



## Court of Appeal Confirms the Need to Present New Employment Agreements with Promotions

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An employment agreement is arguably the most important document that an employer can have in place. The agreement can define and limit numerous employer obligations (e.g. overtime pay obligations) and can establish employee obligations (e.g. non-solicitation obligations).

One of the most critical provisions in an employment agreement, is the termination provision. With an enforceable termination provision, an employee can be limited to their minimum *Employment Standards Act* entitlements or a greater amount. Without such a provision, when dismissed, an employee will be entitled to both their statutory termination entitlements and their common law termination entitlements. With a proper termination provision in an enforceable employment agreement, an employee's termination entitlements could be reduced from 24 months' compensation to only 8 weeks.

Many Canadian employers have adopted the best practice of presenting new employees with an enforceable employment agreement, as the offer of employment. However, many Canadian employers are failing to present an updated and new employment agreement, when an employee is promoted. Without a new employment agreement, the original employment agreement may become unenforceable.

In the recent decision of [Celestini v. Shoplogic Inc.](#), the Ontario

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Court of Appeal held that an employee's contract had become unenforceable due to substantial changes to the terms and conditions of employment. In that case, the employee was hired and executed an enforceable employment agreement in 2005. By 2017, although the employee's title remained the same, his role had dramatically changed and there were substantial changes to his compensation package. As a result of these changes and pursuant to the common law doctrine of *changed substratum*, the Court of Appeal upheld a decision determining that the 2005 employment agreement was unenforceable. Accordingly, the employee's termination entitlements were not limited by way of the 2005 employment agreement. As such, instead of being entitled to only 12 months' termination pay and a pro-rated bonus up to his dismissal (as was provided in the agreement), the employee was awarded 18 months' compensation, including his bonus during the 18 months' notice period.

Although the substantial changes to the terms and conditions of employment are what rendered the agreement unenforceable, as the agreement was over a decade old, it is likely that there were many other issues with it. Indeed, it is exceedingly rare for an employer to have an agreement that is over a decade old, confirmed enforceable, in view of current caselaw. Further, an agreement that is over a decade old, has likely missed addressing a subject that is now considered an important (e.g. remote work, the right to lay off, etc.).

In light of the above, it is important to present current employees with a new employment agreement, when you can. However, a new employment agreement can only be entered into when the current employee is being offered substantial new consideration (e.g. a promotion, a bonus, a new RRSP matching plan, etc.). This is because a fundamental requirement for an enforceable employment agreement is that both sides have been given something new. Whether something constitutes new substantial consideration varies, based on the facts. However, getting to keep your job or getting to still receive the annual holiday bonus, will never constitute new substantial consideration.

If an employee is being provided with new substantial consideration, the employee should be provided with a new agreement, which expressly confirms the new consideration and the employee's original start date. If the employee refuses to execute the new employment agreement, then the employee should not be provided with the new consideration. If there is no new substantial consideration, the employee should instead be provided with a memo to sign. The memo should confirm the new terms and conditions of employment, and that otherwise the terms and conditions in the employment agreement remain enforceable. Indeed, as a best practice, employers will often use the annual compensation memo to confirm that the terms and conditions in the most recent employment agreement remain enforceable.

For further information about the above, including putting into place new employment agreements with current employees and using annual compensation memos, please [contact our firm](#).

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