

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jones v. Prostar Painting and Restoration Ltd.***,
2006 BCSC 1034

Date: 20060705

Docket: S047044

Registry: Vancouver

Between:

Ron Jones

Plaintiff

And:

Prostar Painting and Restoration Ltd.

Defendant

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

Ronald Eichler

Counsel for the Defendant

Herman Cheung

Date and Place of Hearing:

June 21, 2006
Vancouver, B.C.

[1] This case involves an employment contract between the parties and the plaintiff's dismissal from employment.

[2] The plaintiff is a 49 year old salesman, who was hired as an "inside salesperson" by the defendant and began working for the company on March 17, 2003. The defendant is in the business of painting, both residential and commercial premises.

[3] The parties signed an employment agreement at the beginning of the plaintiff's employment. The plaintiff's employment was for an indefinite term, following a probation period. As an employee, the plaintiff was to "devote his full time and attention and best efforts during normal business hours to the business and affairs of the employer." His hours of work were from 8:30 a.m. to 4:30 p.m. April 1 to October 31, and during the less busy months, November 1 to March 31, from 9:00 a.m. to 5:00 p.m.

[4] A non-competition clause was part of the agreement. For five years following the expiration of the employment agreement, the plaintiff was to be bound by the terms of the non-competition covenant, "anywhere within the Lower Mainland of British Columbia (defined as including the area north to Whistler and east to Abbotsford)". During that time

period, he was not to compete with or be employed by a business similar to that of the defendant, nor was he to solicit or attempt to solicit any client or supplier of the defendant.

[5] The covenant also stated, in part:

...it being the intent of this provision that if the foregoing covenant is found to be unreasonable to any extent by a court of competent jurisdiction adjudicating upon the validity of the covenant, whether as to the scope of the restriction, the area of the restriction or the duration of the restriction, then such restriction shall be reduced to that which is in fact declared reasonable by such court, or a subsequent court of competent jurisdiction, requested to make such a declaration.

[6] The plaintiff contends that he was fired on Saturday, September 25, 2004. A letter of termination of employment dated September 27, 2004 was hand delivered to the plaintiff by the defendant on September 27. That letter expressed the employer's concern that in spite of "our in depth discussions" with regard to the plaintiff's performance and commitment, no improvement had been seen. The company felt that the plaintiff was not devoting all of his efforts on a full time basis to the defendant. One complaint was that he had failed to work an eight-hour day each day.

[7] The plaintiff claims he was fired without cause. He seeks to strike out the restrictive covenant; he claims severance pay for a period of seven months, and payment of an unpaid bonus of a minimum of \$10,000, or a maximum of \$25,000. He also seeks costs plus interest.

[8] The parties agree that one of the issues at the time of commencement of the action, payment of commissions, has now been resolved. On June 8, 2006, the defendant paid the outstanding commissions of \$25,423 to the plaintiff.

Position of the Plaintiff

[9] According to the plaintiff, his job was to find clients who required painting services. The defendant would then arrange to have an estimate done and the property painted.

[10] At the time of termination, the plaintiff's pay structure, which had been revised effective October 16, 2003, provided for a base salary of \$20,000 a year, a 10% commission for industrial buildings and houses, and a 6% commission on all other projects. Fifty percent of his commission would be paid on signing of a contract, the balance to be paid upon receipt of full payment from the customer.

[11] There was also a bonus structure. A signed one page agreement dated October 31, 2003, entitled "Bonus Structure for year 2004", provided:

First sales target: \$750,000 gross sales, performance bonus will be \$10,000.
Second sales target: \$1,000,000 gross sales, he'll receive an additional \$15,000.

[12] That agreement was signed by the plaintiff and David Xu, the operations manager and principal of the defendant company.

[13] As part of his evidence, the plaintiff has provided a schedule of a list of contracts that he negotiated in 2004, totalling gross sales of \$812,500. The plaintiff claims that he passed the first sales target of \$750,000, and, at the very least, should receive the bonus of \$10,000.

[14] The plaintiff also claims that had he continued to work the remaining three months of 2004, based on his earnings for the first nine months, he would have

surpassed the second sales target, and would have been eligible for the bonus of \$25,000, rather than \$10,000.

[15] Following his dismissal, the plaintiff contends that he had difficulty finding work, partly because the defendant did not give him a letter of reference. The plaintiff finally found work commencing April 25, 2005, as a salesman with an alarm systems company. At the present time, he is no longer working for that company, and hopes to get back into work as a salesperson in the painting business. For that reason, he wishes the five year restrictive covenant struck.

