"*Pardon the Interruption!*": Altering Employment Contracts Midstream

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> *A fellow is more afraid of the trouble he might have than he ever is of the trouble he's already got. He'll cling to trouble he's used to before he'll risk a change.*
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> WILLIAM FAULKNER, Light in August
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> *Nothing endures but change.*
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> HERACLITUS (540 BC - 480 BC), from Diogenes Laertius, Lives of Eminent Philosophers
>
> *I am altering the deal. Pray I don't alter it any further***.**
>
> DARTH VADER in The Empire Strikes Back

The one constant that applies to most things in life is change. In employment law, change is rudimentary. It is inevitable and unavoidable. With the vagaries of business in undefined and fluctuating markets, employers will desire change in employment contracts more often than not.

Changes to existing employment contracts beg many questions:

- Does a change to an employment contract render the existing agreement invalid?
- Is it unfair for an employer to alter an employment contract midstream?
- What are the employers' obligations to the employee?
- What can employees reasonably expect in the circumstances?
- How do you overcome the inequality of bargaining power?

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CONTRACTS 101

An employment contract like any typical contract needs three vital components: offer, acceptance and consideration. The consideration for accepting the employment contract will necessarily be the fundamental terms of the agreement including but not limited to term, salary, job description, benefits, bonuses, termination provisions and vacation.

Consideration is essentially the promises made by the employer to the employee; conversely, the employee offers as consideration his/her willingness to work steadfastly and with dedication in support of the employer's business. Let's face it, the employer is usually in the driver's seat. The employer has the power and the wherewithal to dictate the terms of the employment relationship; the employee can either accept or reject the employment. Most often, the employee has no choice but to accept the dictates of the employer.

The Employment Standards Act, 2000, S.O. 2000, c. 41 provides the minimum baseline of support for employees in the governance of their relationship regardless of the existence of an actual contract. However, the legislative support is only a starting point. In more complicated relationships or circumstances involving written contracts, the parties will have to rely upon the common law to govern what is effectively an unequal bargaining relationship.

ALTERING THE EMPLOYMENT CONTRACT AFTER THE EMPLOYEE COMMENCES EMPLOYMENT

Generally speaking, it is wise for an employer to have employees enter into a contractual agreement prior to commencing employment. Though it may lack in substance, a simple letter of engagement or a letter of offer with stipulated terms is preferable to no contract. An employment agreement is akin to a prenuptial agreement—it governs the relationship. Before employee and employer "tie the knot", they both have a specific understanding of each other's obligations. Theoretically, there should be no surprises.

But in some cases, the employee begins employment and then the employer attempts to introduce new terms. The employer may require the employee to enter into a new agreement or, to the potential detriment of the employment relationship, alter the original terms agreed upon without the benefit of any new agreement.

Employment contracts that are entered into after the employee has commenced employment may be set aside as being void for lack of consideration.[2] The law recognizes that there has to be something of value—something of greater consideration than the contract itself or the promise of continuing employment—given to the employee at the time the new contract is completed.[3] In *Hobbs v. TDI Canada Ltd*., a leading case in this area, the Ontario Court of Appeal declared:

> The law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms.[4]

FASULLO V. INVESTMENTS HARDWARE LTD

Anthony Fasullo entered into a contract of employment with his new employer for base salary plus commission in May 2007, just before he resigned with notice from his previous employment. Having entered into the agreement with his new employer, he commenced his new venture on June 18th, 2007. On June 20th, 2007, a mere two days after he began and weeks after his initial agreement with the principals of the new employer, he was presented with a document for his signature that included the following language:

> *Termination on Notice*
>
> *The employer may terminate this agreement and your employment at any time upon giving you the written notice or pay in lieu of notice required under the Employment Standards Act 2000.*

Happy to be employed, Fasullo signed the additional agreement albeit reluctantly.

