of his claims, while Western seeks leave to cross-appeal from the costs disposition. For the reasons that follow, I would allow the appeal on the merits and dismiss the cross-appeal.

Facts

[7] Wronko began working for Western in April 1987. It was his first job after graduating from university. He worked continuously for the company for some seventeen years, progressing through the ranks.

[8] In February 2000, Wronko was promoted to the position of Vice-President of National Accounts and Marketing. Following this promotion, he signed a written employment contract with the company, dated December 20, 2000, which was negotiated on Western's behalf by its then-president, Nicholas Ford. The contract provided for an annual salary of $143,000 including car allowance. It also included a termination provision that provided for payment of "the previous two (2) years salary plus bonus to be paid as termination if notice of termination is given... at any fiscal year end or at any other time".

[9] In June 2002, Western's new president, Sean Davoren, delivered an employment contract to Wronko by inter-office mail with an attached note in the form of a "yellow sticky" asking him to, "Please initial, sign and return original to me as soon as possible." Mr. Davoren testified that he was unaware of the December 2000 contract at this time. The key difference in the attached contract was that it reduced Wronko's entitlement to notice of termination from two years to three weeks notice or pay in lieu of notice for each year of employment, to a maximum of thirty weeks.

[10] Wronko did not execute this contract but instead pointed out the error in the termination provision of the new contract, which would eliminate his entitlement to two years termination pay and reduce it to a maximum of thirty weeks.

[11] At a subsequent meeting between Wronko and Davoren in August 2002, Davoren told Wronko that the prior contractual provision for two years notice was a "mistake". However, there is no evidence that Davoren was a participant in the contract negotiations between Wronko and the former president of Western, nor is there any evidence that anyone from Western had previously indicated to Wronko that the two year termination provision was a mistake.

[12] Also at the August 2002 meeting, Wronko was asked to sign a document confirming that he agreed to the reduced termination provision of a maximum of thirty weeks on termination. The document suggested that he seek legal advice before signing it. It further specified that Wronko's agreement to the change in the termination provision from two years to a maximum of thirty weeks notice was "…done voluntarily and is not a mandatory requirement for your continued employment."

[13] Not surprisingly, the legal advice Wronko received following the August 2002 meeting was that he should not sign the document. Wronko wrote to Davoren in

September 2002 by e-mail stating his position regarding the proposed "significant reduction in my severance package…" and explaining why he could not sign. Wronko's message concluded with the statement: "If the Company has a reasonable alternative it wishes to put forward, I am prepared to give it due consideration."

[14] Wronko did not receive a proposal from Davoren regarding a reasonable alternative. Instead, Davoren wrote a memo to Wronko on September 9, 2002 in which he purported to give him 104 weeks (*i.e.* two years) notice that the termination provision in his employment contract would be changed to provide that upon termination of his employment, other than for cause, Wronko would be entitled to three weeks notice or pay in lieu thereof for each year of employment, to a maximum of thirty weeks.

[15] On April 3, 2003, Wronko met with Davoren to deal with general management matters and was confronted with allegations by Davoren that he was not loyal to the company and that he had personal conflicts of interest due to his relationship with the previous president, who was now working for a competitor. These allegations were made in response to a query by Wronko as to whether he could purchase shares in the company – an offer presented to the other senior managers at Western. Davoren denied Wronko this opportunity because of his perceived disloyalty. The trial judge found that there was no evidentiary basis to support Davoren's mistrust of Wronko.

[16] On April 21, 2003, Wronko wrote to Davoren reiterating his opposition to the proposed change to the termination provision of his contract. Davoren did not respond to this letter.

[17] In another meeting between the two in October 2003, Wronko once again raised the question of his continuing employment with the company. Davoren made it clear to Wronko that he was not interested in negotiating terms under which Wronko might leave. Davoren accused Wronko of having a "sweetheart deal" with the old president of Western.

