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“VULNERABLE EMPLOYEES NEED PROTECTION”

The Ontario Court of Appeal has emphatically confirmed that an employment contract signed without new consideration is invalid. In doing so, the Court has produced another addition to a growing line of strongly worded decisions that emphasizes the need to protect vulnerable employees.

In *Hobbs v. TDI Canada Ltd.*, released on December 1, 2004, the Court limited the application of *Techform v. Wolda* (2001), 56 O.R. (3d) 1 (C.A.) and reaffirmed its decision in *Francis v. CIBC* (1994), 21 O.R. (3d) 75, which held that an employment contract that is presented to an employee and signed after the employee begins new employment is unenforceable unless some new consideration is provided.

The successful appellant in the most recent decision, Alan Hobbs, was a salesperson, selling transit advertising. When his old company lost its major source of revenue, the successful bidder – the respondents - offered him a position to work with his old clients. Hobbs had oral discussions with the respondents – who agreed to pay Hobbs certain negotiated commission rates. Shortly afterwards, the respondents provided an offer letter that offered a draw of \$60,000 against commission, with details on the rates to follow. On the basis of that letter, Hobbs quit his old job and agreed to join TDI.

A few days after he started working for TDI, Hobbs was presented with a new document, which he was told was “non-negotiable.” The document set out a range of terms relating to calculation of commissions including terms that limited TDI’s obligation to pay commissions in the event that Hobbs resigned or was dismissed. Having already left his old employer and having started work for his new employer, Hobbs signed the new document.

After a number of months, Hobbs began asking TDI when he would be paid commissions owing. He was only being paid a draw and a monthly car allowance and was growing impatient waiting for a reconciliation. Hobbs quit his employment with TDI and asked for a reconciliation of commissions against draw.

Relying on the new document, TDI maintained that Hobbs was only entitled to be paid commissions if his full annual draw was exceeded – even though he had only worked for 5 months. TDI refused to pay Hobbs commissions on his actual billings weighed against the draw that was actually paid to him. Hobbs sued for commissions owing on the \$3.1 million worth of sales that he had sold for TDI, which all agreed was subject to commission of 6%.

At trial, Justice Peter Jarvis of the Ontario Superior Court dismissed the action. ([2003] O.J. No. 2646) Justice Jarvis held that the new document that Hobbs signed after starting work with TDI was a “second installment” of the contract. He held that since Hobbs had read and signed the contract, he was bound by it even though it was only provided to him after he started work and even though it contained “onerous” terms.

In his reasons, Justice Jarvis also held that the Court was bound by *Techform v. Wolda* and that forbearance from dismissal is adequate consideration in this type of situation. The Court also relied on a 1935 Supreme Court of Canada decision, *Maguire v. Northland Drug Co.* [1935] S.C.R. 312, which arrived at the same conclusion.

In overturning the trial Court decision, the Ontario Court of Appeal rejected the two installment analysis. It held that Hobbs had not been shown the “second installment” and had no way of anticipating its onerous terms. The second document was only provided to Hobbs after he started working and therefore required some new consideration if it were to be enforceable.

The Court of Appeal then considered whether Hobbs was provided with any such new consideration. In distinguishing *Techform v. Wolda*, the Court noted that there was no evidence in Hobbs’ case that the respondent TDI wanted or intended to terminate Hobbs’ employment prior to having him sign the second document. Although TDI may have told him that he had to sign the document to keep his job, there was no explicit or tacit promise of forbearance from dismissal. The Court therefore ruled that there was no consideration and the agreement was unenforceable. The Court held that Hobbs was entitled to \$52,779, the amount billed and collected up to the effective date of his resignation.

Finally, the Court of Appeal reiterated the proper procedure for having employees sign standard form employment contracts – which had been set out by Madam Justice Weiler in *Francis v. CIBC*:

Employers should state “in the original 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 offering letter.”

In light of the Court’s most recent decision, anything short of this procedure will jeopardize the enforceability of any newly imposed employment agreement in the absence of fresh consideration.

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