Employment and Labour Law Reporter

VOLUME 29, NUMBER 12 Cited as (2020), 29 E.L.L.R. MARCH 2020

• AVOIDING THE COST OF IMPRECISE LANGUAGE IN INCENTIVE COMPENSATION PLANS •

Shyama Talukdar, Associate, Baker & McKenzie LLP.

Courts usually treat incentive compensation as part of the compensatory damages owed in lieu of common law reasonable notice of dismissal. However, if the employment contract and/or the incentive plan unambiguously extinguish entitlement to incentive compensation upon notice of dismissal, the agreement(s) will generally prevail over the common law entitlement. In *O'Reilly v. IMAX Corporation*, [2019] O.J. No. 6369, 2019 ONCA 991, the Ontario Court of Appeal once again stressed the importance of using precise language in bonus or stock option plans to deny, or otherwise limit, employee entitlement to incentive compensation during the reasonable notice period.

• In This Issue •

LexisNexis®

KEY TAKEAWAYS

The Ontario Court of Appeal's decision serves as a reminder for employers of the need to use clear and precise language in an employment agreement and/or incentive plan in order to deny (or circumscribe) entitlement to incentive compensation during the reasonable notice period. A failure to do so can prove costly, particularly for senior and executive level employees with generous entitlements to incentive compensation and with lengthy notice period entitlements. Though not a direct issue in this case, employers should still keep in mind that even clear and unambiguous language will not suffice if it amounts to a breach of local employment standards legislation (which varies from province to province).

BACKGROUND

The plaintiff in *O'Reilly v. IMAX Corporation* was a 53-year-old senior executive with 22 years of service

EMPLOYMENT AND LABOUR LAW

Employment and Labour Law Reporter is published monthly by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

ISBN 0-409-91093-7 (print) **ISSN 1183-7152**
ISBN 0-433-44669-2 (PDF)
ISBN 0-433-44383-9 (Print & PDF)

Subscription rates: $665.00 per year (Print or PDF)
$775.00 per year (Print & PDF)

Please address all editorial inquiries to:

General Editor
Edward Noble, B.A., LL.B.
Content Development Associate
LexisNexis Canada Inc.
E-mail: edward.noble@lexisnexis.ca

LexisNexis Canada Inc.
Tel. (905) 479-2665
Fax (905) 479-2826
E-mail: ellr@lexisnexis.ca
Web site: www.lexisnexis.ca

Note: This newsletter solicits manuscripts for consideration by the General Editor, who reserves the right to reject any manuscript or to publish it in revised form.

The articles included in the *Employment and Labour Law Reporter* reflect the views of the individual authors, and limitations of space, unfortunately, do not permit extensive treatment of the subjects covered. This newsletter is not intended to provide legal or other professional advice and readers should not act on the information contained in this newsletter without seeking specific independent advice on the particular matters with which they are concerned.

when he was dismissed. His compensation package included a base salary, commissions, group benefits, and participation in both a Long Term Incentive Plan, which included both restricted stock units ("RSUs") and stock options, and a Stock Option Plan (collectively, the "awards"). The relevant plans stipulated that if his employment "terminates for any reason", his RSUs would be "cancelled immediately without consideration as to the date of termination" and stock options "shall terminate and be cancelled without any consideration being paid therefor". Thus, both would revert back to the employer, IMAX.

IMAX advised the employee that any awards that had already vested could be exercised for up to 30 days after his termination date. Any awards that had not vested as of that date would be "cancelled and forfeited without any consideration".

Ontario Superior Court's Decision

The motions judge found that the employee was entitled to damages, calculated on the basis of 24 months' reasonable notice, together with all commissions outstanding at the date of termination. The judge also determined the employee's damages for wrongful dismissal, including the damages for lost opportunity to earn commissions on sales during the reasonable notice period, the pension contributions that would have been made during that period, and the value of benefits lost during the notice period.

The motions judge also concluded that the language of the relevant plans was not sufficient to cancel the employee's entitlement to exercise the awards or to remove his entitlement to damages for their loss. He was therefore entitled to damages for the loss of the right to exercise the RSUs and stock options that would have vested during the reasonable notice period. IMAX only appealed this latter finding.

Ontario Court of Appeal's Decision

The Court of Appeal outlined the following principles in assessing whether the language in the plans limited the employee's right to exercise the RSUs and stock options during the reasonable notice period:

1. A wrongfully dismissed employee is entitled to damages for the loss of wages, salary and other benefits, that would have been earned during the reasonable notice period.
2. This principle applies to bonuses, stock options, or incentives that are an integral part of the employee's compensation, as well as pension benefits that would have accrued or been earned during the reasonable notice period.
3. In considering whether the loss of such benefits is recoverable, the court undertakes a two-step analysis.
4. The first step requires a determination of the employee's common law right to damages for breach of contract, bearing in mind that the measure of damages is the amount to which the employee would have been entitled had the employer performed the contract.
5. The second step requires the court to determine whether the terms of the relevant contract or plan unambiguously alter or remove the employee's common law rights, having regard to the presumption that the parties intended to apply the law, in the absence of clear language to the contrary.

