Court Of Appeal For Ontario: Assessing "Consideration" In Employment Agreements

Comparable to "offer" and "acceptance", "consideration" is a necessary element to the formation of an enforceable contract. Parties to a contract must receive consideration (a benefit for entering into the contract) in order for the contract to be legally binding, and valid consideration must be something the recipient would not otherwise already be entitled to receive.

The requirement for consideration also applies to employment agreements, and the consideration at the start of the relationship is the employment itself.

What if the employer wants to introduce or modify an employment agreement after the employment relationship has already started? A recent decision from the Ontario Court of Appeal confirms that consideration is required to be given to the employee in order for the new or modified agreement to be enforceable, and it also confirmed that courts will not measure the adequacy of the consideration, merely its existence. This is consistent with the state of the law and guiding case law in Alberta and is a good reminder of what an employer must do if it wishes to change an employment agreement.

Background

In *Giacomodonato v Pear Tree Securities Inc, 2024 ONCA 437* ("***Giacomodonato***"), the employee had initially signed an employment agreement with the employer before he started working in April 2016. The employee then signed a second employment agreement in July 2016 containing modified terms. In January 2018, the employer terminated the employee without cause. The trial judge held that the employee was wrongfully dismissed by the employer and awarded damages calculated under the second employment agreement. The employee appealed and argued that the calculation of damages was incorrectly based on the second employment contract, which he argued was not enforceable or binding because he did not receive adequate consideration for entering it. In the alternative, the employee argued that the amount of consideration he received was not commensurate with what he was giving up as compared to his entitlements under the initial employment agreement.

Decision

The Ontario Court of Appeal dismissed the employee's request for leave to appeal, holding that the second employment agreement was indeed enforceable and binding. The Court of Appeal concluded that fresh consideration had been provided to the employee

in exchange for executing the second employment agreement. In response to the employee's argument that the consideration was not commensurate with the change in contractual entitlement, the Court of Appeal noted that "courts are concerned with the existence, rather than the adequacy, of consideration."

Implications and Current State of the Law in Alberta

Giacomodonato is an employer-friendly case, but it does not change the law in Alberta and is consistent with prevailing Alberta authority. For example:

Francis v Canadian Imperial Bank of Commerce, 1994 CanLII 1578 (ON CA) ("***Francis***"), continues to be cited in Alberta as guiding authority that additional, or fresh, consideration must be provided to create legally binding restrictions on or between the parties with respect to variations of an existing agreement. In *Francis*, similar to *Giacomodonato*, the employer wished to modify the employment terms after the initial employment agreement had been executed. The Court found that no fresh consideration was provided to the employee in exchange for the modified terms to the agreement, and therefore those terms were not binding on the employee.

Recent Alberta case authority on this issue can be found in *Globex Foreign Exchange Corporation v Kelcher,* 2011 ABCA 240 ("***Globex***"). In this case, the Court held that two of three of the respondent employees were not provided with fresh consideration at the time they accepted new restrictive covenants and therefore the new restrictions were unenforceable. The Court further noted that neither of the employees received anything more than what they were already entitled to during their employment when they accepted the new restrictive covenants.

The latter note from the majority in *Globex*, that fresh consideration must amount to something more than what the employee was already entitled to otherwise, was considered and reaffirmed in the recent Alberta case of *Stonham v Recycling Worx Inc,* 2023 ABKB 629 ("***Stonham***"). In *Stonham*, the Court considered whether a clause contained in the employee handbook, signed by the employee years after he was hired, was legally binding and enforceable or not. Even though the employee had signed the employee handbook, the Court concluded that the clause was not binding because the employee had not received any fresh consideration in exchange for signing the employee handbook. The Court in *Stonham* applied at *Globex* to find that continued employment alone is insufficient to be fresh consideration.

Key Takeaways

Giacomodonato confirms the state of the law in Alberta, as well as other provinces, that courts are concerned with the existence of some form of consideration, rather than the adequacy of that consideration. Thus, two takeaways from *Giacomodonato* are as follows:

1. **First, fresh consideration must be present to have an enforceable employment agreement (even where an employment relationship already exists).** In this regard, the courts are concerned with the existence of some form of consideration, rather than the adequacy of that consideration.
2. **Second, employment agreements ought to be executed before the commencement of employment to be binding.** Unless an employee is provided fresh consideration for entering into an employment agreement on day one (or later) of employment, it will probably not be enforceable. If an employer would like to enter into an employment agreement after employment has commenced or make changes to an existing employment agreement, fresh consideration must be provided.

matter. Specialist advice should be sought about your specific circumstances.

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