A few years later, Fasullo was terminated from his employment. At the time Fasullo was terminated from his employment and throughout the summary trial that took place, the defendant employer attempted to rely upon the termination provision referenced above in support of its contention that

[2] Francis v. Canadian Imperial Bank of Commerce (1994), 120 D.L.R. (4th) 393 (Ont. C.A.), varying (1992), 41 C.C.E.L. (Ont.Gen.Div.).
[3] Kohler Canada Co. v. Porter, (2002), 17 C.C.E.L. (3d) 274 (Ont. S. J.).
[4] Hobbs v. TDI Canada Ltd., 2004 CanLII 44783 (ON CA), 246 D.L.R. (4th) 43 (Ont. C.A.), Ontario Court of Appeal at para. 32.

damages had been limited by mutual agreement to notice pursuant to the *Employment Standards Act 2000.*

However, the court disagreed with the employer. The court concluded that there was no actual consideration offered or passing to the employee, Fasullo, within the additional agreement that was executed on June 20, 2007. The mere signing of the June 20, 2007, document did not provide Fasullo with further pay, security or benefits in his employment that differed than what he already enjoyed through the existing Contract signed in the prior month.[5] Without the benefit of further and better consideration, the June 20th document was deemed to be null and void.

For the employer, the problem in *Fasullo* was the failure to clearly state its intention at the time of the initial negotiation. The employer was under the impression that the termination provision had been discussed during initial negotiations. The employee, Fasullo, had no clear recollection that termination provisions were discussed during the initial negotiations. Furthermore, , the employer could not provide any credible evidence to the effect that termination had been raised from the outset. A termination provision is a fundamental term and the employer's desire to have specific language for termination ought to have been disclosed from the outset and not offered later as an afterthought.

Furthermore, the focus of attention at trial on the impugned conduct of the employer was clearly evident. What *Fasullo* suggests is that employers will be carefully scrutinized in their negotiations and conduct after employment commences, most likely owing to the balance of power argument arising out of the employee's manifest lack of control.

THE EMPLOYEE'S OPTIONS

In *Wronko v. Western Inventory Service Ltd.*[6], it has been deemed that an employee faces three options when an employer attempts to amend a fundamental term of a contract of employment. Winkler C.J.O states:

> First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms;

[5] *Fasullo v. Investments Hardware Ltd.*, 2012 ONSC 2809
[6] *Wronko v. Western Inventory Service Ltd*. 2008 ONCA 337 (CanLII).

> Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term (constructive dismissal);
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> Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then – unless proper notice of termination is given – the employer is regarded as acquiescing to the employee's position.

In *Russo v. Kerr Bros. Ltd*, the court went so far as to suggest that acquiescence to any such change can be implied if the employee works through a reasonable notice period under the terms of an altered agreement.[7] In essence, consideration is deemed to have passed because the employee has accepted the changes to the agreement by virtue of his/her continuing employment.

Justice Sanderson found it difficult to reconcile these cases when dealing with the facts and situation in *Fasullo*. The specific contract did not specify a notice period that was greater to or, at the very least, equal to the *Employment Standards Act*. Therefore, the assumption was that the common law would prevail. Whereas *Wronko* and *Russo* dealt with the adequacy of consideration and/or acquiescence , *Fasullo* was silent on the issue of consideration when it came to the additional agreement. As Sanderson, J. states:

> In summary, if Fasullo received no consideration for signing the June 20, 2007 Document, at law the Termination on Notice clause in it is null and void. The Plaintiff cannot be bound by a provision that was null and void ab initio and continued to be null and void to the date of his dismissal. The Contract was never amended to include a valid Termination on Notice Clause. The Defendant cannot rely on that clause in the June 20, 2007 Document to limit the Plaintiff's claim to presumptive reasonable notice and severance pay based on reasonable notice[8].

