Honesty Is The Best Policy: Employer Punished For Misleading Employee About Sale Of Business



In *Gascon v Newmont Goldcorp*. ("***Gascon***"),[1] an Ontario court has sent a strong warning to employers about the consequences of misleading employees into believing that they will remain employed following a sale of business.

Background

In November 2019, Newmont Goldcorp ("**Newmont**") entered into an agreement to sell its Red Lake Mine to Evolution Mining ("**Evolution**"). The anticipated completion date of the transaction was March 31, 2020. As Newmont's General Manager and most senior employee on site, Mr. Gascon was instrumental in facilitating the $375-million sale between November 2019 and March 2020.

Prior to entering into the purchase agreement with Evolution, one of Newmont's Vice Presidents had assured Mr. Gascon that he would be "going with" the Red Lake Mine when it was sold to Evolution. Mr. Gascon understood this to mean that his employment would continue with Evolution after the closing of the transaction.

In mid-March 2020, Mr. Gascon asked the Vice President about his long-term incentive grants and a merit increase, which he usually received from Newmont in late February or early-March. Mr. Gascon was advised that Newmont was working with Evolution to replace these entitlements after the closing of the transaction. The Vice President also asked Mr. Gascon for his cooperation to continue performing his duties prior to the closing.

At about the same time, Newmont learned that Evolution would not be retaining Mr. Gascon as an employee after the closing of the transaction. Weeks later, Mr. Gascon's employment with Newmont was terminated on a without cause basis, effective March 31, 2020.

As a result, Mr. Gascon brought a wrongful dismissal action against Newmont alleging, in part, that Newmont misled him, acted dishonestly, and breached its duty of good faith when he repeatedly inquired about the status of his employment following the sale to Evolution.

The Court's Decision

The summary motion judge agreed with Mr. Gascon and found that the Vice President's conduct in the months leading up to the closing of the transaction was untruthful, misleading, and unduly insensitive. In the judge's view, the Vice President must have known as early as February 2020 that Newmont would be dismissing Mr. Gascon upon the closing if Evolution did not hire him. Mr. Gascon sought numerous opportunities to have a "frank discussion" with Newmont about the future of his employment, and was repeatedly denied.

As a result of Newmont's failure to fulfill its common law duty of honest performance (which states that parties must not knowingly mislead their counterpart about matters directly linked to the performance of a contract), the judge ordered Newmont to pay Mr. Gascon $50,000 in moral or exemplary damages.

Takeaways

Sellers in a commercial transaction may encounter uncertainty during the sale process about whether their employees will remain employed by the purchaser after closing. However, as details about employee retention emerge, sellers have a duty to be truthful with employees about their future employment prospects. While the *Gascon* decision does not impose a positive obligation on sellers to proactively disclose to their employees the fact that they may not be retained after closing, it does stand for the principle that sellers must not knowingly mislead their employees – especially where the employees are instrumental to the success of the closing.

Footnote

1 2020 ONSC 2511.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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