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New uncertainty for employment contract amendments

Recent B.C. decision reinforces consideration for contract change — a step back from 2018 decision that mutual agreement to change may not require it

BY MATTHEW TOMM

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A MODERN trend in the law of contract variation has generated some excitement in the employment law world about whether companies may now be able to change employment contracts without providing fresh consideration — or a new benefit — to employees. That would make life easier for HR professionals. But a recent appellate decision will dampen some of that enthusiasm.

It used to be trite law that both contract formation and post-contract variations require all parties to receive some benefit as part of the transaction. However, that tenet has lately been called into question. The current leading case is the British Columbia Court of Appeal's

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Alberta worker's firing for absenteeism, threats upheld

Worker commented about punching manager, but any threats of workplace violence are inappropriate: Arbitrator

BY JEFFREY R. SMITH

AN ALBERTA worker's dismissal for absenteeism and threats of punching his manager in the face were sufficient cause for dismissal, even if the threats weren't taken seriously or intended to be.

Jason Letourneau was employed with Westcan Bulk Transport, a trucking company based in Edmonton, since 2013. Over the course of 2018, Letourneau missed 12 working days, which caused his manager to warn him on multiple occasions that more unsupported absences would lead to written discipline.

Letourneau said that, on three of the 12 days, he took time off because he was moving. For the other days, Westcan requested that he provide a doctor's note supporting his absences. Letourneau provided notes for some of the days when he was sick, but there were still some absences that were unaccounted.

Letourneau explained that he sometimes missed work because his truck arrived late to Westcan's

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Consideration remains requirement for employment contract changes

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iconoclastic decision in *Rosas v. Toca*, which held that contract variations should be enforceable without fresh consideration, absent duress, unconscionability or other public policy concerns. Since *Rosas*, there has been speculation about whether this fundamental shift will apply in workplace contexts.

Quach v. Mitrux Services Ltd. is British Columbia's first appellate decision to address the impact of *Rosas* on employment law. While it leaves the door open to a change in approach, it sends a strong signal that the impact (if any) of *Rosas* on employment law may prove to be limited.

This article will summarize the established law on the requirement of consideration, address the effect of *Rosas* on those fundamentals and discuss the uncertainty following *Quach* and how employers can respond.

The established law

Consideration refers to the value that passes between the parties to a contract. It marks the key difference between a gift (in which value flows in only one direction) and an enforceable bargain (where all parties receive some benefit).

There is widespread consensus in the current jurisprudence that these principles apply in employment contexts. When amending employment agreements, companies should ensure the transaction includes a benefit for the worker. That benefit could take many forms, including an increase in pay, a promotion or a one-time signing bonus (even a very small one). Case law shows that mere continued employment is not sufficient, as the worker would already be entitled to employment through the relevant notice period for dismissal; but a promise to extend employment beyond the notice period could be valid consideration. Courts typically don't assess the adequacy of consideration but treat it as an all-or-nothing thing — the proverbial peppercorn will do.

Numerous reported decisions showcase employers that thought they had amended their workers' contracts only to find the new terms unenforceable in court. In *Holland v. Hostopia Inc.*, the employer attempted to add a termination clause to the employee's contract after he'd already started working. The court held it did not apply and the employee was entitled to damages in lieu of reasonable notice. In *United Rentals of Canada Inc. v. Brooks*, the court found that a non-competition clause was not enforceable even though the employee had signed the new contract. In spite of the employee's agreement, the benefits of the new terms were one-sided.

Rosas v. Toca

The *Rosas* case portends a significant shift in the approach to contract variations, being the most prominent recent Canadian example of a court dispensing with the requirement of consideration for post-contract promises.

The case involved a woman, Enone Rosas, who lent $600,000 to a friend, Hermenisabel Toca, on condition that the loan be repaid within a year. Instead of paying, each year Toca asked for another year to pay, and each time Rosas agreed. After seven years, Rosas finally sued. Toca argued that the limitation period to sue (being at the time six years) had expired. Her position was that the extensions were mere promises but not amendments to the contract, as no new benefit flowed to Rosas in exchange for the promises to pay "next year." The contract not having been validly amended, Toca would have been entitled to a limitations defence.

The court found that insisting on the requirement of consideration in this instance would work an injustice. The innocent party relied on the promises of the debtor, only to have her forbearance used against her to ground a limitations defence. The court determined that it was time to reform the doctrine of consideration, stating: "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."

The jurisprudence stemming from *Rosas* (and related decisions) is embryonic. It seems likely to take years for the implications of the shift to become clear.

The Quach wet blanket

The idea that post-contract variations no longer need consideration is appealing for many employers, which often see the requirement as cumbersome and impractical. The ability to amend employment agreements without a fresh benefit flowing to employees would make managing the workplace easier. It could afford companies greater power to control costs (for example, by withdrawing benefits); to limit liability (such as by implementing new termination clauses); or to impose favourable restrictions on workers (such as non-competition agreements, protecting proprietary interests, but also rendering workers more dependent).

However, the *Quach* case suggests that the effect of *Rosas* will either not be felt in employment law or will be more limited than in commercial contexts.

The plaintiff, Quach, was hired under a one-year fixed-term contract with Mitrux Services Ltd. Before Quach started the new job but after he had already quit his old job, the company presented him with a new contract, which provided that he could be dismissed on four weeks' notice. Two days after the new contract was signed, and still before Quach started working, the company terminated the contract. On appeal, it argued that the second contract applied and the worker was only entitled to four weeks' pay, not damages for the duration of the initial fixed term.

The B.C. Court of Appeal ruled that the second contract was unenforceable for lack of consideration. Moreover, it specifically held that the *Rosas* analysis did not apply to Quach's situation, opting to rely instead on well-established pre-*Rosas* case law affirming "the general principle that modification of a pre-existing contract will not be enforced unless there is a further benefit to both parties."

"It seems to me that the import of *Rosas* may not change the authority of *Singh* [i.e. representing the established law on consideration] in the nuanced world of employer and employee contractual relationships," said the court. "Whether it does is an interesting question that can and should be left to another day because, in my view, the Second Contract presents much more than a *Rosas*-style variation in any event."

The court's discussion of *Rosas* was *obiter dicta* — there is plenty of scope here for judicial innovation and it seems likely that future cases will test the boundaries of the *Rosas* approach in workplace contexts. It remains to be seen how the jurisprudence will settle. But *Quach* indicates that a carte blanche for companies to make changes without value flowing both ways is unlikely. Prudent employers may wish to implement tried-and-true processes for contract variation and let others provide the test cases as this area of law develops.

For more information, see:

- *Rosas v. Toca*, 2018 BCCA 191 (B.C. C.A.).
- *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25 (B.C. C.A.).
- *Holland v. Hostopia Inc.*, 2015 ONCA 762 (Ont. C.A.).
- *United Rentals of Canada Inc. v. Brooks*, 2016 ONSC 6854 (Ont. S.C.J.).

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