

Be Careful Sending Offer Letters by E-mail

Late last year, the Ontario Superior Court of Justice handed down a decision that most likely has the defendant employer wishing that it could recall its email to a successful job candidate. In *Buaron v Acuity Ads Inc, 2015 ONSC 5774*, the plaintiff, Mr. Buaron, interviewed with Acuity Ads for the position of Senior System Administrator. During this interview, the parties negotiated and reached a verbal agreement on certain terms of Mr. Buaron's employment, including his salary, a three month probationary period and details on benefits and vacation entitlement. Mr. Buaron left the interview on the basis that he would sign a letter confirming the terms that had been discussed.



Following the interview, Acuity Ads sent Mr. Buaron an e-mail with an offer letter attached, which set out the terms of employment as discussed. The e-mail specified that the parties would schedule a time for him to "come in and go through the contracts". Subsequently, Mr. Buaron executed a more comprehensive employment agreement, which stipulated that if he was terminated without cause, he would be provided a severely limited payment in lieu of notice.

Mr. Buaron worked for 9 months before he was dismissed without cause and was provided with severance in accordance with the employment agreement. He argued that the subsequent agreement he had signed was not binding, as a contract between him and Acuity Ads had already been formed when he received its offer letter. As the offer letter was silent on notice upon termination, Mr. Buaron argued he was entitled to receive reasonable notice at common law instead.

The Court agreed with Mr. Buaron, finding that Acuity Ads had already made the offer of employment during the interview. He had accepted its offer during the interview, conditional on receiving written confirmation of the agreed essential terms of his employment - salary, title, vacation, probation period, and benefits. While Acuity Ads could have easily included the employment agreement as an attachment along with the offer letter in its e-mail, or mentioned that a comprehensive employment agreement would have to be signed before Mr. Buaron started work, it chose not to do so. Given the discussions at the interview, the Court found that Acuity Ads' action of sending an offer letter setting out these essential terms was sufficient to establish a binding contract.

To form a legally binding contract, both parties must agree on the essential terms and exchange something of value - referred to as "consideration" - upon executing the contract. Variations or new terms and conditions of existing contracts may not be binding without new or additional consideration for the variation or new term. In this case, Acuity Ads had a binding contract and did not provide fresh consideration when it presented Mr. Buaron with the more comprehensive employment agreement with termination provisions. Accordingly, the termination provisions in

the subsequent agreement were not enforceable. The Court awarded Mr. Buaron reasonable notice, which it determined to be four months - almost half of the time he worked for Acuity Ads.

Buaron serves as a reminder to all employers to avoid communicating agreement (either verbally or in writing) on the fundamental terms of employment with prospective employees before all of the terms and conditions of the employment relationship have been properly set out in a contract.

Another similar, common issue which raises the "consideration" issue is when employers allow an employee to begin work prior to signing an employment contract. In such circumstances, an employee may have an argument that consideration was exchanged when the employee started work. Thus, any contract signed subsequent to the commencement of work is void and unenforceable, leaving any prior verbal discussions or communications to govern the employment relationship.

As noted by the Court in *Buaron*, an employer can vary an existing agreement by providing fresh consideration (for example, a lump sum payment as a signing or retention bonus). However, it is best practice to simply avoid this altogether by communicating an offer of employment along with the key terms, including termination provisions, in the letter or contract of employment. Alternatively, the employer can make an offer with an express stipulation that the terms and conditions of employment will be set out in subsequent documentation. In any case, the agreement ought to be in place before the employee starts work.