

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Atlantic Business Interiors Ltd. v. Hipson, 2004 NSSC 32

Date: 20040311
Docket: S.H. No.153027
Registry: Halifax

Between:

Atlantic Business Interiors Limited

Plaintiff

-and-

Scott Hipson and MMP Office Interiors Incorporated

Defendants

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Judge: The Honourable Justice Robert W. Wright

Heard: January 12-16 and 19, 20, 22, 2004 at Halifax, Nova Scotia

Written

Decision: March 11, 2004

Subject: Employment contracts - restrictive covenant - common law fiduciary duty of a departing employee - breach and causation - constructive dismissal - damages.

Summary: In 1994 the defendant Hipson joined Atlantic Business Interiors (“ABI”) as a sales representative, at which time he signed an employment agreement containing a restrictive covenant which prevented him from joining a competitor and from soliciting ABI customers within mainland Nova Scotia for a period of 12 months after he left ABI’s employ. Some time in 1996, ABI management assigned to Mr. Hipson the Information Technology Institute (“ITI”) account which shortly thereafter blossomed into an annual sales volume in the vicinity of 1 million dollars. Mr. Hipson was delegated full responsibility for maintaining ABI’s customer relationship with ITI.

Effective May 1, 1997 ABI implemented a change in the commission structure for its sales representatives which soured Mr. Hipson towards his employer. He began to look around for other opportunities and eventually joined Office Interiors, a keen competitor of ABI, in late March of 1998 (having given his resignation to ABI on February 27, 1998). At about the same time, ITI moved virtually all of its business from ABI to Office Interiors. ABI then sued over the loss of that business and Mr. Hipson counter claimed for damages for constructive dismissal and for punitive damages because of the unauthorized withdrawal effected by ABI of his final pay deposit from his personal bank account.

Issues:

- (A) Is ABI estopped from relying on the restrictive covenant by reason of a misrepresentation to Mr. Hipson that it would not be enforceable against him?
- (B) Is the restrictive covenant otherwise unenforceable because of a failure to meet the common law tests of reasonableness between the parties and with reference to the public interest?
- (C) Apart from the restrictive covenant, was Mr. Hipson under a common law fiduciary duty as a departing employee not to solicit ABI's customers?
- (D) If so, did he breach his common law fiduciary duty and thereby cause the damages sustained by ABI?
- (E) What is the measure of ABI's damages?
- (F) Was Mr. Hipson constructively dismissed by reason of the unilateral change made by ABI to his compensation plan?
- (G) Is Mr. Hipson entitled to an award of punitive damages?

Result:

- (A) The evidence did not support a finding that ABI was estopped from attempting to rely on the restrictive covenant.
- (B) The restrictive covenant did not meet the common law tests for validity and hence was unenforceable. This was not an exceptional case where the more drastic weapon of a non-competition clause (as opposed to a simply non-solicitation clause), was reasonably necessary to protect the interest of ABI in its trade connections. It is not for the court to write down excessively broad restrictive covenants to narrower terms more reasonable in their scope.
- (C) The degree of responsibility entrusted to Mr. Hipson for maintaining the ITI account, and its associated dependency and vulnerability, was sufficient to support a finding of fiduciary status.

(D) The court declined to draw the inference, based entirely on circumstantial evidence, that the defendant Hipson had improperly engaged in soliciting ITI's business after moving to Office Interiors; nor was the court satisfied that the activities of Mr. Hipson were an instrumental cause of ABI's loss of the ITI account. ABI's action was therefore dismissed.

(E) ABI's damages were provisionally measured at \$280,691.

(F) ABI had the right under its contract with Mr. Hipson to introduce the new compensation plan as it did. The counter claim for constructive dismissal was therefore dismissed.

(G) Although ABI's conduct in effecting the withdrawal of Mr. Hipson's final pay deposit from his personal bank account was ill-conceived and wrong, it was not so egregious or extreme as to warrant an award of punitive damages under the test in *Vorvis v. I.C.B.C.* The counter claim was therefore dismissed in its entirety.

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COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT
THE COVER SHEET.**
