Common Sense Returns?

Background

After working for Sony Canada ("Sony") in Toronto for nearly 26 years, Mr. Riskie revealed to his employer that he and his family were moving to Ottawa as his wife had accepted a position there. Mr. Riskie, a management level employee, asked his employer if they would consider a telecommuting arrangement – he would continue to work in his current role from his new home in Ottawa and come to Toronto as needed. While his supervisor was approving of his proposal the President and CEO was not. Mr. Riskie was advised, prior to completing the move, that Sony would accept his proposal of telecommuting under the condition that he sign a new fixed term employment agreement. Mr. Riskie's status would change from an indefinite employee to a contract employee with a fixed term. Mr. Riskie believed the telecommuting arrangement would work and so he signed the new agreement in the hopes that it would be renewed (even though the agreement did not provide for any renewal rights).

Unfortunately for Mr. Riskie, Sony decided that the telecommuting arrangement was not in the best interest of the company. Mr. Riskie was advised that his contract would not be renewed and so it expired in accordance with its terms. Mr. Riskie received all statutory severance and termination pay which amounted to approximately seven (7) months compensation.

Given his 26 years of service, Mr. Riskie brought a claim of wrongful dismissal stating that the fixed term agreement was void and sought compensation in lieu of reasonable notice for his entire period of employment.

The Termination Provision

Mr. Riskie argued the fixed term agreement as a whole should be considered unenforceable because it violated essential provisions of the *Employment Standards Act, 2000* ("ESA"). Specifically, the termination provision stated that either party may terminate the contract upon thirty (30) days prior written notice to the other party. In other words, the provision failed to meet minimum standards requirements in a number of respects including length of notice, severance pay and continuation of benefits.

Although this argument has been successful in several recent decisions making life difficult for employers, Mr. Justice Dunphy soundly rejected this argument stating that "*the ESA provides minimum standards which the parties are required to comply with and a contract that fails to list all such requirements – as few indeed do – is guilty only of preserving trees from unnecessary destruction. A provision which seeks to contract out of the law is unenforceable; a provision which merely promises to obey it is superfluous.*"

It is fair to say that Mr. Justice Dunphy has finally introduced common sense into the debate regarding enforceability of termination provisions. Employers can only hope common sense is contagious in other courts.

Consideration

Mr. Riskie also argued the employer was not entitled to change his contract to a fixed term agreement because he did not receive proper consideration (legal term for "value") for it. Mr. Justice Dunphy also rejected this argument in finding there was ample consideration to support the validity of the contract in Sony agreeing to allow Mr. Riskie to perform his duties from his home in Ottawa.

This confirms the principle that where an employee is seeking to make a change in his/her terms of employment that the employer has no real interest in but ultimately agrees to, the employer can require, as a condition of agreeing, that the employee accept other changes to the employee's terms of employment. A typical example of this is an employee request following maternity and parental leave for part time hours. Subject to human rights considerations, the employer may elect to accept the request but can attach new terms to the employment agreement in exchange for agreeing to part time hours.

Please contact e2r Solutions® to discuss any questions that you have regarding employment agreements, or about terminations generally.