[18] On September 13, 2004 – two years and four days after the September 9, 2002 memo was sent to Wronko – Davoren sent Wronko an e-mail attaching the 2002 memo and a contract, which was described as the "go forward agreement". The attached contract contained the termination provision set out in the 2002 memo. The e-mail expressed Davoren's view that since two years had passed, the new employment contract was now in effect. He asked Wronko to sign the agreement and return it. Significantly, Davoren wrote: "If you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you."

[19] Given that Wronko had consistently refused to accept a new contract throughout the last two years, he – unsurprisingly – replied the next day that he understood his employment to be terminated. He did not report to work the next day, but offered to

come in to assist with the transition. Davoren e-mailed back, stating that he was not terminated. He further wrote:

> Please be advised that effective September 8, 2004, your 104 weeks notice is complete. In the absence of your signature on the new employment agreement (which remains entirely optional and voluntary) your existing employment agreement remains in place with the amended termination provisions as amended by the company on September 9, 2004 after giving you 104 weeks notice of their impending change.

[20] Wronko replied in a final e-mail that he considered the September 13, 2004 message to be a termination and requested his severance package of two years pay.

Reasons of the Trial Judge

[21] The trial judge identified the real issue as being whether Western had the unilateral right to vary the termination provision in the employment contract upon reasonable notice to the employee. In deciding this issue in the affirmative, he relied on the reasons of the Supreme Court of Canada in *Farber v. Royal Trust Co*., [1997] 1 S.C.R. 846 at para. 34, where in the context of a constructive dismissal claim, Gonthier J. quoted an article stating:

> 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. 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.

[22] It was not disputed at trial or on appeal that Western's proposed amendment to the termination provision in Wronko's employment contract constituted a fundamental change to the terms of the contract. The trial judge concluded that although the employer had the right to impose a fundamental change to the contract, it was required to give reasonable notice of the change to Wronko. The trial judge found that Western had met this requirement by providing two years notice on September 9, 2002. Although the trial judge accepted that Wronko had no intention of resigning and he believed that he was

dismissed unilaterally, the trial judge concluded, based on *Farber*, that it was Wronko who had ended the employment relationship.

[23] In the result, the trial judge dismissed the claims for damages other than for $6,977 in unpaid vacation pay. Based on the plaintiff's partial success, he ordered costs payable to Wronko in the amount of $10,000.

Analysis

[24] The basic premise underlying the individual contract of employment is that it continues as long as both parties agree. In common parlance, the employment of persons is "at will"; that is, either party has a right to terminate the employment relationship without cause. However, the use of the expressions "at will" and "a right to terminate" must not obscure the reality that the employer's right to terminate an employee without cause is a breach of contract that carries with it consequences for the employer, both under statute and at common law. The use of these expressions also must not obscure the reality that an employer's unilateral change to a fundamental term of an employment contract constitutes a repudiation of the contract. An act of repudiation carries consequences, which depend on how the employee responds to the repudiation.

[25] This case must be viewed within the context of these general principles. There are two key issues to be determined. The first is whether the September 13, 2004 letter sent by the president of Western constituted a termination of the employment relationship by the employer. If so, the second question is what, if any, consequences flow from this termination.

1. Was Wronko terminated by Western on September 13, 2004?

[26] In my opinion, the facts of this case do not support the trial judge's conclusion that Wronko ended the employment relationship. The employer's clear intention to terminate Wronko was expressed in Davoren's e-mail of September 13, 2004. In substance, that e-mail was an ultimatum by Western. Wronko was told that if he did not accept the change to his employment contract, "then we do not have a job for you". In light of Davoren's, and by extension Western's, knowledge of Wronko's steadfast opposition to the amendment to his contract, a reasonable person would regard the concluding statement in Davoren's e-mail as a termination.