The Court of Appeal held that the motions judge had applied the correct two-step test. The Court of Appeal upheld the motions judge's finding that the awards were an integral part of the employee's employment, that they would have vested had his employment not been wrongfully terminated, and that he would have exercised the awards, as he had done in the past. This was the first step of the analysis.

In the second step of the analysis, the Court of Appeal also upheld the motions judge's finding that the reference to "terminates for any reason" in the plans could not be presumed to refer to termination without cause. Further, he found that the phrase "cancelled immediately without consideration" was not a clear, express provision that removed the common law right of an employee, terminated without cause, to claim damages in respect of lost unvested RSUs. While the language in the plans at issue extinguished the employee's right to exercise any unvested awards as of the date of "termination", the plans did not establish, in unambiguous terms, when the date of termination is. Thus, the plans left open the possibility that termination could have occurred at the end of the reasonable notice period. Where such ambiguity exists, the language will be interpreted as mandating a lawful termination. Significantly, there was no additional language to remove any entitlement to damages.

• OLD CONSIDERATION IS NO CONSIDERATION FOR CHANGES TO EMPLOYEE CONTRACT •

Joan Young, Partner, and Eleanor Rock, Articled Student, McMillan LLP.

Consideration (or something of value exchanged for something else of value) is a fundamental principle of contract law, with fresh consideration necessary to create a new contract or to amend an existing contract. Two years ago, however, the landmark decision of *Rosas v. Toca*, [2018] B.C.J. No. 938, 2018 BCCA

191 [*Rosas*] cast doubt on whether fresh consideration is always needed to effect contractual amendments.

In the recently released decision of *Quach v. Mitrux Services Ltd.*, [2020] B.C.J. No. 88, 2020 BCCA 25 [*Quach*], the British Columbia Court of Appeal ("**Court**") considered for the first time how *Rosas* applies in an employment law context.

BACKGROUND FACTS

On August 25, 2015, Mr. Quach signed a one-year fixed-term employment contract (the "**August 25 contract**") with the defendant employer, Mitrux Services Ltd. and Ameri-Can Freight Systems Inc. ("**Mitrux**"). The August 25 contract was due to commence on October 1, 2015, specified an annual salary of $138,000, and included a term requiring Mitrux to pay to Mr. Quach his full salary remaining if it terminated the contract before the one-year term was up.

After the contract was signed, Mitrux determined that it would prefer to employ Mr. Quach on a month-to-month basis. Mr. Quach had already left his previous, secure employment and was reluctant to agree to this change. Mitrux then advised Mr. Quach that he needed to agree to the revised terms for his employment to commence, at which point Mr. Quach reminded Mitrux that it already owed him the $1,000 legal cost of drafting the August 25 contract. Mitrux promised to repay this cost after Mr. Quach's employment commenced.

On September 28, 2015, Mr. Quach signed a revised, month-to-month agreement terminable upon four weeks' notice or salary in lieu (the "**September 28 contract**"). Mitrux subsequently terminated Mr. Quach's employment on September 30, 2015 before he had even begun work. Mr. Quach commenced a British Columbia Supreme Court action for wrongful dismissal.

TRIAL DECISION

The main issue at trial was which one of the executed contracts remained operative between the parties. Mr. Quach argued that the August 25 contract prevailed because the September 28 contract was void for lack of fresh consideration. Mitrux instead took the position that the September 28 contract was operative because its promise to repay Mr. Quach's legal costs amounted to fresh consideration.

The British Columbia Supreme Court agreed with Mr. Quach, finding that Mitrux's promise to repay Mr. Quach's legal costs was too vague to constitute fresh consideration to effect the September 28 contract. The trial judge accordingly awarded to Mr. Quach his August 25 contract salary of $138,000 plus aggravated damages and costs. Mitrux appealed.

APPEAL DECISION

The appeal was allowed for the limited purpose of overturning the aggravated damages award. The Court also engaged in a helpful discussion about the need for consideration to amend an existing employment contract.

The Court first affirmed that consideration is a necessary component of a binding contract before acknowledging that *Rosas* brought some flexibility into this basic principle. The Court further remarked that the trial judge rightly relied on *Singh v. Empire Life Insurance Co.*, [2002] B.C.J. No. 1854, 2002 BCCA 452 [*Singh*] when deciding in favour of Mr. Quach as the employee. *Singh* enshrines the proposition that an employer cannot rely on revised terms of employment that are less advantageous to an employee without providing some fresh consideration.

