

Don't Forget to Consider "Consideration"

Jeremy D. Schwartz

One of the most common pitfalls employers face when contracting with employees, is failing to ensure they provide "fresh" consideration for new contractual terms and conditions.

Employers would do well to use the following simple checklist whenever they are contracting with employees, whether present or future, and whether orally or in writing:

1. Offer
2. Acceptance
3. Consideration

These are the fundamental components of a contractual agreement - without which the contract will be unenforceable. The first two are usually simple enough to establish (especially if you always contract in writing – highly recommended). The last component is fraught with difficulty and heavily litigated.

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Obaidi v. Home Depot

Home Depot recently ran in to this issue in [*Obaidi v. Home Depot*, 2010 ONSC 6170 \(CanLII\)](#) (November 11, 2010). In this recent decision, the Ontario Superior Court of Justice refused Home Depot's motion for summary judgment (a motion to determine all or part of an action without trial). Home Depot argued that the written employment contract Mr. Obaidi signed contained a provision that specified the amount Mr. Obaidi would receive on termination without cause, and so his action for common law notice was without merit.

The Court's reasons are clear on why summary judgment was refused - there was a live question about whether Home Depot and Mr. Obaidi had entered into a verbal employment

contract **before** they signed the written contract. Home Depot provided no new consideration (*i.e.* no new promotion or monetary compensation) for signing the written contract containing the termination provision. So there was at least a triable issue about whether Home Depot failed to give Mr. Obaidi "fresh" consideration for the written contract. If there was no fresh consideration, the contract – and along with it the termination provision – were unenforceable.

To avoid this consideration pitfall:

1. When contracting with new employees:
 - a. Advise candidates early that all discussions and correspondence are conditional and subject to the terms of the formal written offer. Document this.
 - b. Ensure new employees do not commence employment and do not start working, including pre-employment training, before they sign on the dotted line. That way, employment is the consideration.
2. When contracting with existing employees:
 - a. Avoid implementing any fundamental changes to the employment contract without providing something in return as fresh consideration.
 - i. It does not have to be significant, though providing something of at least nominal value helps with employee morale and uptake generally. Consideration can include anything from an extra vacation day, to a small signing bonus.
 - ii. Any time you introduce an increase in pay or promote the employee (provided the increase or promotion was not contractually guaranteed) that is a great time to roll out a new written contract or policy.
3. Have your legal counsel draft or at least review your employment offers and contracts, and when in doubt, go back to the checklist – Offer, Acceptance and Consideration.

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