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A PEPPERCORN AND A PEARTREE: A RECENT DECISION BY THE ONTARIO COURT OF APPEAL CONFIRMS THAT IT IS THE EXISTENCE OF FRESH CONSIDERATION RATHER THAN ADEQUACY, THAT MATTERS IN CONTRACT FORMATION

—Julia Dales and Catherine Coulter.

General Context

With very few exceptions, for any contract to be binding, there must be consideration (a detriment to a party or benefit to the other) provided in exchange for a party's agreement to do something. Once formed, a contract cannot be amended without new or "fresh" consideration.

The same is true for employment agreements. When an employer wishes to update an existing employment agreement, the employee must receive fresh consideration in exchange for agreeing to the new terms, such as a signing bonus or other benefit. Alternatively, an employer can terminate the existing employment agreement and enter into a new one. However, that requires providing proper notice of termination to the employee, which may be a lengthy period of time.

The question then is: what amount of consideration is sufficient to make an amended employment agreement binding on the employee?

The decision in *Giacomodonato v. PearTree Securities Inc.*[1] (*PearTree*), released on June 3, 2024, provides guidance as to the extent a court will go to assess the existence of consideration in the employment context.

The Trial Decision

Mr. Donato sued his employer, PearTree, for wrongful dismissal. He won at trial, but the parties disputed how his damages should be calculated.

Mr. Donato had been working for another company when PearTree offered him a job. After negotiations, an employment agreement was signed. However, the parties re-engaged in negotiations thereafter when Mr. Donato indicated he would suffer financial consequences for leaving his current company. PearTree agreed to pay him CA$40,000 to offset those costs and a new agreement was formed, though it did not expressly reference the CA$40,000 payment.

[1] [2024] O.J. No. 2566, 2024 ONCA 437.

Mr. Donato argued that his damages for wrongful dismissal should be calculated based on the first contract he signed, rather than the second. He argued he did not receive fresh consideration for executing the second contract.

Mr. Donato argued there was no consideration provided, as the new contract provided an overall disadvantage to him due to, among other items, its termination clause, expanded restrictive covenants and change in the variable compensation structure.

PearTree argued the new contract was overall more advantageous to Mr. Donato, including the CA$40,000 payment, additional paid vacation and a more favourable variable compensation structure.

The trial judge declined to engage in a comparative analysis of the advantages and disadvantages of the two contracts. While Justice Centa recognized that consideration is particularly important in the employment context due to the inequality of bargaining power, he also recognized:

> It is not role of the court to assess the adequacy of the consideration provided by PearTree or to assess whether or not the economic benefits obtained by Mr. Donato outweigh what he gave up.

Justice Centa found that the CA$40,000 payment and additional paid vacation Mr. Donato would receive constituted fresh consideration. Justice Centa noted, however, that the variable compensation structure in the new agreement did not constitute additional consideration as the first contract did not clearly exclude oil and gas revenue from the variable payout, so there was no basis to find that this constituted a new benefit, as had been argued by PearTree.

The Appeal Decision

The Ontario Court of Appeal upheld Justice Centa's findings and affirmed that "courts are concerned with the existence, rather than the adequacy, of consideration".

In its reasons, the Court of Appeal noted that no authority was presented by Mr. Donato to support his contention that the judge was required to perform "a comparative analysis of the overall advantages and disadvantages of the first and second contract in assessing whether there was fresh consideration for the latter."

Significance

The *PearTree* decision is further confirmation that in providing fresh consideration, employers do not need to provide a benefit that cancels out, or exceeds, any detriment that will result to the employee from the new terms being agreed to.

