Changing (or Litigating) Workplace Policy: The Requirement of Consideration

By Matthew Tomm

Workplaces are dynamic and workplace policies must evolve. However, effectively amending a workplace policy so that it is enforceable in court is not as straightforward as one might think. Changes to company policies can affect employee rights, benefits, or entitlements. For those changes to become enforceable elements of employment contracts, employers may have to provide their employees with consideration. This often overlooked requirement can be a source of unanticipated, and preventable, difficulties.

When an employer is considering making a change to its workplace policy, a number of questions arise:

- What types of policy changes require consideration to be given to existing employees?
- What constitutes "good" consideration at law?
- What can employers and employees do to protect their interests in the face of a change to company policy?

A review of these issues shows that altering workplace policies can create a host of dangers, but both employers and employees have options to manage risk and protect their rights.

What Changes Require Consideration?

Like any contract, a valid and enforceable employment agreement requires an offer, acceptance, and consideration. A promise where one party does not obtain a benefit (i.e. consideration) is not an enforceable contract.

Yet workplaces are dynamic and policies must change with new circumstances. Courts have held that not every alteration to workplace policy requires fresh consideration to be provided to employees. The question is, what policy changes do require consideration?

It is sometimes assumed that only changes to fundamental terms of an employment contract require consideration to be enforceable. The jurisprudence on this point is ambiguous. Some cases dealing with constructive dismissals appear to suggest it matters whether the change affects a fundamental term of the employee's contract. For example, in *Churchill v Stockgroup Media Inc*, the Court held:

> Once an employee has commenced employment, a fundamental term of the employment contract cannot be changed unless the employer provides the employee with fresh consideration in the form of forbearance or some other incentive for the change.[1]

However, case law addressing this issue independent of a constructive dismissal suggests the contrary: If a policy change affects any term of the contract, then to be enforceable there must be consideration. The term need not be "fundamental" to attract this requirement.

According to the Manitoba Court of Appeal in *Adams v Comark Inc*, when determining whether an employer has a right to unilaterally alter an employment policy, "[t]he question to be answered [is] not whether the policy had become a 'fundamental,' 'root' or 'basic' term of the employment contract; but rather, whether it had become a term of the contract at all."[2]

An employer cannot unilaterally change the terms of employment. The Court held: "… if the policy had become a term of the contract, whether fundamental or not, a unilateral change in the term would amount to a breach of contract giving rise to a claim for damages."[3]

Though the failure to provide consideration was not directly at issue in *Adams*, the Court said in *obiter dicta* that to amend the policy the employer should have negotiated a "quid pro quo"; or in other words, consideration.[4]

The analysis in *Adams* is consistent with the distinction between a breach of contract that gives the innocent party the right to repudiate the contract versus a breach that merely allows the innocent party to sue for damages.[5] In an employment context, cases hold that when an employer alters a fundamental term of the employment agreement, the employee can claim constructive dismissal; and when the alteration affects a non-fundamental term, the employee can sue for damages.[6] If the alteration of a non-fundamental term gives rise to a claim for damages, it follows that an employer cannot unilaterally change a non-fundamental term.

The *Adams* analysis contradicts the view that the only policy changes that require consideration are those that would cause a constructive dismissal without it. Even if the change does not allow the employee to resign and sue for the loss of employment,

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it may still entitle the employee to compensation for the loss of a benefit. In light of this, it will sometimes be to a plaintiff's advantage to plead lack of consideration as an alternative basis for relief in situations of uncertain constructive dismissal, as the threshold for what changes potentially trigger relief is considerably lower.

The reasoning in *Adams* is persuasive. Given the ambiguity in the jurisprudence, it would be prudent for employers to assume a change to any term of an employment contract requires consideration to pass to the employee to be enforceable.

Case law provides some guidance for determining what types of policies might be considered terms of the employment contract.

