

No consideration: Ontario Court of Appeal rules contract signed after hiring unenforceable

In a decision issued on December 1, 2004, the Ontario Court of Appeal has allowed the appeal of an employee who claimed he had been unfairly denied commissions owing to him when he resigned his position with his employer. The trial decision, *Hobbs v. TDI Canada Ltd.*, reported in *FOCUS Alerts*, upheld the validity of the employment contract under which the employer had denied the commissions, despite the fact that it contained onerous provisions and was signed by the employee after he had been hired (see ["Blinded by optimism": Court enforces "onerous" contract signed after hiring"](#)). In allowing the appeal, the Court of Appeal stated that the issues to be resolved were whether the employer had disclosed fairly to the employee what the terms of his new employment would be and whether it could rely on the terms of the agreement that it had obliged the employee to sign after he had been hired.

Hobbs, a salesperson, had accepted employment with TDI on the basis of a contract that specified an annual draw of \$60,000 but was silent on commission rates, which were to be covered in a separate document. Hobbs and TDI had agreed verbally to the commission rates. One week after starting his employment, Hobbs was given a document called the "Solicitor's Agreement". He was told that it was non-negotiable and that he had to sign it before any payments would be made to him.

Among the terms of the Solicitor's Agreement were the following:

- The commission rates to which the parties had agreed verbally were "subject to change at the sole discretion of TDI Management and changes [to them would] not be deemed a change in the solicitor's employment terms."
- Commissions were "payable only on amounts actually received by the Company during the term of solicitor's employment", and no commissions would be paid until a solicitor's cumulative commissions surpassed his or her annual draw.
- Commissions would be paid once they exceeded the solicitor's annual draw, with 25% being held back for bad debts.
- If a solicitor's employment were terminated, the Company would pay the solicitor only "the commissions due him/her as of the date of his/her termination over that solicitor's annual draw."
- A solicitor who was terminated or who resigned would have no claim for commissions "with respect to any billings on accounts commencing subsequent to his/her date of termination of employment, even though such billings result from contracts actually entered into before his/her termination of employment or for collections occurring after such date."

After almost three months of employment, Hobbs had seen no commission cheques. He had been under the impression that he was to be paid on a quarterly basis based on sales made, after taking into account the monthly draws he had received. However, TDI told him that he would

be paid commissions only when they had reached the value of his full annual draw and all of the billings on which they were based had been collected from clients.

Another month passed without Hobbs receiving any commission payments. Although his sales then exceeded his annual draw of \$60,000, he was told that he would not be paid until all of the money had been collected. At that point, Hobbs decided to accept employment elsewhere. At the time, he had earned a total of \$76,043 in commissions, yet had been paid only some \$23,000, based on his monthly draws of \$5,000, his car allowance and vacation pay.

The trial judge held the contract signed by Hobbs after he had been hired was onerous but enforceable. He held that it should not be seen as a second contract, but as the second installment of the contract signed by Hobbs when he was hired. He also ruled that, even if the Solicitor's Agreement was a new contract, it was enforceable because it provided Hobbs with consideration (something of value). The judge noted that, although it was clear that the consequences of not signing the second agreement would be termination, this did not make the agreement invalid. Referring to the decision by the Ontario Court of Appeal in *Techform Products Limited v. Wolda* (see "[Independent contractor's invention owned by company, Court of Appeal rules](#)"), the judge held that an employer's agreement not to dismiss an employee for a reasonable period of time after the second agreement is signed is adequate consideration for the employee signing it.

COURT OF APPEAL: AGREEMENT AN AMENDMENT OF ORIGINAL CONTRACT

In upholding Hobbs' appeal, the Court of Appeal ruled that the trial judge had erred in holding that the Solicitor's Agreement was the second installment of one contract. The Court gave three reasons for concluding that the Solicitor's Agreement was a separate contract:

- The initial letter presented to Hobbs gave no indication that it was the introductory part of a more extensive contract of employment that was to follow at a later date. Nothing in the hiring letter suggested that Hobbs would be required to sign any other document relating to commissions or that such a document would form part of his employment contract with TDI. Nor did anything in the hiring letter hint at the onerous terms of the Solicitor's Agreement.
- The Solicitor's Agreement was inconsistent with the commission arrangement to which Hobbs and TDI had already agreed – rates of six percent for new business and five percent for renewals. The Solicitor's Agreement, while setting out those commission rates, provided that TDI could change the rates unilaterally at any time.
- The verbal agreement between Hobbs and TDI regarding commission rates and the written offer of employment contained all of the essential terms of the employment contract between TDI and Hobbs. The Solicitor's Agreement was not necessary to complete an already valid contract.

Accordingly, the Court held that the Solicitor's Agreement was not part of the employment contract under which TDI hired Hobbs but, rather, was an amendment of the contract.

NOTHING OF VALUE TO EMPLOYEE IN AGREEMENT

Having found that the Solicitor's Agreement was not part of the original employment contract, the Court then considered whether its terms were valid and enforceable and held they were not, because the Agreement contained no consideration in favour of Hobbs. The Court disagreed with the trial judge's conclusion, based on *Wolda*, that Hobbs' continued employment constituted legal consideration flowing from TDI to Hobbs. In the Court's view, Hobbs' case was governed not by the principles contained in *Wolda* but by those set out in the Court of Appeal's 1994 decision, *Francis v. Canadian Imperial Bank of Commerce*, which made it clear that "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".

In the cases relied on by the employer, the Court stated, something more than mere continued employment had passed to the employee signing the disputed contract. In *Wolda*, for example, the employer had formed a clear prior intention to terminate the employee. However, in return for signing the agreement, the employer tacitly promised not to dismiss the employee for a reasonable period.

In Hobbs' case, however, there was no evidence that TDI had intended to end Hobbs's employment before it asked him to sign the Solicitor's Agreement. Nor did the evidence suggest that TDI had considered that Hobbs' signing the Agreement would affect any right it had to dismiss him. Signing the Agreement did not provide Hobbs with any more job security than he had under the terms of the original contract signed at the time of his hiring.

The Court concluded by noting the importance of closely scrutinizing amended contracts in an employment context to ensure that something of value passes to the employee in return for the amendment:

"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. The law recognizes this vulnerability, and the courts should be careful to apply [*Wolda*] only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment."

Accordingly, the Court allowed Hobbs' appeal and awarded him the commissions withheld by TDI and interest.

In Our View

Because of its conclusion on the lack of consideration in the contract, the Court did not have to deal with Hobbs' submissions that TDI had misrepresented the employment opportunity it was offering. However, the Court advised employers that, if they wish to have new employees sign a standard employment agreement, they should incorporate the terms of the agreement into the original contract of employment by stating in their offer of employment that the offer is conditional upon the prospective employee agreeing to accept the terms of the employer's standard form of agreement, a copy of which could be enclosed with the offer letter. In this case, TDI had failed to advise Hobbs that it would require him to sign a standard form of agreement and did not advise him of its terms until after he had resigned from his previous employment. This prevented Hobbs from making a fully informed decision about his future.

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