OLD CONSIDERATION IS NO CONSIDERATION FOR CHANGES TO EMPLOYEE CONTRACT

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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 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 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 Ins. Co.*, 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.

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[1] *Quach* at para 13.[ps2id id='1' target='/]

A Cautionary Note