

When Necessary Adaption Becomes Constructive Dismissal



To remain agile in today's competitive business environment organizations need to adapt. Sometimes that adaption necessitates a change to an employee's job or working conditions. When that happens it is important to remember that when you change something about an employee's job, even if the employee agrees to the changes, those changes need to benefit both you and your employee.

Re-negotiating Employment Contracts

When you hire an employee to do the job outlined in the job description and negotiate certain working conditions you know that in the future changes may be necessary. When these future changes occur you need to renegotiate the details of these changes with your employee. If you change the hours, days, location and so on or the tasks the employee is expected to perform you are changing the job, even if you have no choice but to make the change for business purposes.

According to contract law, when you enter into a contract with another party both parties must receive a benefit (consideration) from this contract. This same holds true when you enter into an employment contract with an employee. Initially the benefit to you is the employee doing the work you need done and the benefit to the employee is being compensated for that work. The details of how, when and where the work is performed and how, when and where you provide benefit to the employee, in terms of salary and other compensations, are the details of the agreement.

If, however, you subsequently change details of the employees working conditions including providing a new contract, remember that both parties must receive fresh consideration from the changes. If both parties do not receive consideration the courts will consider the contract an unenforceable variation and you may be found to have constructively dismissed the employee and end up paying additional fees and court costs.

It is useful to note that the benefit for the employee cannot simply be the continuation of their current job, as that was a benefit (consideration) the employee had under the original contract and it cannot be considered a fresh consideration.

Take the scenario where you hire an employee to work weekday shifts and later you realize you need the employee to work evenings or weekends or you add new responsibilities into the employees job that require the employee to do tasks the

employee may not be able to do. If the employee does not agree to these new working conditions or cannot perform the work and you terminate the employee that employee may turn around and take you to court. To make a real change to an employee's job or working conditions you need to provide the employee with a benefit that extends beyond not firing the employee.

In one example in BC, the court ordered an organization to compensate a former employee the equivalent of 10 months wages. The court found that the organization had constructively dismissed the employee after the employee quit because she could not perform the new responsibilities assigned to her. In this case the organization assigned a new responsibility that included using a new software program. Unable to learn the software the employee eventually resigned in frustration. She later claimed she had been constructively dismissed. The court sided with the employee and found that the employer had repudiated the initial contract by imposing a unilateral change without any consideration or notice.

Note that even if you do not have a written contract that spells out details of the working conditions or tasks and responsibilities, the conditions under which the employee has been working can be used to establish the details of the working conditions and responsibilities. Change those, even if they are not written down, and you could be setting yourself up for a claim of constructive dismissal down the road.

Tips To Remember When Changing An Employee's Job

It is highly likely that your organization will have to change the working conditions and duties of your employees to remain adaptable in a changing and competitive business environment. When this occurs it is important to remember that when making a change to an employee's working conditions and/or tasks and duties:

1. Provide the employee with a good amount of notice regarding any changes and the opportunity for training or discussion about these changes as soon as possible.
2. Negotiate with the employee a compensation for the change such that you are providing the employee with a benefit for agreeing to that change. This can include additional financial compensation, more vacation time, telecommuting one day per week or other clear consideration for the change.
3. If the employee cannot perform the new duties or work under the working conditions provide the employee with proper termination notification and required severance.
4. As always be aware that if you make a change that the employee cannot manage because of a protected human right such as disability or family consideration, you might be in for additional trouble. Take steps to consider all implications before making a change and involve the employee in the discussion early in the process so any change you make is well considered and considers all parties.