- In *Adams*, the employer allowed employees to collect frequent flier miles when travelling for work. This was a significant benefit to some employees (the value to the Plaintiff was 10% of his base salary). This was held to be a term of the contract.
- In *Dawson v FAG Bearings Ltd*,[7] the Court found that discipline policies and company rules contained in the company's Employee Handbook were not terms of the employment agreement. This was in part because the Handbook was provided after the offer and acceptance of employment.[8] The employee's breaches of the policy in the circumstances did not provide a basis for dismissal with cause.
- In *Sloan v Union Oil Co of Canada Ltd*,[9] the Court held that a provision in an employee booklet that promised a termination allowance (to be paid upon any without cause termination) was a term of the employment agreement. The Court said:

  > The concession by an employer to an employee of the right to holiday pay or a termination allowance is as much a part of the consideration for his services as is his right to wages. It is part of the contract of employment.[10]

- *Bartolic v Canada Safeway Ltd*,[11] concerned a sick-leave policy that the employer attempted to eliminate. The policy provided for payout of any accumulated sick leave upon retirement, voluntary termination or permanent layoff. On termination, the plaintiffs claimed for their banked sick leave credits. The Court held that, though the company was not required by law to provide sick-leave benefits, "once it did so the plaintiffs were entitled to rely upon its provisions."[12]
- *Rose v Shell Canada Ltd*,[13] suggests that benefits provided by an employer after a person is hired can become part of the employment contract. The Court wrote in *obiter* that terms may be added to an employment contract "by conduct", or by implication: "Such terms frequently occur. When, for instance, an employer introduces a dental plan to which the employee must contribute but to which he does not object, that plan becomes a term of his employment."[14]

None of this is to say that employers cannot manage the workplace by introducing new policies. *Barton v Rona Ontario Inc*[15] shows companies will generally be able to unilaterally implement safety policies that employees must follow or be subject to disciplinary measures. The plaintiff was a manager who failed to enforce a safety policy by allowing a wheel-chair bound employee to be lifted to a mezzanine from the shop floor using a "picker truck". The plaintiff claimed the policy did not form part of his contract because it was not referred to in his written employment agreements. The Court disagreed, finding that the imposition of the safety policy was "well within Rona's management rights; they are as binding on Mr. Barton as if they had been set out in a written contract."*16*

Similarly, *Adams* addressed other changes to company policy besides the discontinuance of the frequent flier program. These included policies prohibiting conflicts of interest, maintaining confidentiality of internal communications, and a requirement that travel arrangements be processed through the company or its authorized travel agent. The Court of Appeal held such policies were not terms of the employment contract.

What Constitutes "Good" Consideration?

Courts do not generally assess the adequacy of consideration. Thus, the value provided need not be proportionate to the value of the lost benefit for the employees. The Court in *Clarke v Insight Components (Canada) Inc* held: "In the absence of proof of unconscionability in the making of the [employment] contract, the court will not weigh the comparative values of the parties' contractual promises."[17]

However, mere continued employment is not enough. According to the Alberta Court of Appeal in *Globex Foreign Exchange Corp. v Kelcher*:

> … continued employment alone does not provide consideration for a new covenant extracted from an employee during the term of employment because the employer is already required to continue the employment until there are grounds for dismissal or reasonable notice of termination is given.[18]

However, a promise to continue employment beyond the relevant notice period has been held to constitute consideration. In *Techform Products Ltd v Wolda*,[19] the employer gave the employee an amended contract and intended to terminate employment on 60 days' notice (the employee's contractual entitlement) if the employee refused to sign it. As consideration for his acceptance, the employer promised to forebear from dismissing the employee for a reasonable period of time beyond the notice entitlement. This was deemed good consideration. Similarly, *Hobbs v TDI Canada Ltd* also suggests that if the employer promises not to dismiss the employee on the necessary notice (as would be its right), then the employee has

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gained something of value she did not have before, namely, increased security of employment.[20]

What Can Employers and Employees Do To Protect Their Interests During a Policy Change?

Employers might understandably want to institute policy changes without introducing the topic of consideration and potentially having to negotiate with employees. However, avoiding the issue risks laying the groundwork for more costly litigation down the road.

It is often assumed that employers can unilaterally change employment agreements by providing reasonable notice of the change. There is a basis for that view in Alberta's jurisprudence. *Rosscup v Westfair Foods Ltd* held: "Even if an employer and an employee fail to come to an agreement to vary the terms of their employment contract … an employer may make substantial and unilateral changes to the terms of the employment contract if it gives the employee reasonable notice of such changes."[21] In *Rosscup*, the employer unilaterally changed the employee's severance entitlement, without providing consideration or getting the employee's agreement. The change was deemed effective because the employer gave reasonable notice.

