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B.C. Court of Appeal Overturns Award of 18-Month Severance Package based on an Oral Promise

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The question before the B.C. Court of Appeal in *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144, was whether the employer had made an oral promise to an employee to pay an 18-month severance package equal to $176,250 at the time of separation, regardless of whether the employee retired or was terminated.

The Facts

The employer operated a copper mine and employed over 1000 unionized employees, as well as about 300 non-unionized supervisors, managers and managerial support staff. The employer had a practice of hiring unionized employees for its non-unionized supervisory and managerial positions, and offering them severance packages at the time of hiring equivalent to one month per year of service, to a maximum of 18 or 24 months, depending on the position. Two employees [2] Mr. Jylha and Mr. Aubrey [2] argued they had been orally promised severance packages of 18 months on retirement at the time they were hired into non-unionized positions, that the promises constituted express terms of their employment contracts, and that they had been wrongfully denied the severance packages when they retired.

The trial judge agreed that the employer had orally promised these severance packages to the two employees, and that by virtue of these promises the severance entitlements were express oral terms of the employees' contracts. This was notwithstanding that their written employment contracts did not provide for the severance packages. The trial judge relied on evidence that the employer had discussed these severance packages with the employees prior to hiring them from the unionized positions, and that some other terms of their employment were not contained in their written employment contracts. There was additional evidence only with respect to Mr. Jylha that he had initially rejected the position because he felt his union pension was more valuable, before the employer assured him that he would receive the severance package on retirement or leaving the employer. Interestingly, the trial judge also commented that a large corporation with a human resources department, dealing with unsophisticated individual employees, should clearly set out the terms of the employment contract to avoid the risk of adverse inferences being drawn from the absence of express terms.

The employer appealed both awards, but abandoned its appeal against Mr. Jylha (presumably because there was stronger evidence that the severance package had been promised to him on retirement) so that only the 18-month severance package awarded to Mr. Aubrey was before the Court of Appeal. In a judgement released in April, the Court of Appeal held that the trial judge erred by finding that the employer had promised Mr. Aubrey that the severance package was payable on retirement, as opposed to only on termination. The Court of Appeal found that while it was clear Mr. Aubrey believed that he was being promised the severance package if he retired, there was no evidence the employer had actually referenced retirement when discussing the severance package with him. Because

Mr. Aubrey had retired rather than involuntarily left, the payment of the severance package was never triggered.

Conclusion

The Court of Appeal's decision reconfirms that in order for an oral promise to constitute an express term of the employment contract, the term must be sufficiently certain, based on what the parties have objectively communicated. However, it also offers a caution to employers against making oral promises at the time of hiring that are not contained in the employment contract. To that end, it is notable that the employer abandoned its appeal of the severance package worth $169,800 awarded to Mr. Jylha. The takeaway for employers from this is to ensure that all of the terms of employment are set out in written employment contracts, and to not allow informal compensation schemes to exist outside of the contracts.

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