FRESH CONSIDERATION NEEDED: COURT OF APPEAL CONFIRMS EMPLOYMENT AGREEMENT UNENFORCEABLE AND OFFER LETTER GOVERNS EMPLOYMENT

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Many employers provide job candidates with an offer letter which includes only cursory details about the position and often does not include a termination clause. In many cases, these candidates are asked to sign the offer letter, with the understanding that they will be provided with a more detailed employment agreement later on—perhaps during orientation.

Employers who engage in this practice often take for granted that the offer letter constitutes a binding agreement. In *Holland v Hostopia.com*, the Ontario Court of Appeal reaffirmed that when an employee signs an offer letter and then subsequently signs an employment agreement with new terms, the employment agreement is unenforceable if the employee does not receive fresh consideration such as a cash payment money or another tangible benefit in exchange for agreeing to the new terms.

The Facts

In *Holland v Hostopia.com*, Sean Holland was hired by Hostopia.com pursuant to an offer letter, which did not contain a termination clause. The offer letter also expressly stated that Holland's employment was conditional upon him subsequently signing an employment agreement. Holland proceeded to sign the offer letter as presented, and commenced his employment. Later, Holland was provided with a six-page employment agreement, which contained a termination clause that limited his termination entitlements to the statutory minimums set out in Ontario's employment standards legislation. When Holland then signed the employment agreement, he was not provided with any additional compensation or benefit in exchange for signing the agreement.

When Hostopia.com subsequently terminated Holland's employment, the company relied upon the terms of the employment agreement, and provided him with the statutory minimum pay in lieu of notice. Holland then filed a claim against Hostopia.com for common law reasonable notice, arguing that the employment agreement was unenforceable due to a lack of fresh consideration.

The Law: Reasonable Notice by Default

It is a general principle in Canadian employment law that an employee who is dismissed without cause is entitled to common law reasonable notice. The reasonable notice period is determined on a case-specific basis, by reference to the character of employment, length of service, age, experience, and qualifications of each employee. Suffice it to say, common law reasonable notice periods are considerably longer than the minimum notice periods set out in employment standards legislation.

In order to displace the general principle of common law reasonable, an employment agreement must contain carefully drafted language that expressly limits an employee's termination entitlements to the statutory minimums. If an offer letter is silent as to an employee's termination entitlements, the general principle applies. Thus, offer letters without termination clauses are deemed to include an implied term that entitles the employee to common law reasonable notice upon the termination of the employment relationship.

The Trial Decision

The trial judge rejected Holland's arguments about contractual consideration and sided with the company. In accepting the employer's position, the trial decision held the offer letter and the employment agreement were interrelated documents, in respect of which consideration had been given when Holland accepted the offer letter. In arriving at this conclusion, the trial judge found that the offer letter and the employment agreement did not contain inconsistent terms. Holland proceeded to appeal.

The Ontario Court of Appeal's Decision

The Ontario Court of Appeal overturned the decision of the lower court on the enforceability of the employment agreement, finding that: (1) the offer letter and the employment agreement contained inconsistent terms; and (2) Holland did not receive fresh consideration when he signed the employment agreement.

The Court of Appeal confirmed that since the offer letter was silent as to Holland's termination entitlements, the offer letter contained the implied term of common law reasonable notice. Further, since the employment agreement purported to limit Holland's termination entitlements to the statutory minimums, the employment agreement introduced a new "very material" term, which was inconsistent with at least one implied term in the offer letter. Since Holland was not provided with any consideration for relinquishing his common law rights, the Court of Appeal found that employment agreement was unenforceable and Holland's employment with Hostopia.com was governed by the terms of the offer letter.

Instead of limiting him to the statutory minimum seven weeks of pay and benefit continuation in Ontario's Employment Standards Act, the Court of Appeal found that Holland was entitled to reasonable notice of eight

months' salary and benefit continuation.

Lessons for Employers

Employers who engage in the practice of providing job candidates with cursory offers letters followed by detailed employment agreements may wish to reevaluate their current practices and documentation. To ensure that the employment relationship is governed by the terms of the employment agreement, *Holland v Hostopia.com* directs that employers must provide the employee with fresh consideration. Better yet, such employers should consider dispensing with the bifurcated documentation altogether. Instead, employers should consider having all job candidates sign a single document that contains all the terms of their employment which, if accepted, will apply from the outset of the employment relationship. Sometimes, less paper and fewer steps saves both time and money.

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A Cautionary Note