

Breach of employment, stock rights case arbitrated

Record had deposition excerpts with admissions from company president

By: Michigan Lawyers Weekly Staff ■ in Verdicts & Settlements ○ December 29, 2016

In this action for breach of employment and stock rights agreements, the parties entered into an employment contract and, claimant argued, a poorly written stock rights agreement. Claimant asserted that neither he nor the president of the respondent were legally sophisticated, but that both were experienced, successful salesmen.

The stock rights agreement provided for American Arbitration Association commercial arbitration, while the employment agreement provided for arbitration under the AAA employment rules. Martin C. Weisman was appointed the commercial arbitrator and David Barbour was appointed the employment arbitrator. The arbitrations were consolidated for hearing, which was conducted from March 14-17, 2016.

Respondent sells copiers and other office equipment in Southeastern Michigan. Claimant had experience in copiers and several other fields, including legal publishing and biologics. Respondent hired claimant to be its vice president and general manager pursuant to a five-year employment agreement that respondent could terminate only for cause. In the event of termination without just cause, the agreement provided for liquidated damages equal to the unpaid balance of the contract at \$265,000 per year.

Contemporaneously, the parties executed a stock rights agreement which was extremely ambiguous as to whether it granted stock or stock rights. The distinction turned out to be unimportant as the agreement provided for payout of a lump sum equal to the value of the stock or stock rights. Arbitrator Weisman in the commercial case ultimately determined that claimant had stock rights but not stock. Applying the formula for valuing the stock rights, Weisman awarded \$665,932.

The dispute arose because there was confusion as to whether claimant was an actual shareholder or merely an employee. The stock rights agreement was highly ambiguous on this point. The parties conducted themselves as if claimant was a shareholder for the first two years of the contract.

Claimant argued that apparently nobody informed respondent's CPA that claimant was a shareholder. Claimant's status as a shareholder would have dramatically impacted respondent's tax reporting and in fact would have necessitated amended personal and corporate returns. Respondent's CPA learned that claimant was a shareholder (or so he thought) in February 2014.

Respondent's and its CPA's solution was to retroactively amend the employment and stock rights agreements. Consequently, respondent's president offered to enhance claimant's compensation and responsibilities if he would agree to retroactively amend the agreements. He solicited a proposal from claimant.

Respondent's president found claimant's proposal unacceptable. Upon learning that his attorney had obtained an expert opinion that the stock rights agreement conferred stock rights, not stock, respondent's president began setting the stage for a "just cause" termination which would allow respondent to escape the payouts provided in the employment and stock rights agreements. Within four months, respondent believed it had racked up enough just cause to fire claimant and escape the payouts. It was wrong. Nonetheless, respondent fired claimant in June 2014.

Towards the end of claimant's tenure, respondent locked him out, denied him access to the computer network and ordered him to cease all communications with respondent's personnel. Respondent also demanded that claimant return his company-issued laptop. Claimant retained the laptop for nine days so that his attorney could image the hard drive and through his attorney returned the laptop to respondent.

The question in both arbitrations was whether respondent had just cause to fire claimant. Both arbitrators answered “no.”

Respondent’s asserted bases of just cause were:

- (1) claimant abandoned his job when he failed to return the computer for nine days;
- (2) he engaged in criminal fraud or embezzlement by (a) telling people he was an owner, (b) failing to return for 10 days the 2012 corporate tax return which he had ready access to in the ordinary course and (c) failing to list people that he told he was an owner;
- (3) he breached job duties and responsibilities by telling customers and employees that he was an owner and securing the 2012 tax return from the CPA;
- (4) he defied directives to (a) return the 2012 tax return and (b) stop telling people he was an owner; and
- (5) he was insubordinate for failing to return his laptop for nine days.

The arbitrators easily rejected these grounds as pretextual.

The key to success in the arbitration was the detailed depositions of respondent’s president, CPA and other employees taken by co-counsel William G. Tishkoff. Much of the testimony was admitted over respondent’s objection as admissions under MRE 801(d)(2)(D). This was particularly important because the parties agreed to forgo a hearing transcript. Thus, the record consisted of pages of deposition excerpts containing admissions by respondent’s president, CPA and other managers.

After three months of skirmishing in Livingston County Circuit Court, claimant collected the full amount of the judgments with interest — \$670,823.46 for the stock rights agreement and \$901,802.72 for the employment agreement.

James K. Fett, counsel for claimant, provided case information.

Type of action: Breach of employment contract, stock rights agreement

Injuries alleged: Economic damages — severance, bonuses, value of stock rights

Name of case: Confidential

Court/Case no./Date: Judgments entered in Livingston County on two Arbitration Awards; 01-14-0001-6939; May 17, 2016

Tried before: Arbitration

Names of arbitrators: Martin C. Weisman (stock rights agreement); David M. Barbour (employment agreement)

Demand: \$1,314,696

Highest offer: \$400,000

Arbitration awards: \$670,823.46 (stock rights agreement); \$901,802.72 (employment agreement)

Most helpful expert: William G. Mallon, CPA, Rochester

Attorneys for claimant: James K. Fett, William G. Tishkoff

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