[27] Support for this conclusion is found in the trial judge's finding that "it is clear from the evidence that the Plaintiff did not intend to resign" (at para. 31). The trial judge also found that it was reasonable for Wronko to infer from the message of September 13, 2004 that if he did not accept the new terms, "the phrase 'then we do not have a job for you' was effectively notice of termination" (at para. 32). In light of these factual

2. What consequences follow from the termination?

i) Is Wronko entitled to damages for wrongful dismissal?

[28] The trial judge accepted Western's position that an employer has a right to make a unilateral and fundamental change to a term of an employment contract upon providing reasonable notice of that change to the employee. He further accepted Western's submission that the September 2002 memo sent to Wronko advising him that the termination provision in his contract would be amended in two years time constituted reasonable notice. On this view, the unilateral change to the provision was properly effected as of September 2004 and the employee was bound to accept the change without further consequences to the employer.

[29] In coming to this view, the trial judge relied on the passage quoted above from *Farber*, repeated here for ease of reference:

> 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. 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.

[30] The Supreme Court in *Farber* was faced with a situation where the plaintiff, a senior manager, was given one month notice by his employer that he had to accept a demotion or resign. The plaintiff refused to report to this new position and sued for constructive dismissal. The *Farber* decision must be interpreted in light of these facts. The Supreme Court in that case was not purporting to outline the rights and obligations of the parties in circumstances where an employee registers an unequivocal rejection of an intended fundamental change to the terms of his employment and where the employer permits him to continue to work according to the existing terms without giving notice that refusal to accept the new terms will result in termination. Those are the circumstances in the present case.

[31] The reasons of Mackay J.A. of this court in *Hill v. Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124, speak precisely to this situation. In *Hill*, the court dealt with the case of

a commission salesman employed pursuant to an indefinite term contract, terminable on two weeks notice, that tied his remuneration to a commission based on net sales. The employer was concerned with delinquent accounts and on notice to the salesman it began to withhold ten per cent of his commissions in a reserve fund for bad debts. The salesman complained periodically about this arrangement, but remained in the employ of the company for over a year after the practice was initiated. Following the employee's resignation from the company, he brought an action to recover the withheld commissions. The trial judge found as a fact that the salesman had never agreed to the variation and ordered the commissions to be paid at the originally agreed rate.

[32] On appeal, Mackay J.A. held that mere continuance by an employee in employment does not amount in law to an acceptance by an employee of a unilateral variation of his contract by his employer.[1] The employee is entitled to insist on the employer's adherence to the terms of the contract. The employer could have terminated the employee's contract and offered him employment on the new terms, but it did not do so. This was fatal to its position. Mackay J.A. stated at 132:

> Where an employer attempts to vary the contractual terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms.
>
> …
>
> *If the plaintiff made it clear…that he did not agree to the change…the proper course for [the employer] to pursue was to terminate the contract by proper notice and to offer employment on the new terms. Until it was so terminated, the*

[1] Laidlaw J.A. wrote an opinion concurring in the result. In his concurring reasons, Laidlaw J.A. stated at 128-29: "The right of the appellant [employer] to withhold and retain any amount from the commission payable by it to the respondent [employee] depends upon an agreement on the part of the respondent authorizing the appellant to do so. Such an agreement can be expressed or may be implied. There was no express agreement on the part of the respondent. The single question arising in this case is whether or not such an agreement should be implied in the circumstances". Laidlaw J.A. concluded that an agreement should not be implied in light of the factual findings of the trial judge. Gibson J.A. dissented.

> *plaintiff was entitled to insist on performance of the original contract.* [Emphasis added.]

[33] In the cited passage, Mackay J.A. identifies three options that are available to an employee when an employer attempts a unilateral amendment to a fundamental term of a contract of employment. They may be summarized as follows.

[34] First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.

[35] Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal", as discussed in *Farber*, although this term was not in use when *Hill* was decided.

