"Blinded by optimism": Court enforces "onerous" contract signed after hiring

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An Ontario court has upheld the validity of an employment contract signed by a salesman even though he was already employed by the employer when he signed the contract and, under its terms, was eventually denied compensation for the sales he had generated.

At issue in *Hobbs v. TDI Canada Ltd.* (March 13, 2003) was an action by Allan Hobbs against his employer for damages for commissions owing, constructive dismissal and misrepresentation. Hobbs 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.

One week after starting his employment, Hobbs was given a document that he was told was non-negotiable and that he had to sign before payments would be made to him. He was told to study it and sign it as soon as possible. Hobbs found the document more complex than he had expected. However, he signed it despite his misgivings and without asking any substantive questions about its terms.

If Hobbs had taken the trouble to examine the contract, he would have seen that it provided that an employee who resigned voluntarily would receive no commissions for sales made unless the commissions exceeded the amount of the employee's annual draw, with 25% being held back for bad debts. As well, the agreement stated that such employees had no claim to commissions or compensation that commenced, or collections that occurred, after their resignation. What this meant was that, for employees leaving TDI voluntarily, commissions would be paid based only on actual collections made as of the date of their departure.

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.

ONEROUS TERMS, CLEARLY SPELLED OUT

In dismissing Hobbs' action, the court observed that, while Hobbs was an experienced salesman with wide experience in the industry, he had chosen not to question the contract, despite its clearly spelled-out and onerous terms. He had asked no meaningful questions about it and had signed without coercion. Noting that the contract resulted in Hobbs being denied remuneration for the sales he had generated, the court speculated as to why a man of Hobbs' experience would sign such an agreement:

> "It may be that he was blinded by the optimism a new venture often engenders and proceeded with his employment until problems occurred. Mr. Hobbs gradually became frustrated with the details of the remuneration and decided to leave of his volition. He did so knowing that he would not be paid more than the draw he had received. He also knew that he would have been paid all commissions less advances and any bad debts. None the less he chose to leave."

The court held that the employer had not made any misrepresentation that caused Hobbs to sign the contract and that there was no evidence of duress:

> "Mr. Hobbs was an experienced businessman who was not lured to his position with the company. He was employed and well paid at the time of the negotiations. He was given adequate time to review the terms of the solicitor's agreement under circumstances where neither coercion nor duress could be said to exist."

The court also held that the contract was not unconscionable. TDI had not taken advantage of any weakness or necessity on the part of Hobbs. The terms of the agreement were clear and their meaning should have been clear to Hobbs.

ONE CONTRACT IN TWO INSTALLMENTS, OR TWO CONTRACTS?

The court also held that the agreement presented to Hobbs after he was hired should not be seen as the substitution of one contract for another without consideration (something of value) but, rather, as the second installment of a single employment contract. However, the court also stated that the second agreement could stand, even it were held to be separate from the first.

The court 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" on our What's New page), the court held that an employer's agreement not to dismiss an employee for a reasonable period of time after the agreement is signed is adequate consideration for the employee signing the contract.

In Our View

Courts will not always uphold an agreement if a currently employed employee is told to sign it or face dismissal. The question with such contracts is whether they provide anything of value to an employee who already has the benefit of being employed. The Court of Appeal in *Wolda* held that the validity of such an agreement depends upon whether the employer has formed a genuine intention to terminate an employee, and agrees not to do so for a period of time if the employee signs. In these cases, the promise by the employer not to terminate is valid consideration. However, the Court of Appeal went on to say that

> "[w]here there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract say, 'sign or you'll be fired' and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter."

For other cases in which courts have enforced relatively harsh terms in employment contracts, see "Ontario Court of Appeal upholds validity of termination clause for independent contractor" and "Clause limiting wrongful dismissal damages to Employment Standards Act minimum upheld by Court" on our What's New page. For further developments in this case, see "No consideration: Ontario Court of Appeal rules contract signed after hiring unenforceable" on our What's New page.

For further information, please contact André Champagne at (613) 940-2735.