Case In Point

Appellate Court: Employee Can't Transform Employer's Supportive Leniency (Allowing Flexibility in Her Start Time) into Contractual Obligation

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The Ontario Divisional Court recently considered the issue of whether flexibility offered by an employer to an employee alters a fundamental term of the employee's employment contract.

In Peternel v. Custom Granite & Marble Ltd., the Divisional Court upheld a trial judge decision that the employee's 8:30 a.m. start time at work was an existing term of the employment contract, notwithstanding past flexibility on the start time. The employer's insistence that she attend work every day at that time did not represent a breach of the employment contract. It held there was no error in the trial judge finding which did not accept that the employee "could transform the employer's supportive leniency into a contractual obligation that could be held against it."

The employee had worked for the employer for approximately 3.5 years when she commenced a year-long maternity leave. Prior to her maternity leave, the employee had been provided with some flexibility with respect to her start time due to personal and family matters. She was required to, and did, attend work at 8:30 a.m. for early morning meetings or when asked.

When the employee returned from maternity leave, the employer cited the needs of the business and informed her she had to be at work consistently by her 8:30 a.m. start time. The employee argued that she had been provided with flexibility on the start time prior to the maternity leave and that the employer had unilaterally changed a fundamental term of her employment contract, thereby constructively dismissing her. Moreover, she argued that the employer failed to reinstate her to the position she held prior to her maternity leave and it had discriminated against her on the basis of family status.

Following an eight day trial, the trial judge dismissed the employee's claim in its entirety. The judge found that the employee had always been required to work 8:30 a.m. to 4:30 p.m., but that the employer had provided her with some flexibility in her start time. A subsequent corporate restructuring required it to more strictly enforce the start time. As a result, the employer was not imposing a unilateral change that substantially altered the essential terms of the employment contract but rather "was asking the plaintiff to do what she had done throughout her employment as a Scheduler: to be at work when [the employer] needed her." Therefore, the employee was not constructively dismissed from her position. Furthermore, the employer had met its obligation to restore the employee to either the position she held prior to her maternity leave or to a position that was substantively and qualitatively the same as she held prior to her maternity leave.

On appeal, the Divisional Court found that there were no palpable or overriding errors in the trial judge's factual findings nor were there any errors in law. Among other things, it deferred to the trial judge's finding that it was always a term of the employee's employment contract that she had an 8:30 a.m. start time; in fact, by insisting on a 10:00 a.m. start time, it was the employee who was attempting to impose a unilateral change.

The Divisional Court also upheld the trial judge's determination that the employee had failed to prove a *prima facie* case of discrimination as "there was no evidence at trial that specifically demonstrated how [the employee's] right to care for her children was adversely impacted by [the employer's] requirement that she start at 8:30 a.m. each morning."

This case is a helpful reminder for employers that providing limited flexibility to an employee does not mean that the terms of an employment contract have been fundamentally altered. It also highlights that a good practice may be to let employees who are provided with limited flexibility know that the terms of their employment contract remain the same.