[16] With regard to his termination, the plaintiff says that he was fired without cause, and is entitled to seven months' severance pay. He contends that the firing was unjust, that there was never any written notice given to him, and no written warning letters. He admits that he left work early from time to time, but claims that was only during the slow part of the yearly sales cycle. He points to the fact that his sales for the year were exemplary.

[17] Mr. Jones also asserts that he believed things were going well at work, and was taken by surprise by his termination. He contends that by firing him at the end of the busy sales cycle, the defendant company sought to avoid having to pay him a salary during the slower part of the year.

[18] The plaintiff claims he was entitled to reasonable notice of his termination, with reasonable payment in lieu. The severance clause in the signed employment contract limited severance to that set out in the *Employment Standards Act*, R.S.B.C. 1996, c. 113, one week per year of employment. The plaintiff says that clause is inoperative, as he was dismissed without cause.

Position of the Defendant

[19] David Xu, president and operations manager of the defendant company, deposes that the painting industry is very competitive, and the defendant has a proprietary interest in their list of clients. He says he discussed the matter of confidentiality and non-competition with the plaintiff prior to confirming the plaintiff's employment.

[20] Mr. Xu deposes that in January 2004, he noticed a change in the plaintiff's work performance and work routine. The plaintiff began to leave work early, "usually between 12:00 p.m. and 2:00 p.m." Further, the plaintiff appeared to be distracted, unfocused and inattentive, failing to follow up with his paperwork. His work habits had gone from satisfactory to unsatisfactory.

[21] According to Mr. Xu, he had a series of meetings with the plaintiff in which he raised his concerns with Mr. Jones about his work performance and failure to work the required hours. Mr. Xu had a series of these meetings in April 2004, again in July 2004, and again in August 2004. At the end of each meeting, Mr. Xu said that the plaintiff indicated that he understood the problems, and that he would improve his work performance and attendance. The promised improvement never happened.

[22] Mr. Xu became concerned and suspicious, thinking that perhaps Mr. Jones was working for one of the defendant's competitors, or that he might even be starting his own business in competition with the defendant. So Mr. Xu hired a private investigation firm, and surveillance was conducted on Mr. Jones on August 23, 26, 31, September 3 and 7, 2004.

[23] Instructions to the private investigation firm were to conduct surveillance on Ron Jones to determine if he was working for competitors or had opened his own business. In their confidential report of September 8, 2004, the investigation firm wrote that, according to their observations, Mr. Jones was not working for any competitors nor engaged in his own business. But rather, "It appeared that Jones was on a religious adventure."

[24] The surveillance report advised that one of the investigators had sat down next to Mr. Jones at a restaurant, and engaged him in conversation. Mr. Jones apparently told the investigator that he was working for a painting business, that he was paid on salary and commission, and that he had built a huge network of clientele. But he said he was no longer into material things. After being attracted to Jesus Christ at the beginning of the year, he was now walking a straight and focused line, receiving instructions from spiritual guides, who were preparing him for work as a healer.

[25] Mr. Jones told the investigator that he would continue working for the defendant company, giving them a job every so often to keep them happy, while he continued to live on his salary and commissions.

[26] Following receipt of the second surveillance report, Mr. Xu deposed that he met with the plaintiff on September 26, 2004, at the plaintiff's home. At that time, Mr. Xu said he asked the plaintiff if he would or could improve his work performance and attendance to comply with the employment contract. The plaintiff apparently answered that he would not change his work habits, that he was happy, and that he would not work the required hours.

[27] At that point, the defendant terminated the services of Mr. Jones. The defendant claims that it had cause to do so because the plaintiff was in breach of the terms of the employment contract, and had no intention of complying with those terms. As the plaintiff was dismissed for cause, the defendant contends there are no grounds for severance pay.

[28] There is nothing to contradict the evidence of Mr. Xu with regard to the circumstances of dismissal.

Conclusion

[29] I agree with the defence that Mr. Jones was dismissed for cause, and the claim for severance pay is dismissed.

[30] The defence claims that there is no bonus payable. That the calculation of a bonus should be based only on monies actually received by the defendant company in the year 2004. Although a contract may have been signed in 2004, final payments made in 2005 should not be included in the calculation of gross profits in determining the plaintiff's bonus.

[31] If that were the case, then the amount to be calculated for 2004 would be under \$750,000, and Mr. Jones would not be eligible for a bonus.

[32] Additional clauses in the agreement of October 3, 2003, which governed the year 2004, give some indication of the intention of the parties in the event contracts are not paid in the same year as negotiated, or the same year as work may be done. For example:

6. 50% commission will be paid upon receipt of the signed contract with starting date no longer than 45 day, balance upon receipt of full payment from customer.

