B.C. Court Of Appeal Adopts A New Approach To Contractual Amendments

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The B.C. Court of Appeal has recently adopted a significant reform to the "principle of consideration" that all employers should be aware of.

When parties to a contract agree to amend the contract's terms, the common law has always required each party to receive fresh consideration. The purpose of this is to distinguish a gratuitous promise from a legal obligation. To be enforceable, a party should receive something of value (*e.g.*, a payment, benefit, avoiding a loss, etc.) in exchange for its promise to abide by new contractual terms.

In the workplace, employers are often confronted with the need for fresh consideration when they seek to implement new contractual terms for ongoing employees. For instance, when an employee's role in the company evolves to the point that a non-solicitation or non-competition covenant may be necessary. In these cases, the requirement for fresh consideration is often quite vague. Courts have provided little guidance on whether they will scrutinize the amount of a payment to an employee, and employers are left to speculate as to what amount might be sufficient.

The *Rosas v. Toca* Case

It is in light of these challenges that the Court of Appeal's decision in *Rosas v. Toca*, 2018 BCCA 191 is significant. The case concerned Ms. Rosas, who had won $4.163 million in the lottery, and agreed to loan $600,000 of her winnings to her friend Ms. Toca to allow her to buy a home, with the loan to be repaid in a year. Ms. Toca did not repay the loan in a year; instead, each year she would ask for another year to pay, and then another. Each time, Ms. Rosas agreed. When, after seven years, Ms. Rosas finally sued to recover the amount of the loan, Ms. Toca argued that each agreement by Ms. Rosas to give Ms. Toca another year to pay was unenforceable because Ms. Rosas had not received any consideration from Ms. Toca in exchange for her promise to give Ms. Toca another year. Accordingly, Ms. Toca successfully argued at trial that Ms. Rosas was seeking to enforce a seven year old contract, and the limitation period (at that time, six years) had expired.

Faced with these difficult facts – Ms. Toca benefitting from having given nothing to Ms. Rosas in exchange for Ms. Rosas generously giving Ms. Toca more time to pay – Chief

Justice Bauman writing for the court found that the time had come to reform the law of consideration. Under the new approach, when parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. Therefore, while a variation supported by consideration may continue to be enforceable, a lack of fresh consideration will no longer be determinative. Using this approach, the Court found that each extension Ms. Rosas gave Ms. Toca was an enforceable variation of their agreement, and Ms. Rosas's action was well within the limitation period. Accordingly, Ms. Rosas was granted judgment in the amount of $600,000 plus prejudgment interest.

The Takeaway

An important caveat for employers is that this case was decided in the context of an unpaid debt, not an employment relationship, and it is too soon to know with certainty how courts will apply this new approach on different facts. It will also be interesting to see whether jurisdictions outside of B.C. consider and adopt this approach. Given the recognized power imbalance that is often present between employers and employees, it is likely courts will remain cautious in enforcing contractual amendments that are clearly made to an employee's detriment, particularly when the employee is pressured to agree and did not have a legitimate opportunity to negotiate. These concerns could engage the existing concepts of duress, unconscionability, or other public policy concerns referenced by the court as rendering an otherwise valid term unenforceable. In the interim before the courts provide clarity in the employment realm, the prudent choice for employers who want to be certain that contractual amendments will be enforceable is to continue to provide fresh consideration.

Still, the change in the law is significant, and the Court of Appeal's decision may provide solid footing for employers and employees in many cases to proceed with increased confidence moving forward that contractual variations are enforceable in the absence of fresh consideration, or to defend amendments that have already been implemented. This is particularly so when there is a sensible basis for the amendment based on developments in the employment relationship, the amendment was legitimately negotiated, and it is apparent that the employer and employee believed the amendment was enforceable. As we await further guidance from the courts, employers seeking to implement changes to terms of employment should be diligent in ensuring that any new terms are properly documented in amended employment agreements and that careful consideration is given to the manner of execution to defeat potential arguments of duress or unconscionability.

By

Andrew Nathan

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749