When the employee is not terminated but faces the choice to either remain in employment or to repudiate a fundamental change to the employment contract and leave albeit reluctantly, the decision can be daunting from a practical and economic point of view. It may very well be a question of how truly fundamental is the change to the

[7] Russo v. Kerr Bros. Ltd, 2010 ONSC 6053 (CanLII), 326 D.L.R. (4th) 341
[8] Fasullo, supra, p. 56.

spirit and intent of the agreement and what effect such a change imposes upon the relationship between the employee and the employer. In *Piron v. Dominion Masonry Ltd.*[9], the court concluded that the unilateral change to a well-documented history of a past practice of negotiated bonuses constituted a fundamental breach to an oral agreement warranting the employee to declare that the employer had altered a fundamental change to his employment contract. In this case, the bonuses were significant and were negotiated for various completed projects. When the bonuses disappeared at the employer's insistence, so did a valuable component to the employee's expected remuneration. The trial judge had followed the seminal decision in *Farber v. Royal Trust Co.*, [10] on what constitutes constructive dismissal and determined that even the payment of a "modest" bonus would have preserved the process as to the future. But a blanket denial of bonus was detrimental to the relationship and a wrongful act on the part of the employer, thereby allowing the employee to elect repudiation of the contract and to sue successfully for constructive dismissal. [11]

THINGS TO "CONSIDER" WHEN ALTERING A CONTRACT

When considering changes to an existing contract of employment, an employer ought to take some time to think about the impact of the alterations, the effect on workplace relationships and the resulting beneficial interest. An employer has to be practical and clear about the change that is being sought and, at the same time, determine what "carrot" can be offered to the employee as reasonable consideration.

Here are some things to "consider"[12]:

- Consider "consideration": Are the terms fundamental to the agreement?
- Will the change enhance or impede productivity?
- Will the alteration be a detriment to the workplace relationships?
- Is the offer of a signing bonus or provisional advancement worthy of consideration?
- Is there an allowance for independent legal advice?
- Is there an opportunity to provide compensation for the expense of Independent Legal Advice?
- How much time is necessary to allow for time for consultation and advice?
- Should discussion about change take place "outside the office" (restaurant, coffee shop, neutral ground)?

[9] *Piron v. Dominion Masonry Ltd.*, 2013 BCCA 184 (CanLII)
[10] *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 S.C.R. 846
[11] *Piron*, supra, at paragraphs 18 and 19.
[12] This list is, by no means, exhaustive. It is only meant to illustrate possible scenarios.

- Should there be a promise to revisit and review the terms at a mutually acceptable time?

SUMMARY

When considering an alteration of an existing agreement, careful heed must be paid to reason in the circumstances. Change is welcomed when the employee feels that there is some advantage being given to them---some reward, trade off or consideration for their compliance and their loyalty. The change in consideration ought to be fair and in the best interests of all of the parties involved. As in most employment situations, change ought to be clear, unequivocal and with sufficient notice. The ultimate goal is to create harmony in the workplace despite the fact that there is an imbalance arising out of the inequality of the bargaining power. When altering the deal, the employer will want to ensure that the employment relationship remains unimpaired and without any ensuing risk.

Appendix

Francis v. Canadian Imperial Bank of Commerce (1994), 120 D.L.R. (4th) 393 (Ont. C.A.), varying (1992), 41 C.C.E.L. (Ont.Gen.Div.).

Kohler Canada Co. v. Porter, (2002), 17 C.C.E.L. (3d) 274 (Ont. S. J.).

Hobbs v. TDI Canada Ltd., 2004 CanLII 44783 (ON CA), 246 D.L.R. (4th) 43 (Ont. C.A.), Ontario Court of Appeal at para. 32.

Fasullo v. Investments Hardware Ltd., 2012 ONSC 2809

Wronko v. Western Inventory Service Ltd. 2008 ONCA 337 (CanLII).

Russo v. Kerr Bros. Ltd, 2010 ONSC 6053 (CanLII), 326 D.L.R. (4th) 341

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Farber v. Royal Trust Co., 1997 CanLII 387 (SCC), [1997] 1 S.C.R. 846