...

If Ron Jones' employment is terminated with Prostar, he will receive commission for all sales that he generated up to the termination date, any future sales generated from all estimates and request for estimates that handed in up to the termination date. And the paying schedule is the same as listed above.

[33] There is no suggestion the plaintiff would forfeit part of his commissions payable in 2005, due to his severance. Nor should he have to forfeit a bonus earned in 2004.

[34] In my view, the position of the defendant on the calculation of the bonus cannot and should not be supported. The plaintiff is entitled to a bonus of \$10,000, based on the revised pay structure for 2004 signed by the parties on October 31, 2003. It refers only to gross sales within the year 2004. It does not stipulate that the actual commissions payable to the plaintiff must be paid within the year 2004.

[35] The plaintiff has presented evidence that gross sales in the amount of \$812,500 were negotiated and contracted for in 2004 through his efforts. Although he did not receive all his commission payments within that year, the plaintiff would still be eligible for his commissions and performance bonus of \$10,000.

[36] On the issue of future possible sales, the defendant argues there is no basis to infer future sales of any amount, and no evidence to say what the plaintiff could have earned beyond the end of September 2004. I agree with the defendant. Particularly given the evidence of the surveillance operators, and the discussions between Mr. Xu and the plaintiff.

[37] With respect to the non-competition clause, both parties agree that ***Elsley v. J.G. Collins Insurance Agencies***, 1978 CanLII 7 (S.C.C.), [1978] 2 S.C.R. 916 at 923-924, 83 D.L.R. (3d) 1, establishes the test for enforceability: A restrictive covenant in restraint of trade is generally unenforceable as being against public policy, unless the covenant protects a legitimate proprietary interest of the employer; the restraint is fair and reasonable between the parties and in the public interest with respect to the nature of the prohibited activities and the length of time and geographic area over which it will operate; and the terms of the restraint are clear and certain.

[38] If a non-competition clause is overly broad or otherwise unreasonable, the court may find the clause entirely unenforceable or, where the circumstances permit, the court may choose to sever or read down its terms to “cure the illegality while remaining otherwise as close as possible to the intentions of the parties expressed in the agreement”: ***Transport North American Express Inc. v. New Solutions Financial Corp.***, 2004 SCC 7 (CanLII), [2004] 1 S.C.R. 249, 2004 SCC 7 at para. 32 as applied in ***ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.***, 2005 BCCA 605 (CanLII), 2005 BCCA 605 at para. 57.

[39] The defence relies on the five year restrictive covenant on the issue of non-competition. Because the painting industry is a highly competitive one, the defendant argues it should be entitled to rely upon an employment contract entered into by the parties and agreed to by the parties. Given the industry, and protection to be accorded to a client list under these circumstances, this covenant should be enforced, according to the defendant. The defendant pleads a proprietary interest, worthy of protection, particularly with regard to its clients.

[40] Alternatively, the defence argues that if the region or the length of time is deemed to be overly broad, then it would be appropriate for the court to read down the region or the time, but not to strike out the restrictive covenant clause.

[41] In my view, there are no grounds to strike out the restrictive covenant clause, but there are grounds, on the basis of fairness, to restrict the non-competition clause to a time period of two years, rather than five years. Reading down is particularly appropriate in this case because that is what the parties expressly agreed should occur in the event that the non-competition clause was found to be unreasonable. It is clear that the defendant has a proprietary interest that it was determined to protect. To strike the clause altogether would be to create a substantially different bargain from that reached by the parties.

[42] While the geographic area covered by the non-competition clause is quite broad, the plaintiff is not prevented from working as a sales representative in the Lower Mainland; he is merely prevented from acting in that capacity within the painting industry. I am satisfied that the clause is reasonable between the parties and in the public interest if it is read down to operate for a period of two years from the date of termination, rather than five years.

[43] The plaintiff has argued that costs should be awarded to him, in part because the plaintiff's claim for commission owed was necessary because the defendant was

refusing to pay validly earned commissions. And, in fact, those commissions were not paid until two weeks before the hearing date, two years after they were earned.

[44] The defence claims that the commissions owed were not the central issue of the application, and the plaintiff should not be awarded costs in any event.

[45] The plaintiff has not been successful on all issues, but has been successful sufficiently to be entitled to costs. It was only after commencing and pursuing this action that the plaintiff was able to receive his unpaid commissions. And these were paid two years late. In addition, the plaintiff was successful on the issue of the bonus, and partially successful in his position on the non-competition covenant.

[46] The plaintiff is entitled to costs at scale 3.

“N. Morrison, J.”

Madam Justice N. Morrison