The importance of signing the employment contract before starting work

CANADIAN EMPLOYMENT NEWS SERIES
Employment Update

26 MAY 2016
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In a recent decision, Holland v. Hostopia.com Inc., the Ontario Court of Appeal concluded that a termination provision in an employment agreement was unenforceable because the employment agreement was signed after the employee commenced employment, and in the absence of consideration from the employer.

Case background: employee seeks reasonable notice in excess of contractual entitlements

Sean Holland was employed by Hostopia.com as a National Account Manager. Mr. Holland was hired pursuant to an offer letter that addressed the essential terms of employment, such as salary, but did not include reference to Mr. Holland’s entitlement to notice in the event of termination.

Mr. Holland accepted the offer of employment by signing the offer letter and then started working. Approximately nine months later, Hostopia.com presented Mr. Holland with an employment agreement, which he signed shortly thereafter.

The employment agreement included a termination clause that allowed the employer to terminate Mr. Holland without cause and without notice, provided that he receive pay in lieu of notice in accordance with the Ontario Employment Standards Act, 2000 (ESA). The employment agreement also included a provision stating that the agreement was made “in consideration of the Employee’s employment by Hostopia and the compensation paid to the Employee from time to time while so employed.”

Approximately seven years later, Mr. Holland’s employment was terminated without cause. The employer provided Mr. Holland with pay in lieu of notice as required by the employment agreement. However, Mr. Holland brought an action against Hostopia.com for wrongful termination, alleging that the employment agreement was unenforceable and that he was entitled to reasonable notice at common law.

The trial judge disagreed with Mr. Holland, holding that the employment agreement was enforceable. Specifically, the trial judge found that the offer letter and employment agreement constituted two parts of one contract of employment and, because there was only a single contract of employment, the employment agreement was not void for lack of consideration.

In light of the trial judge’s finding, Mr. Holland’s reasonable notice period and other compensation factors were prescribed by contract, and therefore, common law notice was not available to Mr. Holland.
Ontario Court of Appeal: employment agreement is second contract needing independent consideration

Mr. Holland appealed the trial judge’s decision to the Ontario Court of Appeal. The main issues to be determined on appeal were:

(i) the enforceability of the termination provision in the employment agreement, and

(ii) the appropriate reasonable notice period.

The Court of Appeal found that the employment agreement was unenforceable, reversing the trial judge’s decision. There were two main reasons for the Court of Appeal’s conclusion.

1. The court concluded that the offer letter and employment agreement cannot be considered two interrelated parts of one contract. Once Mr. Holland signed the offer letter, he accepted a complete contract of employment. The employment agreement was then a second contract that required independent consideration to be enforceable. To that end, the court stated that “a promise to perform an existing contract is not consideration [...] Fresh consideration was required.”

The court also observed that the requirement of consideration in the context of an amended agreement is very important in the employment context because there is a general inequality of bargaining power between employers and employees.

2. The court concluded that there was no evidence of discussion between Hostopia.com and Mr. Holland related to the termination provision prior to Mr. Holland signing the offer letter, nor was there evidence that Mr. Holland was made aware that the employment agreement would contain terms different from those set out in the offer letter. Further, there was no evidence that Mr. Holland agreed to waive his right to reasonable notice of termination at common law when he signed the offer letter.

In summary, the court found that the termination provision in the employment agreement was a new and material term that Mr. Holland did not consent to prior to signing the offer letter, and that Mr. Holland did not receive consideration from Hostopia.com in exchange for signing the employment agreement.

Since the offer letter did not specifically address termination and reasonable notice, there was an implied term in the offer letter that entitled Mr. Holland to reasonable notice prior to the termination of his employment in accordance with common law. With the termination provision in the employment agreement invalidated, the Court of Appeal concluded that Mr. Holland was entitled to reasonable notice as dictated by common law, which amounted to eight months.

Legal principles: consideration

The threshold issue in this case is consideration. At law, consideration is something of value received by a promisor from a promisee. All parties to a contract must receive consideration – something of value – in order for the contract to be enforceable.

In the context of a new employment relationship, the consideration provided by the employer to the employee is employment after the contract has been signed. In return, the consideration provided by the employee is the employee’s agreement to various terms and conditions as outlined in the contract.

However, after the employment relationship has begun, the employer can no longer offer employment in exchange for the employee’s signing of the contract because the employee is already employed. Instead, when an employer wishes to have an employee sign a contract after the employment relationship has begun, the employer must provide the employee with something more. That can (and often does) take the form of a signing bonus, added benefit, increase in compensation, or extra vacation time.

Takeaway for employers

This case serves as a reminder for employers to ensure that each employee signs an employment agreement prior to the first day of employment. In addition, this decision recognizes the importance of providing an employee with new
consideration if the employer seeks to make amendments to the terms and conditions of the employment relationship after employment has begun.


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