Ontario Court of Appeal confirms that disagreement over calculation of a bonus does not give rise to constructive dismissal

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In a recent decision the Ontario Court of Appeal has confirmed a lower court decision which held that an employer's calculation of a senior employee's bonus entitlement (denying him $329,000 he thought he was entitled to) constituted a breach of his employment contract, but did not give rise to a constructive dismissal claim.

In *Chapman v. GPM Investment Management*, the plaintiff was employed by GPM Investment Management, a company which provides real estate management services, as its Chief Executive Officer and President (as well as being a director of Integrated Asset Management Corp., a company which held an ownership interest in GPM). He had worked for GPM for nine years, under three successive memoranda of understanding ("MOU") which set out the terms and conditions of his employment. The most recent MOU included the following provision:

Annual pro rate bonus available shall be 10% of pretax profit of GPMA and Darton less interest income and depreciation. Profit shall not include present level, if crystalized, of performance fees to GPMA on GPM/Endow (8) of $0.60 MM.

The dispute between the parties arose in October of 2011 when the plaintiff was informed that, in calculating his bonus for that year, GPM intended to exclude income associated with the sale of a specific piece of property (the "Ellerslie lands"). The piece of land had been acquired by GPM as a long-term investment before Mr. Chapman commenced employment with the company and was viewed by the company as falling outside the scope of the bonus calculation. A week after being notified by the company of how it intended to calculate his bonus, the plaintiff left his employment, claiming that the refusal to include the profits from the sale of the Ellerslie lands in calculating his bonus constituted a constructive dismissal. He sued GPM for damages for breach of his employment contract and for constructive dismissal.

At trial, the judge found that GPM had breached the plaintiff's employment contract. The plaintiff's contract required that his bonus be calculated based on all of GPM's income, including capital gains on real estate investments, and not just on operating income. However, the trial judge found that this did not give rise to a claim for constructive dismissal. In his view, the dispute between the parties as to how the bonus was to be calculated was a matter of disagreement over the interpretation and application of the bonus scheme in his contract, but did not represent the alteration of an essential term of that contract. The trial judge also found that Mr. Chapman had other dispute resolution options available to him to resolve the dispute over the amount of his bonus, other than leaving his job and suing to recover the money. Mr. Chapman appealed to the

Ontario Court of Appeal.

Before the Court of Appeal, Mr. Chapman argued that the trial judge had erred in law in his application of the test for establishing constructive dismissal. The test relied upon is that set down by the Supreme Court of Canada in *Potter v. New Brunswick* (2015). The *Potter* test has two branches: (i) the first applies where an employer has, by a single unilateral act, breached an essential term of the employment contract; (ii) the second applies where there has been a series of acts that, taken together, show that the employer no longer intends to be bound by the contract of employment. The first branch of the *Potter* test has two steps: (i) the employer's conduct must first be found to constitute a breach of the employment contract; and (ii) if a breach of contract is found, the employer's conduct must be found to *substantially alter an essential term of the contract*. In applying this second step of the first branch, the question which must be asked is "*whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention to no longer be bound [by the employment contract*]*."*

The Court of Appeal rejected all of the appellant's arguments and found that the trial judge had correctly applied the test for constructive dismissal laid down in *Potter*. According to the Court, both branches of the *Potter* test are directed at answering the same ultimate question – *i.e*., whether the employer has, by its conduct, evinced an intention not to be bound by the employment contract. The trial judge had relied upon the plaintiff's own testimony, which confirmed that he had not been advised by anyone on behalf of GPM that any of his terms and conditions of employment had been or would be altered, in concluding that GPM intended to continue to be bound by the employment contract. The Court of Appeal found that the trial judge had not committed any error in characterizing the dispute between the parties as solely about whether a particular transaction fit within the plaintiff's bonus structure, nor was he wrong in concluding that the plaintiff, a commercially sophisticated party, could have been expected to explore other dispute resolution alternatives to resolve this dispute. The conclusion that the employer's conduct did not constitute constructive dismissal was upheld.

The appeal was dismissed, with costs in the amount of $17,000, awarded to GPM.

In our view

Although it may be tempting to look at the amount of money the plaintiff was out as a result of his employer's improper bonus calculation (over $329,000) and jump to the conclusion that this necessarily represents a substantial alteration to an essential term of the employment contract, the Court of Appeal decision makes it clear that this is not the proper approach. Regardless of how serious a breach of an employment contract might seem, the question which must be asked is whether the breach reveals an intention on the part of the employer to no longer be bound by the

employment contract. This decision appears to confirm that the severity of breach alone will not be sufficient to meet the test for constructive dismissal set down by the Supreme Court of Canada in *Potter*.

For further information please contact Steven Williams at 613-940-2737 or Sophie Gagnier at 613-940-2756.