In other words, it is not the quantum but the existence of consideration that is of concern to the courts. However, of note, Justice Centa had observed in his reasons that "neither two additional weeks of paid vacation nor $40,000 can be fairly described as a mere peppercorn." Does this mean a peppercorn (i.e., nominal consideration) would be insufficient to bind an employee to a new agreement? Not necessarily. To the contrary, in the 2018 Ontario Superior Court decision *Lancia v. Park Dentistry Professional Corp.*,[2] Justice Andrew J. Goodman held that monetary consideration (in that case, CA$2,000) was sufficient fresh consideration even where the new terms would result in a net reduction to the employee's overall compensation. In making this finding, Justice Goodman stated:

> [54] While Park Dentistry readily concedes a reduction in Lancia's net compensation, I agree that this was permissible by law and does not nullify the New Contract's enforceability. Park Dentistry was not required to offset the reduction in compensation by providing monetary consideration of an equal amount. **Indeed, it is trite law that courts will not inquire into the adequacy of consideration – a "peppercorn" will do. As long as there is consideration, contracts may be varied or superseded by new agreements.** [emphasis added]

[2] [2018] O.J. No. 648, 2018 ONSC 751.

Takeaway

To safely update an employment agreement, a clear signing bonus that is expressly set out in the agreement remains the safest bet. While technically the amount of the consideration should not matter, employers should remain wary of providing a peppercorn as consideration where the new terms of the agreement will result in onerous conditions on the employee and where the employee is not alternatively being offered proper notice of the change. In addition, conditional consideration, such as an incentive bonus which may not be earned or stock options which may not vest, are potentially problematic consideration on their own without a signing bonus. As always, it is still the law that unconscionable agreements or ones signed under duress will not be upheld.

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INDEPENDENT MEDICAL EXAMINATION ORDERED TO PROVE ALLEGED INABILITY TO MITIGATE

—Laurie Jessome. © Cassels Brock & Blackwell LLP. Reproduced with permission.

In *Marshall v. Mercantile Exchange Corp.*, [2024] O.J. No. 3387, 2024 ONSC 4182 (*Marshall*), the Ontario Superior Court of Justice was asked to consider whether an employee claiming wrongful dismissal damages from his former employer could be ordered to attend an independent medical examination (IME). In an unusual decision in the employment world, the Court found that an IME could be appropriate.

Marshall had been employed as a courier by the Mercantile Exchange Corporation (Mercantile) for over 25 years. At the time his employment was terminated, he was 58 years old and earned $52,000 per year. He claimed that he was entitled to 26 months of reasonable notice of termination, which is generally considered to be at or close to the maximum period of notice awarded by Ontario courts. In the litigation, Marshall took the position that he may not be able to mitigate his damages at all during the claimed notice period because he was suffering from stress and depression caused by the termination of his employment. In response, the defendant brought a motion seeking an IME.

Marshall objected to the request for the IME for the following reasons: (i) the impact of his medical condition on his ability to mitigate was not the primary issue in the proceeding; (ii) his medical condition was not the basis for his claim for damages; (iii) Courts have recognized that it is common for employees to experience mental health issues after being dismissed without the necessity of an IME; and (iv) if the Court ordered an IME on these facts, employers could use such requests as "a weapon" in wrongful dismissal claims.

In response, Mercantile argued that the cases where the Court took notice of the impact of dismissal on mental health were different from this matter because, in those cases, the mental health issues were alleged to have prevented the employee from seeking new work for only a limited period of time. Here, Marshall was alleging that he would have no duty at all to mitigate for up to 26 months. The defendant also noted that the mental condition of the plaintiff had been put into question by his own choice. Given the potentially significant impact on the value of the claim, Mercantile argued that it must be permitted to test the validity of the plaintiff's claim.

Ontario's *Courts of Justice Act* gives its courts the discretion to order an IME where "the physical or mental condition of a party to a proceeding is in question". Here, the Superior Court of Justice agreed with the defendant employer Mercantile that the mental condition of the plaintiff was at issue in the proceeding and that its impact went "well beyond the usual adjustment period that courts afford plaintiffs to overcome the shock of dismissal before being obliged to mitigate

their damages." (para. 11) The Court also took notice of the fact that the plaintiff was taking the position that he had no obligation to mitigate in the context of relatively high employment rates and when his role at Mercantile had been a relatively low income level, suggesting that a significant number of comparable jobs might be available.

