

January 2003

**RESERVING THE RIGHT TO CHANGE EMPLOYMENT
CONTRACTS UPON MINIMUM STATUTORY NOTICE**

In the recent case of *Magyarosi v. Berg Chilling Systems Inc.*, the Court of Appeal affirmed the employer's right to change an employee's compensation with only minimum statutory notice, if the employee had contractually agreed to such a change.

The plaintiff, Joseph Magyarosi, was a sales technician at Berg Chilling Systems with 22 years service. Throughout his career with the defendant, Magyarosi received several promotions and changes to his job description.

An employment contract Magyarosi had signed part way through his employment in 1996 was central to determining the issue of constructive dismissal. Under the terms of the 1996 contract, Magyarosi was to become more of a resource person to assist with projects that required his expertise. His base salary was increased substantially from the sum of \$25,000 to \$100,000. Under the contract, he agreed that the employer could change certain of his employment terms, as long as minimum statutory notice periods were respected:

No change shall be made by the Employer to the salary and commissions referred to in paragraph 2 above, without providing the same notice that would be required by the *Employment Standards Act*, as amended, for the termination of employment.

In 1999, Magyarosi was given notice of a new compensation package, to take effect 12 weeks later, that would substantially reduce his overall compensation. Magyarosi resigned and claimed that he had been constructively dismissed.

At trial, Madam Justice Bonnie Croll of the Ontario Superior Court found that under the 1999 package, Magyarosi's earnings would total the sum of \$97,537, a reduction of about 25% from Magyarosi's 1998 compensation of roughly \$127,000. However, Madam Justice Croll held that the 1996 contract was enforceable and its notice provisions were sufficient. Therefore, there was no constructive dismissal.

In enforcing the 1996 contract, the Court acknowledged that Magyarosi received independent legal advice not to sign the contract, which he did not follow. The Court also found that the contract was clear and unambiguous, and had been negotiated in good faith. In that regard, the employer specified in writing on two occasions that Magyarosi was not obligated to sign the contract, and agreed to certain changes to it that he had proposed.

As the 1996 contract was found to be enforceable, the employer was entitled to change Magyarosi's compensation package upon providing only statutory notice of the change. Given that the employer provided Magyarosi with notice that well exceeded the eight weeks of minimum notice to which Magyarosi was entitled

under the *Employment Standards Act*, the Court held that Magyarosi was not constructively dismissed.

Magyarosi's appeal was dismissed by the Ontario Court of Appeal on October 1, 2002. The Appeal Court found that the clause in the employment contract permitting changes on only minimum statutory notice "constitutes the appellant's agreement to the employer's right to effect that reduction which cannot therefore be said to be a unilateral change made without contractual authorization". It was thus not an act of constructive dismissal.

What should employers do to seek to rely on similar provisions in employment contracts?

Among other things, employers should consider the following:

1. As in the case of *Magyarosi*, the provision should be introduced only at the time of hiring or when additional, significant consideration (such as a promotion and pay increase) is offered to the employee.
2. If the employer seeks to rely on such a provision, it should be written clearly and unambiguously so that there is no room for differing interpretations of its meaning.
3. The employee must understand the legal implications and consequences of such a provision before agreeing or giving consent, and should therefore be encouraged to obtain independent legal advice with respect to it.

Written by Darryl Hiscocks and Ivan Luksic.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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