The Ontario Court of Appeal has taken a different position. In *Wronko v Western Inventory Service Ltd*, the Court held an employer cannot unilaterally vary a fundamental term of the contract simply by giving reasonable notice to the employee when the employee makes it clear that she is rejecting the new term.[22] To effectively alter the terms of employment when an employee clearly rejects a proposed new term, the Court held the employer must terminate the employment relationship on the proper notice and offer re-employment on the new terms.[23] If the employer does not take this course and permits the employee to continue to fulfill her job responsibilities under the original contract, the change will not have been effective: "… unless proper notice of termination is given — the employer is regarded as acquiescing to the employee's position."[24]

Wronko suggests that notice of a change to the employment contract does not obviate the need for the employee's agreement for the change to be effective. In theory, notice would also not obviate the requirement of consideration. Consideration is a fundamental requirement for a binding contract, and simply providing notice that the terms of the employment contract will change does not avoid the need for consideration to pass to the employee in order to make the change binding.

Given the uncertainty in the jurisprudence, the safest options for employers seeking to alter a workplace policy that affects employment agreements is to:

- provide consideration and secure the employee's agreement to the proposed change;
- provide consideration and reasonable notice of the proposed change; or
- if the employee clearly rejects the change, or if the employer wants to avoid having to provide consideration at all, then communicate to the employee that the current terms of her employment will terminate at the end of the proper notice period and that continued employment will be available after that point on terms that include the desired policy changes.

On the other hand, employees faced with a policy change that adversely affects their employment agreements should consider clearly communicating that they do not agree to the proposed change, even if the employer provides consideration for it. Otherwise they risk being found to have acquiesced. After registering their refusal, they can either resign (if the change was of a kind to trigger a constructive dismissal) or continue working under the original terms. If the employer does not provide consideration for the change, they may be able to claim damages for the lost benefit, even if the change did not trigger a constructive dismissal.

Endnotes:

1 *Churchill v Stockgroup Media Inc*, 2008 BCSC 578 at para 47 [emphasis added].

2 *Adams v Comark Inc*, 1992 CarswellMan 121, [1992] 5 WWR 306 at para 13 (Man CA).

3 *Supra* note 2 at para 19; see also para 22; see also *Wronko v Western Inventory Service Ltd*, 2008 ONCA 327 at paras 41-42, leave to appeal to SCC refused, [2008] S.C.C.A. No. 294; but see *Kafka v. Allstate Insurance Company of Canada*, 2012 ONSC 1035.

4 *Supra* note 2 at para 18.

5 G.H.L. Fridman, *The Law of Contract*, 5th ed (Toronto: Thomson Carswell, 2006) at 607.

6 *Brent Chapman v GPM Investment Management and Integrated Asset Management Corporation*, 2015 ONSC 6591 at para 16; *Poole v Tomenson Saunders Whitehead Ltd*, 1987 CanLII 2647 (BC CA).

7 *Dawson v FAG Bearings Ltd*, 2008 CarswellOnt 6386, 2008 CanLII 55459 (Ont Sup Ct).

8 *Supra* note 7 at paras 31, 33.

9 *Sloan v Union Oil Co of Canada Ltd*, 1955 CarswellBC 89, [1955] 4 DLR 664 (BC Sup Ct).

10 *Supra* note 9 at para 46 [emphasis added].

11 *Bartolic v Canada Safeway Ltd*, 1998 CarswellBC 399, [1998] BCJ No 469 (BC Sup Ct).

12 *Supra* note 11 at para 13.

13 *Rose v Shell Canada Ltd*, 1985 CarswellBC 783, 7 CCEL 234 (BC Sup Ct).

14 *Supra* note 13 at para 22 [emphasis added].

15 *Barton v Rona Ontario Inc*, 2012 ONSC 3809.

16 *Supra* note 15 at para 24.

17 *Clarke v Insight Components (Canada) Inc*., 2007 CarswellOnt 9776, 74 CCEL (3d) 254 at para 30 (Ont Sup Ct).

18 *Globex Foreign Exchange Corp v Kelcher*, 2011 ABCA 240 at para 87.

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19 *Techform Products Ltd v Wolda*, 2001 CarswellOnt 3461, [2001] OJ No 3822, 108 ACWS (3d) 480 (Ont CA).

20 *Hobbs v TDI Canada Ltd*, 2004 CarswellOnt 4989, [2004] OJ No 4876, 135 ACWS (3d) 641 (Ont CA).

21 *Rosscup v Westfair Foods Ltd*, 1999 ABQB 629 at para 37.

22 *Supra* note 3, 41-42; but see Kafka, supra note 3.

23 *Supra* note 3 para 36.

24 *Supra* note 3 para 36.

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