In the end, the Court ordered that if Marshall took the position that he was still unable to mitigate after 12 months had passed, he would be required to submit to an IME. The Court held that this struck a fair balance between giving the employer the right to test allegations of an inability to mitigate without opening up potential abuse of IMEs as a litigation tactic. "None of that is to say that the plaintiff is not suffering from a condition that prevents him from mitigating. It is merely to say that if someone takes a position as unusual as the plaintiff is taking, they should be prepared to subject themselves to an independent medical examination in order to test the assertions they are making." (para. 16)

Notably, the Court did not mention if the plaintiff had already put his own medical evidence on the record regarding his condition. It is relatively common for plaintiffs in wrongful dismissal claims to include medical information from their own doctors confirming that they have experienced physical or mental distress as a result of the termination of this employment. It would be interesting to see if the Court would still order an IME on the basis that the plaintiff's medical condition was in question if other medical evidence was available or if the defendant would also have to show that the medical assessment of the plaintiff's own physician was unreliable or incomplete. Regardless, the decision in *Marshall* provides employers with helpful guidance on when it might be appropriate to insist on an independent assessment of an employee's medical condition in litigation.

[***Laurie Jessome*** *is a partner at Cassels and is head of the firm's national Employment & Labour Group.*]

PROGRESS OF LEGISLATION

British Columbia

Employment Standards Regulation Amended

On July 8, 2024, the *Employment Standards Regulation* was amended by BC Reg 191/2024. The amendments modified section 45.14 of the Regulation, which provides that employers who employ a child in the recorded entertainment must remit 25% of any earnings over $2,000 to the Public Guardian and Trustee to hold in trust for the child. The amended section 45.14 permits a person who acts on behalf of the child to choose to have the 25% of earnings remitted to the Alliance of Canadian Cinema, Television and Radio Artists' Minors' Trust instead of the Public Guardian and Trustee.

New Brunswick

ESA Definitions of "Employee" and "Employer" Expanded

On August 1, 2024, the *Employment Standards Act* was amended by *An Act to Amend the Employment Standards Act*, SNB 2022, c. 52, to expand the definitions of "employee" and "employer".

The expanded definition of "employee" includes any person who performs work, supplies services, or receives certain training at the place of employment, "regardless of whether the person receives accommodations to meet the person's needs." The expanded definition of "employer" includes any person who authorizes a person to be present at the place of employment to perform work, supply services, or receive training.

For more details of the amendments, see *Canadian Employment Law Guide* newsletter no. 200, dated December 2022.

An Act to Amend the Employment Standards Act was first introduced on November 1, 2022 and received Royal Assent on December 16, 2022. According to a November 1, 2022 news release, the purpose of the amendments is "to eliminate situations in which people living with a disability receive less than minimum wage for doing work comparable to that completed by others."

Regulated Exemptions Now in Force in Relation To *Employment Standards Act* Definition of "Employee"

N.B. Reg. 2024-56 was filed on July 30, 2024 and came into force on August 1, 2024. It amends the *General Regulation - Employment Standards Act* to provide that, for the purposes of the definition of "employee" found in section 1 of the *Employment Standards Act*, the following activities are now exempt:

(a) job trials or job-shadowing not exceeding 35 hours or 5 days, whichever occurs first, for the purpose of learning about job or career opportunities and that do not lead to employment;

(b) experiential learning completed for credit as part of an educational program; and

(c) pre-employment training not exceeding eight weeks, offered by or on behalf of the Province, the Government of Canada or a local government as defined in the *Local Governance Act*, for the purpose of providing occupation-specific learning opportunities.

Northwest Territories

Minimum Wage Increased on September 1

The minimum wage in the Northwest Territories as increased, effective September 1, 2024. The increase was announced in a July 10, 2024 news release, The rate increased from $16.05 per hour to $16.70 per hour.