[36] Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then – unless proper notice of termination is given – the employer is regarded as acquiescing to the employee's position. As Mackay J.A. so aptly put it: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

[37] On the facts of the present case, the trial judge erred in treating this case as though the employee had chosen to pursue the second option, an action for constructive dismissal as discussed by the Supreme Court in *Farber*. This error is understandable. In many cases, where an employer imposes a unilateral change of a fundamental term of an employment contract, the employee's response will be to sue for constructive dismissal because the change will have an immediate and undesired impact on the employee. For example, a unilateral change may represent an immediate demotion of the employee, or it may amount to a significant reduction in salary or hours of work.[2]

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[2] In such scenarios, if the employee remains in the position for a period of time despite the altered terms and then decides to pursue an action against the employer, an issue may arise as to whether the employee's conduct in remaining in the job constituted an acceptance of the new terms, or if the choice to remain in the complained of position is to be regarded as mitigating damages for constructive dismissal: see R.S. Echlin and J.M. Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (Aurora, Ont.: Canada Law Book Inc., 2001) at 42.

[38] In the present case, the unilateral change did not have an immediate impact on the employee. Wronko's response to the attempted change and Western's reaction to his response bring this case outside the constructive dismissal context and squarely into the third situation identified by Mackay J.A. in *Hill*.

[39] Western gave notice in September 2002 of its intention to amend the termination provision of Wronko's employment contract effective September 2004. This notice constituted a repudiation of the contract.[3] In response, Wronko gave clear, unequivocal and repeated notice from September 2002 until September 2004 that he refused to accept the new termination provision. In other words, he did not choose to accept the employer's repudiation of the contract and sue for damages, as would be the case in a constructive dismissal situation.[4] Despite Wronko's refusal to agree to the new termination provision, Western permitted him to continue in his employment according to the existing terms of his contract.

[40] Having been made aware of Wronko's opposition to the new contract in September 2002 and his continued opposition thereafter, Western had two choices: it could advise Wronko that his refusal to accept the new contract would result in his termination and that re-employment would be offered on the new terms. If Western were to take this position, the termination provision in the December 2000 contract would be triggered. Alternatively, Western could accept that there would be no new agreement and that Wronko's employment would continue on the existing terms. Having failed to choose the former course, Western must be taken to have acquiesced to Wronko's position and to have accepted that the terms of the existing contract remained in effect. Western's decision to terminate Wronko in September 2004 thus carried with it the consequence that Wronko was entitled to two years termination pay pursuant to the terms of his existing employment contract.

[41] This result, in my view, is in accordance with the views expressed by employment law scholars. Ellen Mole in *Wrongful Dismissal Practice Manual*, vol. 1, 2nd ed., looseleaf (Markham, ON: LexisNexis Canada Inc., 2006) at 3-1 states that: "Once a contract of employment has been formed, neither party has the right to unilaterally change a significant term of the contract, unless both parties agree to the change." She goes on to cite the passage referred to above from *Hill v. Gorman* identifying the three options that are available to an employee when an employer attempts to unilaterally alter the employment contract.

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[3] In the language of ordinary commercial contracts, Western's 2002 letter constituted an anticipatory breach of contract defined as "a statement by a party or an act by a party from which it can be inferred that it is repudiating or renouncing its obligations and declaring that it has no intention of performing them; it is not an actual breach because the time for performance has not come." John Swan, *Canadian Contract Law*, 1st ed. (Markham, ON: LexisNexis Canada Inc., 2006) at 481.

[4] See Echlin and Fantini, *supra*, at 42.

[42] Similarly, the authors of *Employment Law in Canada*, vol. 2, 4th ed., looseleaf (Markham, ON: LexisNexis Canada Inc., 2005) note at 13-16 that management "can only make lawful unilateral changes if it precedes them by serving due notice of termination", in which case "it could be said that the employer has given proper notice that employment is to end but has coupled it with an offer of re-engagement on the changed items, which the employee can accept by continuing to work under the new terms."[5]

[43] Western did not provide Wronko with notice that it intended to treat his objection to the new termination provision as grounds for dismissal. Given Wronko's continued opposition to this change in his contract, Western's act of terminating Wronko in September 2004 constituted a wrongful dismissal that triggered the termination provision in his existing contract.

ii) Assessing Damages

[44] In his statement of claim, Wronko pleaded damages for wrongful dismissal, as well as damages for bad faith conduct on the part of Davoren and Western in the course of terminating the employment relationship and punitive and exemplary damages.

