EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Look before you offer: Court awards nearly $200,000 to man who never started the job

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Can an employer be liable for wrongful dismissal damages to an employee who never even started work? Yes, if a court finds it entered into a binding contract of employment with the employee. This was the result in *Spark v. Generex Pharmaceuticals, Inc.*, an Ontario court decision rendered on November 30, 1999.

"THE SHORTEST JOB INTERVIEW ON RECORD"

In 1996, Generex, a small, thirteen-employee private company, found itself in need of cash to pursue business opportunities. The company was advised that its "family" image had to be upgraded so that it presented more of a "corporate" face to prospective investors. Accordingly, the company went shopping for a team of executives to lend it the corporate cachet it was seeking.

Through Jack Magee, an executive recruiter, Generex linked up with Lorne Spark, a self-employed owner of a print brokerage business. Magee and Spark met with Generex's Chairman, Mark Perri on September 24, 1996 and, after what Magee described as "the shortest job interview on record", Spark was offered the job of president. Shortly afterwards, Spark received a fax from Generex, which contained a "proposal for the position of President", setting out the salary and benefits package, and indicating that the company would require that Spark make a three-year commitment to remain on the job.

"OUR DEFINITION OF BEING HIRED"

In his evidence, Spark stated that, after receiving the fax, he called Generex to indicate he was accepting the job. He was asked to start on November 1. In preparation for his new job, Spark hired someone to manage his print brokerage firm. As well, he terminated a consulting contract he would no longer be able to carry out.

He needn't have bothered. He was advised that the November 1 starting date was being changed to November 4. However, when he showed up for work on that date, he was told to come back in one week. On November 11, he was again told to go home. Spark found it increasingly difficult to contact anyone at Generex. He finally reached someone in mid-December and was advised that his services would not be required. After protesting that he had already been hired, he was told "your definition of being hired and our definition of being hired are obviously two different things". Spark sued for wrongful dismissal and breach of contract.

A "RECIPROCAL COMMITMENT", AN "ENFORCEABLE AGREEMENT"

At trial, Generex's witnesses said that their discussions with Spark were preliminary and exploratory only, and denied that the fax to Spark constituted an offer of employment. They also denied ever having had a conversation with Spark in which he accepted an offer of employment. The Court, however, resolved the factual dispute in Spark's favour, finding that he had been offered and had accepted the position of president, at an annual salary of $100,000.

Highly damaging to the company was the finding that the contract was for a three-year term. Not surprisingly, the company argued that the mention in the fax of Spark's three-year commitment did not amount to a fixed-term arrangement, as nothing had been said about a commitment on the part of Generex. The judge did not agree that Generex had no obligation in this regard: "[I]t would not make sense for the company to demand a three year commitment from Mr. Spark in the absence of a reciprocal obligation to employ. He was, after all, being put in a position in which he would have to (and did) make alternative arrangements for the ongoing operation of his print brokerage business. It would make no sense for him to do so and to put his previous livelihood at risk had Generex not also made a three year commitment to him."

The fact that some terms, such as Spark's entitlement to share options, had not been settled, did not preclude the agreement being viewed as concluded and enforceable, the court stated. Enough had been agreed upon for the parties to have bound themselves in a contractual relationship.

Nor was the fact that no formal agreement had been signed by the parties determinative. Based on the accepted evidence of the parties' words and actions, the judge did not "consider that the parties were dealing 'subject to contract' or that the execution of a formal document was a pre-requisite for a binding legal relationship to exist".

Therefore, having held that the contract was for a term of three years, the court found that Spark was owed damages equal to the unexpired portion of the term which, in this case, was all three years. After deducting monies earned in mitigation of Spark's damages, this came to nearly $194,000.

In Our View

Where there is convincing evidence of a verbal offer to hire an employee, and the parties' actions bear out that an offer of employment was made and accepted, the employer will likely have to live with the results, in spite of any changed circumstances that it may have experienced, as Generex evidently had. Particularly devastating for Generex was the fact that this was a fixed-term contract with no escape clause allowing the parties to terminate it short of the three-year term without attracting damages amounting to the unexpired portion of the term.

For further information, please contact André Champagne at (613) 563-7660, Extension 229.