The Court affirmed that for now, *Singh* remains authoritative in the "nuanced world of employer and employee contractual relationships".[1] The Court further noted that whether *Rosas* should apply to employment law is a question for a different case because the September 28 contract terms represented too substantial an amendment to justify waiving the requirement for fresh consideration.

TAKEAWAYS

Quach reinforces that employers must provide fresh consideration to amend an existing employment agreement. The decision also suggests that significant

contractual amendments are unlikely amenable to waiver of the general requirement for fresh consideration. Ultimately, whether *Rosas* applies in an employment law context — and how — remains to be seen. But for now, the safest course is to ensure something of value is provided to an employee when new or amended terms are offered if you want the new terms to be enforceable.

[***Joan Young*** *is a partner and senior litigator in McMillan's Advocacy & Litigation Group, and the Competition & Antitrust Group. Her practice emphasizes complex civil and commercial litigation, class actions, and administrative/regulatory hearings representing a wide range of clients and industries, such as automotive, mining, forestry, hospitality, manufacturing and government.*

Eleanor Rock *is an Articled Student in the Vancouver office of McMillan LLP. Eleanor received her Juris Doctor from the Peter A. Allard School of Law at UBC in 2019. Following Eleanor's anticipated May 2020 call date, she will join McMillan LLP's Advocacy and Employment Law Group as an Associate.*]

---

[1] *Quach* at para 13.

• AN EMPLOYEE'S HIGHER PAY DURING NOTICE PERIOD WON'T RETROACTIVELY MITIGATE EARLIER DAMAGES •

John Schudlo, Associate, Norton Rose Fulbright Canada LLP.

The Ontario Divisional Court recently released a decision that helps to clarify the law on mitigation of damages in wrongful dismissal cases.

The Court held that if a dismissed employee gets a new job during his or her notice period that pays more than the employee's previous job, the employee's surplus earnings can't serve to reduce damages owed to the employee for the period he or she was unemployed.

The Court held that, in other words, a dismissed employee's notice damages can't be "back-filled" by higher earnings earned later.

An employee who is dismissed from his or her employment has the obligation to take reasonable steps to find replacement employment to minimize (or "mitigate") his or her losses. When a dismissed employee does find replacement employment during the notice period, income earned during the notice period will be deducted from any damages owed to the employee in lieu of notice.

So, if, during an employee's notice period, the employee secures a replacement job, that employee will be said to have mitigated his or her damages from the moment the replacement job began and thereafter. However, the law has been somewhat unclear on how a court should treat an employee's earnings when that employee earns more in his or her replacement employment than he or she did in previous employment.

In *Kideckel v. Gard-X Automotive Refinish Inc.*,[1] the Court considered this very issue.

In February of 2014, Martin Kideckel's employer gave Mr. Kideckel working notice that his employment would terminate, without cause, on May 30. Three months later, Mr. Kideckel's employment did terminate. After two weeks of being briefly unemployed in early June, Mr. Kideckel secured a new job with a new employer. In his new position, Mr. Kideckel earned more than he had earned working in his previous position. As such, from the date Mr. Kideckel began working at his new job, he was said to be fully mitigating his notice damages.

However, because Mr. Kideckel was actually *more than* fully mitigating his damages from his date of hire and after, his former employer argued that the notice damages Mr. Kideckel was owed for his two-week period of unemployment should be reduced by any surplus earnings Mr. Kideckel had earned during the balance of his notice period.

Mr. Kideckel had argued that he was owed $900 in damages for lost wages during the two-week period he

was between jobs. In response, his former employer argued that, during the remainder of the notice period, Mr. Kideckel earned thousands of dollars more than he would have otherwise earned in his previous job, so the $900 loss had been recovered.

Ultimately, the Court did not side with Mr. Kideckel's former employer. The Court held that Mr. Kideckel's surplus earnings, earned after he began working for his new employer, did not mitigate the $900 in losses Mr. Kideckel had suffered during the two-week period in which he had been unemployed.

The Court reasoned:

> ... if the employer gave adequate working notice for the entire notice period, the worker would have been paid while he continued work up until commencing new employment, with no duty to account back to his old employer for his increased wages.

Employers should take heed of this decision. While it is good news for everyone if a dismissed employee secures new employment during his or her notice period, according to this decision, surplus earnings cannot be applied retroactively.

[***John Schudlo*** *is an employment and labour lawyer at Norton Rose Fulbright in Ottawa. He represents both provincially and federally regulated employers.*]

---

[1] [2020] O.J. No. 41, 2020 ONSC 37.

• "HEAT OF THE MOMENT" RESIGNATIONS DO NOT ALWAYS END THE EMPLOYMENT •

Brendan Harvey, Lawyer, Yeager Employment Law.