[45] The trial judge did not attempt to assess Wronko's damages in the event that his decision on the merits was in error. Evidence was led at trial that assists in making this assessment.

[46] At the time of his dismissal, Wronko was earning $143,000 per year. The total amount of potential damages for his notice period of two years is therefore $286,000. However, the duty to mitigate requires that Wronko's subsequent earnings from other employment during the notice period be deducted from the damages to which he would otherwise be entitled.

[47] Wronko testified that he earned a total of $218,205 in the two-year period following his termination.[6] The total amount of damages payable for wrongful dismissal is therefore reduced to $67,795.

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[5] The trial judge relied on *Fellowes-Strike v. Co-Operators Group Ltd.*, [1998] O.J. No. 1714 (Gen. Div.) for the proposition that a fundamental change may be made unilaterally by the employer on giving reasonable notice of the change. The trial judge in that case found that no notice of termination was given to the employee when she was advised of intended changes to her terms of employment, which were to take effect in three to five years time. That finding is difficult to reconcile with his other finding that the employer "made clear to her that she would have to adapt to the new regime or otherwise look elsewhere for employment" (at para. 8). After the employee chose to leave her employment, the case should have been decided on a traditional constructive dismissal analysis. I note that this decision has been criticized by academic commentators for modifying general principles of contract law: see G. England, R. Wood and I. Christie, *Employment Law in Canada*, *supra* at 13-22 to 13-23.

[6] In cross-examination, Wronko was asked by counsel for the employer: "So the total income you earned, not including employment insurance, for the two-year period roughly following the termination of your employment,

[48] The parties have not argued before us the issue of Wronko's claims for damages for bad faith conduct on the part of Western or for punitive and exemplary damages. I thus do not express any views on the merits of these claims.

Conclusion

[49] In the result, I would allow the appeal and award damages as quantified above, plus prejudgment interest. Having regard to my view that the main appeal should be allowed, I would refuse Western's request for leave to appeal the trial judge's costs award against it.

[50] The trial judge's decision on the merits clearly influenced his limited costs award in favour of Wronko. However, in his unreported decision on costs, the trial judge expressed serious concerns about Western's conduct in this litigation:

> …the defendant virtually finessed the departure of the plaintiff from its ranks after making unfounded and unfair allegations about the manner in which the plaintiff obtained his contract of employment. The defendant continued its hardball tactics by dispatching its president to the trial to challenge the vacation pay that had previously been calculated by the defendant's personnel. In my opinion, that conduct has no role in the relationship between employer and employee, particularly as it pertains to the emotionally charged area of severance.

[51] In *Wallace v. United Grain Growers Ltd*., [1997] 3. S.C.R. 701 at para. 95, Iacobucci J. wrote: "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal." These legal protections are of little value to an employee who seeks to assert his rights in court, but is faced with an employer who engages in "hardball tactics" in the course of litigation. To ensure that employees have access to the justice system, the courts must renounce an employer's use of such tactics. One way to do this is through costs sanctions.

[52] Having regard to Wronko's success in overturning the trial judge's decision on the merits and to Western's tactics as commented on by the trial judge, I would award the appellant his costs on a substantial indemnity basis both here and below. If the parties

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was $129,125 plus $88,667?" He agreed that these figures were correct. However, it appears from his earlier testimony and his income tax return that his actual income in 2005 was $129,538, for a total of $218,205.

are unable to agree on the quantum of costs, they may file brief written submissions on costs with the Registrar of this court within fifteen days.

"Winkler C.J.O."

"I agree. J. C. MacPherson J.A."

"I agree. Paul Rouleau J.A."

RELEASED: April 29, 2008
"WKW"