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Ask an Expert

with

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Could taking flex hours away lead to a claim for constructive dismissal?

Question: I've just joined a company that has a history of giving employees a bit too much freedom. Management wants to change that and start enforcing things like regular hours of work. Is it acceptable to change an employee's work hours from flex to regular 9 to 5 hours? Is that a fundamental change in the employment contract that might lead to a successful claim for constructive dismissal?

Answer: Constructive dismissal is said to occur "where an employer decides unilaterally to make substantial changes to the essential elements of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job..." (*Farber v. Royal Trust*

Company, [1977] 1 S.C.R. 846). Whether an amendment to hours of work will be considered a substantial change to an essential element of the employment contract depends on the specific facts of the situation.

One factor to consider is the wording of the employment contract (should one exist). A written contract that expressly provides an employee with the ability to work flexible hours will support a claim for constructive dismissal if those hours are subsequently amended by the employer. On the other hand, an employment contract that expressly recognizes the employer's ability to unilaterally make changes to conditions of employment, including hours of work, will assist in defending against this type of claim.

Another factor to consider is the practice between the parties with respect to hours of work. If an employee has been agreeable to such unilateral modifications in the past, this behaviour may be relied upon to demonstrate the employee recognizes and accepts that changes can be made to his hours of work, and that such changes do not amount to a fundamental breach of the employment contract.

A final consideration is the impact of this change. If a move to regular business hours only requires the employee to make minor adjustments to his hours of work (for example, if the employ-

ee is currently electing to work 8 a.m. to 4 p.m., or 10 a.m. to 6 p.m.), then it will be more difficult for him to successfully argue that a change to regular business hours constitutes a substantial change.

However, if an employee is using the flexibility to work evening shifts or at home, it is possible this restriction on hours could be considered "substantial."

The most effective way to preclude a constructive dismissal claim is to obtain employee consent prior to any substantial workplace change.

However, where consent is unlikely, another option is to provide the employee with reasonable notice of the change in hours of work. Just as an employee can be terminated without cause where reasonable notice is provided, so too can an employer amend the fundamental terms of an employment agreement on the giving of reasonable notice. To be effective, notice should clearly inform the employee of the pending change and when it is expected to take place.

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