Employers must be wary when an employee suddenly resigns in the heat of the moment. In certain circumstances, an employer may be obliged to follow up with the employee or allow a cooling-off period to ensure that the resignation is truly voluntary and intentional. An employer who quickly pounces on an employee's heated resignation — and unreasonably refuses to allow the employee to return to work — may be surprised to find that they are the defendant in a wrongful dismissal action.

RESIGNATIONS

Under ordinary circumstances, when an employee voluntarily says "I quit", the employment relationship naturally comes to an end. And because it is the employee who initiates the termination (as opposed to the employer dismissing the employee), the employer will usually be under no further obligation to provide notice or severance pay to the employee. There cannot be a wrongful dismissal if there is no dismissal at all.

WHY IS A "HEAT OF THE MOMENT" RESIGNATION TREATED DIFFERENTLY?

A "heat of the moment" resignation is treated differently because the employee's outburst may not reflect the employee's true intentions. In the course of heated conversations, people may make statements that they did not genuinely mean, did not intend to say, or soon after regretted saying. Sometimes it may be necessary for an employer to allow cooler heads to prevail.

Courts recognize that an unintended resignation has significant consequences for an employee. An employee will usually be without employment income for a time, and without any severance pay to help bridge the gap until they can find new employment (employees who voluntarily resign are also typically denied Employment Insurance benefits). Considering the ramifications of a resignation, courts demand clear and unequivocal evidence that the employee has genuinely intended to resign.

WHEN IS A "HEAT OF THE MOMENT" RESIGNATION NOT ACTUALLY A RESIGNATION?

In *Kerr v. 2463103 Nova Scotia Ltd. (c.o.b. Valley Volkswagen)*, [2014] N.S.J. No. 20, 2014 NSSC 27, the Nova Scotia Supreme Court provided a helpful description of when a "heat of the moment" resignation may *not* be sufficient to end the employment relationship:

> [W]here the employee, in a state of depression, frustration or emotional angst makes a hasty (usually) statement that he or she quits and shortly thereafter, realizing the rashness of his or her statement or actions, either retracts the statement in short order or engages in discussions with the employer to patch up the dispute leading to the declaration of intent to quit, the employee has not quit.

This quote from *Kerr* suggests that in order to retract a "heat of the moment" resignation, the employee should be able to show that:

1. The resignation itself was in the heat of the moment; and
2. Shortly after the resignation, the employee attempted to retract the resignation and repair the relationship.

Although *Kerr* is a Nova Scotia decision, the law in BC is similar.

For example, in *Bru v. AGM Enterprises Inc.*, [2008] B.C.J. No. 2380, 2008 BCSC 1680, the employee was under obvious stress when she stated to her boss "I can't take it any longer and I am quitting." The following day, the employee called and asked whether she still had a job. When the employer stated that she had quit, the employee denied this. After a trial, the BC Supreme Court agreed that the employee had not "clearly and unequivocally" resigned. The Court summarized its reasoning as follows:

> The central point is this: when it was clear that there was some kind of misunderstanding, the defendant could not just stand on the black letter utterances on November 13, and ignore all the surrounding circumstances, including Ms. Bru's plea she had not quit (which was implicitly at least a request to review and discuss).

As a result, the employer was required to pay wrongful dismissal and other damages to the employee.

In *Fitzsimmons v. North Thompson School District No. 26*, [1996] B.C.J. No. 3041 (BCSC), the employee walked out of a heated board meeting when she felt she was being personally attacked. When asked to rejoin the meeting, she stated "if you want my resignation, you can have it." The employee went home in an upset state shortly after, and then called in sick for the following day. While she was absent, the board decided to accept her resignation. After learning that they had accepted her resignation, the employee sent a letter to the employer indicating that she had no intention of resigning, and clarifying that her offer of resignation was the result of emotional upset. The BC Supreme Court agreed with the employee, finding under the circumstances that she had not voluntarily resigned. As a result, the employee was awarded wrongful dismissal damages.

LESSONS FOR EMPLOYEES AND EMPLOYERS

It is essential for employers to exercise caution before accepting an employee's resignation that is made as part of an emotional outburst or while the employee is in obvious distress. Likewise, employers need to be cautious if the employee follows up by attempting to retract the resignation, or if there are other signs that the employee may not have intended to resign. These should be red flags for employers that legal advice is needed.

Employees who find themselves having regrettably "resigned" in the heat of the moment should consider whether there is still time to repair the employment relationship. If the relationship can be saved, quick action on the part of the employee is critical. The longer an employee waits to patch up the relationship, the more unfair it generally becomes to insist that the employer must welcome them back. Employees in

these circumstances should seek advice immediately to determine whether there may still be a reasonable opportunity to patch up the relationship.

[***Brendan Harvey*** *is an employment lawyer with a practice focused on wrongful dismissal, employment standards, and human rights claims. Practicing in North Vancouver, BC, he advises and represents employees and small businesses at all stages before, during, and after the employment relationship.*]