Since 2022, the minimum wage is adjusted annually using a formula based on the percentage change in the Consumer Price Index and the average hourly wage for the previous year.

The government also announced the release of a "What We Heard Report", which summarizes the results of a public survey on the minimum wage. Read the report here: https://www.ece.gov.nt.ca/sites/ece/files/resources/annual_minimum_wage_adjustment_2024_wwhr.pdf.

Saskatchewan

Minimum Wage Increasing on October 1, 2024

In a news release dated July 2, 2024, the Saskatchewan government confirmed that the province's general minimum wage will be increasing effective October 1, 2024. The current rate of $14.00 per hour will increase to $15.00 per hour.

The Immigration Services Act Proclaimed in Force July 1, 2024

In the issue of the *Canadian Employment Law Guide* newsletter from June 2024 (issue no. 207), we told you that *The Immigration Services Act*, SS 2024, c. 14 (the "Act"), received Royal Assent on May 8, 2024 and that it would come into force by order of the Lieutenant Governor in Council. That order has now been issued. The Act was proclaimed in force effective July 1, 2024.

The Act established a licensing regime for foreign worker recruiters and immigration consultants, as well as a registration regime for employers who recruit foreign nationals for employment. The regimes are similar to those that existed under *The Foreign Worker Recruitment and Immigration Services Act*, which was repealed when the Act was proclaimed into force.

The Act also imposes certain obligations on foreign worker recruiters, employers, and immigration consultants, including a number of prohibited practices, disclosure requirements, contract requirements, and record-keeping obligations.

The Saskatchewan government's new release announcing the coming into force is available here: https://www.saskatchewan.ca/government/news-and-media/2024/july/02/the-immigration-services-act-comes-into-force.

WORTH NOTING

Treasury Board of Canada Secretariat Announces Pay Equity Commissioner Has Granted Extensions To Deadline for Developing Pay Equity Plans for Core Public Administration and Royal Canadian Mounted Police

In a news release dated August 20, 2024, the Treasury Board of Canada Secretariat announced that the Federal Pay Equity Commissioner has granted extensions to the September 4, 2024 deadline to complete its pay equity plans for both the core public service and the Royal Canadian Mounted Police. The extensions are for three years for the core public service and for 18 months for the RCMP.

According to the news release, "employees who may be entitled to an increase in compensation under the final pay equity plans will receive that increase, as well as interest on that sum, backdated to the original deadline of September 4, 2024."

Federal Government Seeking Feedback on Strengthening the Canadian Workforce

As part of a call for input related to strengthening the Canadian workforce, the government of Canada has made an online questionnaire available.

According to the August 13, 2024 news release:

> By pooling together diverse views from across the country on how to drive a modern, inclusive, and productive labour market for the 21st century, the government will be better positioned to identify ways to build on our strengths, address challenges and seize opportunities to better prepare Canadians for success today and tomorrow.

The online questionnaire will be open until September 30, 2024.

Federal Government Announces "Employment Strategy for Canadians with Disabilities"

In a news release dated July 11, 2024, the federal government announced the launch of the "Employment Strategy for Canadians with Disabilities". The Strategy "aims to close the employment gap between persons with disabilities and those without by 2040." According to the news release, the Strategy is focused around three goals:

- **Individuals** – help them find and maintain good jobs, advance in their careers or become entrepreneurs;
- **Employers** – help them to diversify their workforces by creating inclusive and accessible workplaces; and
- **Enablers** – increase the supply, capacity, and reach of individuals and organizations that support disability inclusion and accessibility in employment.

