Cassels

Employer Ordered to Pay a Year's Salary to Employee Who Was Dismissed Before Commencing Employment

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In *Quach v. Mitrux Services Ltd*.,[1] the Court of Appeal for British Columbia confirmed that employers must provide fresh consideration to amend an existing contract of employment – even if the employee in question has not yet started work.

Background

In August 2015, Mitrux Services Ltd. (Mitrux) hired Tri Quach pursuant to a one-year, fixed-term employment contract at an annual salary of $138,000 (the Fixed-Term Contract). The Fixed-Term Contract provided that if Mitrux terminated Mr. Quach's employment prior to the end of the one-year term, it would have to pay Mr. Quach the balance of his salary for the remainder of the term.

Shortly after the parties signed the Fixed-Term Contract, Mitrux sought legal advice and determined that the Fixed-Term Contract, which had been prepared by a lawyer engaged by Mr. Quach, was not in the company's best interest. Mitrux then approached Mr. Quach and demanded he sign a new month-to-month contract entitled "Employment Agreement & Contract Waiver" (the Second Contract) to replace the original Fixed-Term Contract. The Second Contract permitted Mitrux to dismiss Mr. Quach on providing only four weeks' notice or pay in lieu.

Having already left secure employment, Mr. Quach resisted Mitrux's demand. He also reminded the company that despite its earlier promise, Mitrux had still not reimbursed him for the $1,000 in legal costs he had incurred in connection with the Fixed-Term Contract. Mitrux assured Mr. Quach it would repay him for his legal fees once he started work, but that he would need to sign the Second Contract if he still wanted the job.

On September 28, 2015, Mr. Quach signed the Second Contract.

On September 30, 2015, one day before Mr. Quach was scheduled to start work, Mitrux terminated the Second Contract. Mr. Quach sued for wrongful dismissal.

The primary issue at trial was which of the two executed contracts governed the relationship between the parties. The trial judge rejected Mitrux's argument that the Second Contract was the operative agreement,

holding that it failed for lack of fresh consideration. The Court awarded Mr. Quach damages of $138,000, equal to his full annual salary under the Fixed-Term Contract, as well as aggravated damages. Mitrux appealed.

Appeal Decision

The Court of Appeal for British Columbia allowed the appeal on the issue of aggravated damages only. It concluded that the Fixed-Term Contract governed the employment relationship as Mr. Quach had received no fresh consideration in exchange for executing the Second Contract. As a result, Mr. Quach was entitled to his full annual salary of $138,000.

Citing its own decision in *Singh v. Empire Life Ins. Co*.,[2] the Court confirmed that an employer cannot rely on the provisions of an amended employment agreement that are less advantageous to the employee than the original terms of employment unless the employee receives fresh consideration at the time of entering into the amended employment agreement.

The Court expressly rejected Mitrux's position that its promise to reimburse Mr. Quach's $1,000 in legal fees amounted to fresh consideration, noting as follows:

- It was unclear from the evidence whether Mitrux had promised to reimburse Mr. Quach for his legal fees before the parties executed the Fixed-Term Contract, or whether Mitrux had agreed to do so in connection with the Second Contract.
- In any event, the Second Contract made no reference to the $1,000 reimbursement and instead indicated that Mr. Quach would receive consideration in a different form altogether, through Mitrux's agreement to "waive probationary requirements as set out by the Labour Standards of BC…" Although the Court attributed no value to this reference to the three-month period under BC's *Employment Standards Act* during which an employee is not entitled to notice of termination, it was clear that Mitrux did not intend for the $1,000 payment to serve as consideration for the Second Contract.
- Importantly, Mitrux admitted that it never paid $1,000 to Mr. Quach when he signed the Second Contract or at any later time.

Given the absence of any payment or commitment to make a payment under the terms of the Second Contract, Mitrux failed to establish that Mr. Quach received fresh consideration in connection with the Second Contract.

Key Takeaways

This decision illustrates the impact of the principle of consideration on employment law. Employers cannot use a new contract to introduce new, less favourable terms of employment after an employee has already signed an employment agreement (or commenced work without signing one) unless the employee receives something of value at the time of signing the new employment agreement. This is true even if the employee signs the new contract as Mr. Quach did here.

There are a number of ways to satisfy the “fresh consideration” requirement, such as by providing an employee with a signing bonus, a raise or a new benefit in connection with the amended agreement. The appropriate form of consideration will depend on the circumstances. As highlighted in this decision, it is also important that the agreement correctly describe the consideration given and that the employee actually receive the benefit in question.

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[1] 2020 BCCA 25.

[2] 2002 BCCA 452.

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