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From Draft to Damages: When a Commission Plan Isn't Final—but Employer Conduct Still Results in Liability

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A recent decision from the Ontario Superior Court of Justice demonstrates how past and subsequent conduct of contractual parties can assist with interpretation of an employment agreement, in the context of entitlement to commission payments.

Introduction

Mr. Salam was employed as the Director, Product and Business Solutions at the Ontario Research and Innovation Network ("ORION"). After 2 years and 3 months of service, his employment was terminated without cause at the age of 49. He received his minimum 2 weeks of pay in lieu of notice under the *Employment Standards Act, 2000* ("*ESA*") and an additional 2.5 weeks of base salary based on his employment agreement. Mr. Salam sued for wrongful dismissal and claimed for reasonable notice, as well as unpaid commissions in excess of $600,000. ORION denied that Mr. Salam was entitled to commissions because the commission plan he relied upon was a draft plan that was never approved or implemented. Mr. Salam found new employment 4 months after termination at a lower salary.

In determining whether ORION owed Mr. Salam unpaid commissions, the Court reviewed:

1. ORION's past payments to Mr. Salam and corresponding email descriptions of those payments from the Vice President, which were provided to Mr. Salam for achieving his sales quota (representing 15% of his base salary at the time);

2. his employment documentation, including his employment agreement (which stated he would receive a base salary, eligibility for a commission plan, and eligibility for a compensation enhancement program, which translated to a discretionary performance-based bonus);

3. three employment confirmation letters signed by ORION's Chief Executive Officer, over the course of 16 months, which confirmed his compensation to external parties and explicitly included a mention of commissions; and

4. a draft commission plan.

Draft Commission Plan Never Finalized

The Court found that the draft commission plan was never finalized because 1) ORION never executed it or sent a signed copy back to Mr. Salam, 2) there were no final versions of the plan circulated, or emails to that effect (for example, the draft plan had a DRAFT watermark in place), 3) other ORION employees testified that the plan was not in place, and 4) the company's Vice President repeatedly told Mr. Salam that the plan was a "work in progress that was subject to approval" and that it had not been formally approved or put in place yet.

In sum, Mr. Salam was the only party who thought that the commission plan had been finalized and did not have evidence to support that position.

Employment Agreement Never Amended to Include Draft Commission Plan

The Court found that the commission plan was not a binding agreement, and the employment agreement was never amended to include the draft commission plan. Even if the plan was approved, it could not have been binding. Essential terms were missing, such as:

- which customer accounts would be considered when calculating commissions;
- the percentage rate at which the commissions would be calculated; or
- how the calculations would be performed, including when customers entered into multi-year contracts.

No Meeting of the Minds, and an Agreement to Agree is Not Binding

Further, the Court noted that there was no "meeting of the minds" between the parties, based on the contradicting evidence that the parties provided regarding their understanding of commissions. An agreement to agree on the essential terms is not an agreement, and the Court confirmed these fundamental contractual principles once more in *Salam*.

Past and Subsequent Conduct Interpreted to Find Entitlement to Commissions

Despite finding that the draft commission plan was not binding, the Court considered the parties' subsequent conduct, his past history of receiving such payments in previous fiscal years, the parties' communication of such payments (coming from the Vice President, someone in senior leadership), and found that he was entitled to commissions representing up to 15% of his base salary. There was no dispute that the employment agreement confirmed that he would be eligible for commissions – just not how much. Further, the three employment confirmation letters stated that Mr. Salam would receive commissions of 15%, or alternatively up to 15% of his base salary. These letters were also signed off by the Chief Executive Officer and relayed to external parties, factors which strengthened the finding that Mr. Salam was entitled to commissions up to 15% of his base salary.

Conclusion

Ultimately, the Court awarded Mr. Salam damages for unpaid commissions. The unpaid commissions were calculated based on the average of the commissions he received for the two prior years, for the time he was actively employed at ORION, plus his notice period, adding up to $16,043.44. In addition to unpaid commissions, the Court awarded Mr. Salam 6 months of reasonable notice because his employment agreement lacked an enforceable termination clause which limited his termination entitlements to the minimum amount of pay in lieu of notice under the *ESA*.

Given that Mr. Salam found new employment in 4 months, the damages in respect of the final 2 months of the notice period were based on the difference of his former and new salary, to account for his mitigation earnings. The Court also awarded Mr. Salam damages for lost benefits calculated at 10% of his base salary, noting that the Courts have generally followed this approach. These amounts were then deducted by the statutory pay in lieu of notice that Mr. Salam already received, plus the 2.5 weeks of additional termination pay he received pursuant to the employment agreement, plus regular deductions.

Key Takeaways for Employers

In disputes regarding unpaid wages, the Courts will look to see how an employer has previously paid an employee and how the employer explains what each past payment represents. An employer should therefore exercise caution when communicating to an

employee the reason(s) behind each payment made, and when issuing employment confirmation letters to ensure that an employee's elements of compensation are accurately reflected to external parties. This type of communication is scrutinized even further when they come from senior leadership, as it confirms that the company intends to pay the employee such compensation.

When drafting incentive compensation plans, the key terms, such as the basis on which incentive compensation is calculated, conditions for eligibility (as well as any circumstances that disentitle the employee to incentive compensation) should be clearly set out. Where the incentive compensation plan is a separate document from the employment agreement, an employer should ensure that the terms of the plan are consistent with the terms as specified within the employment agreement.

Finally, an agreement to agree is not a binding agreement, and the parties must have a "meeting of the minds" for a contract to be binding and upheld by the Court. Accordingly, when the parties are in the process of drafting or negotiating an agreement that is ancillary to the employment relationship, such as a commission plan or agreement, employers should clearly communicate to the employee that the plan is in draft form only, and that it is subject to approval by management before implementation. For best practices, an employer should include an effective date for when the plan takes effect, to only counter-execute the plan with the employee when it is in finalized form, and to implement the plan or agreement consistently across the organization to employees who are eligible.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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