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• THREAT OF TERMINATION NOT SUFFICIENT
“CONSIDERATION” FOR NEW OR AMENDED TERMS OF EMPLOYMENT •

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The recent decision of the Ontario Court of Appeal in *Hobbs v. TDI Canada Ltd.*¹ (“*Hobbs*”) illustrates that courts will not enforce a written agreement introducing new or amended terms of employment relationship unless the employer provides *sufficient, new*, consideration for the terms. The promise of continued employment does not satisfy the consideration requirement.

THE FACTS

Mr. Hobbs accepted and commenced employment with TDI on the basis of terms set out in an offer letter. The offer letter outlined Mr. Hobbs’ annual draw against commissions, entitlement to benefits, and holiday and vacation entitlements. However, the offer did not specify the commission rates which had

been agreed to orally. When Mr. Hobbs questioned this omission, he was told that the commission rates would be covered in a separate document.

Six days after Mr. Hobbs commenced employment, TDI presented him with a non-negotiable document for signature (the "Agreement"). The Agreement set out the agreed commission rate, but also included what the court described as onerous terms such as: management's right to change commission rates at its sole discretion; and the elimination of Hobbs' right to commissions after dismissal even on contracts entered into prior to dismissal.

After only five (5) months of employment Hobbs began to question TDI's intention to pay commissions, and he resigned to accept new employment. Hobbs then initiated a lawsuit claiming unpaid commissions. In response, TDI argued that Hobbs' entitlement to commissions was restricted by the terms of the Agreement.

THE COURT'S DECISION

The trial judge agreed with TDI, upheld the Agreement and dismissed Hobbs' claim. However, the Court of Appeal disagreed and overturned the trial judgment for two significant reasons.

First, the Court of Appeal rejected the position that the Agreement formed part of the original contract of employment because:

- The original offer letter did not indicate that Hobbs would be required to sign the Agreement or that the Agreement would form part of his terms of employment.
- The Agreement was inconsistent with the oral agreement regarding commission rates.
- The Agreement was presented to Hobbs after he had already been hired and had started work.

Second, the court concluded that the Agreement was not enforceable as an independent agreement because TDI provided no "consideration" for the Agreement. In particular, the court rejected TDI's argument that continued employment constituted sufficient consideration. Citing its earlier decision in *Francis v. Canadian Imperial Bank of Commerce*,² the court stated (at para. 32):

...the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms.

The court concluded that *continued employment* could only be considered sufficient consideration where the employer actually forebears on a *clear prior intention* to terminate. The court noted that this is particularly important given the inequality of bargaining power that often characterizes the individual employment relationship (at para. 42):

The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable.

LESSONS FROM HOBBS

In light of *Hobbs*, employers need to remember:

- When presenting offers of employment, ensure that all important terms and conditions are included in the offer.
- Terms and conditions of employment found in documents other than an offer letter or employment agreement (such as a confidentiality agreement, non-competition agreement or benefit plans) should be presented with the offer or as attachments to the employment agreement. Alternatively, the offer should be made conditional upon the employee signing these separate agreements.
- All agreements must be signed BEFORE the individual commences employment.
- Changes to significant terms and conditions of employment require reasonable notice or new consideration.
- New consideration may include a reasonable monetary compensation.

- The promise of continued employment does not constitute sufficient consideration, unless the employer forebears on a clear, prior intention to terminate.

¹ [2004] O.J. No. 4876 (C.A.) (QL).

² [1994] O.J. No. 2657 (QL), 21 O.R. (3d) 75 (C.A.).