Federal Government Announces Actions Intended To Reduce Use of Temporary Foreign Worker Program

In a news release dated August 6, 2024, the federal government announced the implementation of certain actions that are intended to reduce the use of the Temporary Foreign Worker Program. Specifically, the news release referred to four actions:

- Enforcing consistent application of the 20 per cent cap policy for temporary foreign workers. This includes the policy for the "dual intent sub-stream", which applies to temporary foreign workers who intend to apply for permanent residency. Employers using this stream will be subject to more stringent guidelines;
- Applying a stricter and more rigorous oversight in high-risk areas when processing Labour Market Impact Assessments (LMIAs) and when conducting inspections;
- Considering LMIA fee increases to pay for additional integrity and processing activities; and,
- Looking to implement future regulatory changes regarding employer eligibility (factors such as a minimum number of years of business operations or history of lay-offs by the employer).

In a subsequent news release, dated August 26, 2024, the federal government announced that certain changes that will be implemented as of September 26, 2024. These are:

- The Government of Canada will refuse to process Labour Market Impact Assessments (LMIAs) in the Low-Wage stream, applicable in census metropolitan areas with an unemployment rate of 6% or higher. Exceptions will be granted for seasonal and non-seasonal jobs in food security sectors (primary agriculture, food processing and fish processing), as well as construction and healthcare;
- Employers will be allowed to hire no more than 10% of their total workforce through the TFW Program. This maximum employment percentage will be applied to the Low-Wage stream and is a further reduction from the March 2024 reduction. Exceptions will be granted for seasonal and non-seasonal jobs in food security sectors (primary agriculture, food processing and fish processing), as well as healthcare and construction; and
- The maximum duration of employment for workers hired through the Low-Wage stream will be reduced to one year (from two years).

Manitoba Conducting Public Consultation on Accessible Employment Standard Regulation

In a news release dated July 15, 2024, the Government of Manitoba announced that it is launching a review of the Accessible Employment Standard under the *Accessibility for Manitobans Act*.

The Accessible Employment Standard was first enacted on May 1, 2019. It addresses practices relating to employee-employer relationships, including recruitment, hiring, accommodations, and retention.

Members of the public are invited to provide feedback through an online survey or sign up for virtual town hall sessions hosted by the Accessibility Advisory Council.

The consultation will be open until November 1, 2024. For more information, see: https://engagemb.ca/accessible-employment.

Nova Scotia Releases Workers' Compensation System Improvement Review Committee Report

The government of Nova Scotia has released a report from the Workers' Compensation System Improvement Review Committee. The report's release was announced in a news release dated August 30, 2024.

According to the news release, the report is focused on 10 priority areas:

- system sustainability
- injury prevention
- awareness and understand of the system
- claims administration

- supporting safe and timely return-to-work
- compensation and benefits
- coverage
- psychological health and safety and gradual onset stress
- reviews and appeals
- system transparency and accountability.

The report may be accessed here: news.novascotia.ca/sites/default/files/2024-08/Workers%27 Compensation Review Committee Report.pdf.

Prince Edward Island Seeking Feedback on Draft Regulations Under *Temporary Foreign Worker Protection Act*

The government of Prince Edward Island is seeking feedback in relation to draft regulations under the *Temporary Foreign Worker Protection Act*. According to a news release dated August 29, feedback will be sought until September 19, 2024.

Further information may be found here: https://www.princeedwardisland.ca/en/information/workforce-advanced-learning-and-population/temporary-foreign-worker-recruiter-licence.

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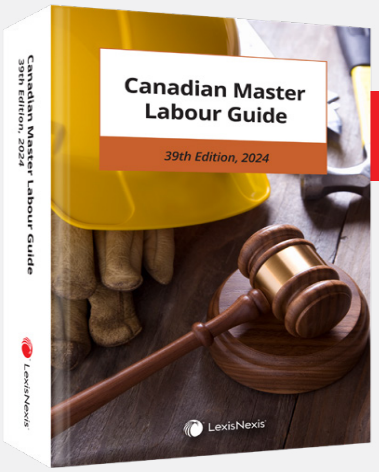

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- New individual termination notice requirements in the federal jurisdiction
- Changes to group termination notice requirements in Ontario

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