Snatching Defeat From The Jaws Of Victory

Tossonian v. Cynphany Diamonds Inc. o/a Symphony Diamonds, 2014 ONSC 7484, costs decision 2015 ONSC 766

On paper, this recent decision appears to be a victory for the employer, Symphony Diamonds, who successfully established that there was no agreement as to a five-year term of employment, despite the existence of a written contract that set out the five-year term. A review of the decision on the merits as well as the subsequent cost award, however, reveals that this is a case where hard-ball litigation tactics ultimately backfired on the employer. It is a salutary lesson for employers on the benefits of reasonable offers and avoiding the escalation of legal battles.

The Background

On July 11, 2011, Razmig Tossonian met with Sarkis Zorian in Vancouver, B.C.. Both were in the jewellery business. Tossonian worked with Rodeo Jewellers in British Columbia and Zorian owned several jewellery stores in Toronto. Tossonian wanted to move to Toronto and the two businessmen had a fruitful discussion about Tossonian's possible role with Symphony Diamonds.

On July 20, 2011, Zorian sent an email to Tossonian, confirming an offer to him to become Director of two stores in Toronto. The email set out compensation, a moving allowance and incentive based on sales. Most importantly, the email made no mention of any kind of term or guaranteed length of employment.

In any event, Tossonian accepted Zorian's offer and moved to Toronto in August, 2011. He started work a week later. In early September 2011, Tossonian and Zorian signed a simple employment agreement that set out the same economic term contained in Zorian's earlier email, but also mentioned a five-year employment term. Interestingly, it appears that Tossonian himself had modified a template

used by Symphony Diamonds.

Mr. Zorian also verbally confirmed to Tossonian's bank that there was a five-year guaranteed employment agreement. Tossonian apparently also bragged to one co-worker that he couldn't be fired because of the guarantee. In light of the evidence, there was clearly a strong case to be made for the employee's assertion that the parties had agreed to a five-year term.

In March 2012, Zorian found out that Tossonian had been discussing employment opportunities with a competitor. Zorian became very angry at this lack of loyalty, swearing at Tossonian in three languages and refusing to let Tossonian to return to the store to work.

Unfortunately, Tossonian's new Toronto opportunities did not materialize as quickly as Tossonian would have liked and ultimately, he returned back to B.C. to work with his former B.C.-based employers. Tossonian sued for wrongful dismissal and asserted that his damages should be measured by the difference between the value of his five-year contract with Symphony Diamonds, less mitigation.

At trial, Tossonian's claim was for approximately $175,000 plus interest and costs.

Round One – The Trial Decision

The fundamental legal issue was whether the written employment agreement was enforceable.

Zorian testified that he only signed the written agreement with the five-year clause in order to support Tossonian's mortgage application, but that it was never really part of the employment agreement. Zorian denied committing to a five-year term in July 2011 or at any time before Tossonian started employment. Effectively, Zorian was willing to mislead the mortgage company to help Tossonian.

Management lawyers are very familiar with the concept that it is difficult to enforce terms in a written agreement that is signed after the start of employment,[1] but this is a rare example where that principle has been used against an employee. Essentially, Justice Mew relied upon the fact that Tossonian moved to Toronto without any kind of written (or email) confirmation of the alleged five-year agreement.

Despite the signed written employment agreement of September 2011, Justice Graeme Mew found that there was no enforceable agreement as to the five-year term.

As such, Justice Mew simply focused on what would be "reasonable notice" for a relatively short-term employee who had moved from Vancouver to Toronto to accept employment with Symphony Diamonds. Justice Mew determined that reasonable notice was only two months.

This was a huge victory for the employer, who avoided a judgment for almost $175,000. Justice Mew's decision was for $13,250 plus interest and costs. Justice Mew accepted that Tossonian was being paid cash on a weekly basis that was not being reported to Revenue Canada, but Justice Mew refused to condone

this practice and did not compensate Tossonian for the loss of his cash earnings.

As is typical, Justice Mew requested written submissions on the issue of legal costs.

Round Two – The Cost decision

The employee Tossonian only recovered $13,250, significantly less than the $175,000 he was claiming for wrongful dismissal. He received nothing with respect to the damages for “bad faith dismissal” he had claimed.

The Ontario legal system encouraged people to use the Small Claims Court system for claims less than $25,000. Even if a plaintiff is successful in the superior court system, a trial judge can deny the plaintiff reimbursement of costs for taking the case to the wrong court system.

The defendant pointed out that the ultimate judgment was well below the small claims court threshold of $25,000 and submitted that Tossonian should get no costs. The defendant also pointed out that Tossonian’s lawyers had entered into a “contingency agreement” with Tossonian, which meant that Tossonian would have to share only a portion of $13,250.

Tossonian’s lawyers, however, claimed reimbursement for more than $90,000 for the costs of the trial and a motion. The claim was based on a “partial indemnity basis”, which meant that the fees and disbursements actually devoted to the trial would likely have exceeded $150,000. Because Tossonian’s lawyer agreed to a “contingency” arrangement, Tossonian would only have to pay a fraction of that amount. The real issue is whether Symphony Diamonds or Tossonian’s lawyer would have to bear the cost of the 6-day trial.

Ultimately, Justice Mew awarded costs in excess of $90,000 to Tossonian. He commented critically on Symphony Diamonds’ “hard-ball” litigation tactics, including failing to make a reasonable offer of settlement and bringing an unmeritorious motion for security for costs.

Having achieved an excellent result in court on the merits of the case, Symphony Diamonds ended up being required to pay more than 7 times the actual judgment in legal costs and disbursements to Tossonian. In addition, Symphony Diamonds’ own costs exceeded $140,000.

The case illustrates the fact that in most employment cases, the litigation costs can quicklhy outstrip the amount in dispute. The combined legal costs of both parties, had Tossonian not been able to pursue the case on an contingency basis, would have amounted to approximately $300,000.

There are lessons to be learned from the Tossonian and Symphony Diamonds saga:

1. Employers should take employment offers seriously. People make significant life decisions based on offers of employment. A qualified employment lawyer can draft a good offer template for a small fraction of the price of litigation. Employers should not let employees start work on a handshake or short email exchange. The offer should contain a clear and enforceable termination clause.
2. Employers should never sign written agreements for mortgage purposes. It is

never a good idea to lie to the banks.

3. Employers should not agree to pay cash “under the table.” It is never a good idea to lie to the Canada Revenue Agency. Tossonian and Symphony Diamonds will no doubt face some interesting questions from the Canada Revenue Agency.
4. Even when the Employee’s conduct has been extremely upsetting, employers should make a good offer. When Employers achieve a better result in court than in their offer, i.e. “beat their offer”, there are significant cost benefits. Symphony Diamonds could have argued that it had little or no obligation to pay costs, if it could have shown that it “beat its offer.”
5. Do not bring frivolous motions. Symphony brought a security for costs motion that was unwise. The motion increased costs and added to the impression of “hardball” tactics. Employers are often already perceived as the “deep-pocketed” litigant against the “weak” employee. Plaintiff’s counsel can exploit a judge’s natural sympathy for the “little guy.” Most judges hate hardball tactics, which are often seen as a way for the former employer to bully a weak and financially desperate unemployed employee.

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