"Jobs today are dynamic, changing all the time for short periods. If a noncompete agreement could be cast away anytime some aspect of the job changed, that would really run roughshod over the whole system of having noncompete agreements."

— Michael L. Chinitz, Needham

MASSACHUSETTS Lawyers Weekly

Shift in duties doesn't void noncompete

Not 'material change' to work relationship

By: Eric T. Berkman June 11, 2020

A project manager's temporary undertaking of different duties did not constitute a "material change" that would invalidate his noncompete agreement, a Superior Court judge has decided.

Defendant Sean Donahue worked for plaintiff Now Business Intelligence, an IT consultancy, implementing SharePoint collaboration technology at NBI client sites. Experiencing a shortage of billable client work when his primary project for client Raytheon ended, Donahue took on non-billable business development tasks for a period of time.

Counsel for employer

When Donahue left the company, taking several NBI clients with him, NBI filed suit alleging breach of his noncompete.

Donahue asserted that his new non-billable work rendered the agreement unenforceable under the "material change" analysis laid out in the Supreme Judicial Court's 1968 *F.A. Bartlett Tree Expert Co. v. Barrington* decision.

Judge Michael D. Ricciuti disagreed.

"The court in *Bartlett Tree* held that a restrictive covenant … was no longer enforceable because changes to the employee's job over an eighteen-year period … 'show[ed] a clear new employment contract … and that the [original employment] contract was abandoned and rescinded by mutual consent," Ricciuti wrote, granting NBI's motion for summary judgment. "Such is not the case here. When his contract work at Raytheon ended, Donahue was neither promoted nor demoted, his job title and salary did not change, and he continued to work on … projects [in his area of expertise]."

Ricciuti also found that while NBI may have violated the Wage Act by not paying his full salary on a biweekly basis, he failed to show NBI owed him commissions for business he generated.

The 18-page decision is *Now Business Intelligence, Inc. v. Donahue, et al.*, Lawyers Weekly No. 12-026-20.

Useful citation

The plaintiff's lawyer, Samantha C. Halem of Wellesley, said the case will be useful to management-side employment lawyers in situations in which employees raise *Bartlett Tree* as a defense to a noncompete claim.

"If you ask employment lawyers who do noncompete work what's the number one case thrown back and forth, it will always be *Bartlett Tree*," Halem said. "Any party who wants to get out from under a noncompete will rely on that case to say it's no longer enforceable."

While more recent cases expanded the parameters of "material change," the NBI case is one of the first written rulings to say *Bartlett Tree* does not apply, Halem said.

"This should put a little bit of the brakes on using *Bartlett Tree* every time," she said.

Halem also found the Wage Act finding helpful.

Donahue had testified he was orally promised a commission between 5 and 10 percent on any new business he brought to NBI, but he acknowledged no exact number was ever agreed upon and urged the judge to determine his commissions by using either percentage. The judge found that no such commission could be deemed "due and payable" within the meaning of the statute because it was not "definitely determined."

"[Ricciuti] described this situation as the 'very antithesis of the concept of definitely determined,'" Halem said. "That's very clear language we're all going to quote. It'll show up in a lot of briefs if it gets picked up."

Donahue's attorney, Laura M. Moisin of Boston, said she respectfully disagreed with the decision.

"We believe a jury should have determined whether the defendant's job responsibilities materially changed, particularly in this context — software implementation — where job responsibilities can be highly specialized and extremely nuanced," Moisin said. "There is a practical reality to what a material change amounts to for an employee, and we believe that the case law that follows *Bartlett Tree* takes that into consideration."

Regarding the commissions issue, she said the ruling failed to account for more recent case law holding that it is sufficient to show a commission is "arithmetically determinable."

That represents an evolution from the "definitely determined" rule and directly applies here, Moisin said, asserting that Donahue's testimony that he was owed between a 5 and 10 percent commission should have been grounds for a jury to make a damages determination.

Boston employment attorney Shannon M. Lynch said the case serves as a reminder for businesses to include material change protections when drafting restrictive covenant agreements. For example, she said, companies might include language expressing a clear intent that the agreement remains in effect notwithstanding anticipated changes to compensation and other terms and conditions of employment.

"While not a silver bullet, a well-drafted material change provision can fortify enforcement efforts," Lynch said.

Michael L. Chinitz, an employment lawyer in Needham, said Ricciuti's material change analysis was "on point."

"Jobs today are dynamic, changing all the time for short periods," Chinitz said. "If a noncompete agreement could be cast away anytime some aspect of the job changed, that would really run roughshod over the whole system of having noncompete agreements."

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Chuck Rodman of Newton, who primarily represents employees, said the *Bartlett Tree* argument can be "overplayed" at times and is not a panacea for probable breaches of restrictive covenants.

Still, Rodman said, in many instances an employee asserting the defense will survive summary judgment by showing a question of fact.

"This may be what they were counting on — not losing on the breach issue because it's so intensely factual as to whether or not there was a sufficient change in terms and conditions to warrant escape."

Material change?

NBI engaged Donahue on a contract basis in 2015 to provide SharePoint implementation services to Raytheon, a major client.

Eventually, NBI hired Donahue as a full-time project-manager, and he continued to work onsite at Raytheon in that capacity. He was to be paid bi-weekly on an annual $110,000 salary and had to enter his time daily into the NBI timekeeping system.

At that time, Donahue informed NBI about work he did on the side for his own company, with no one expressing any concern. Meanwhile, he signed a non-competition agreement binding him for a year after his end date.

After the Raytheon project ended in 2016, little billable work was available to Donahue, so NBI had him take on non-billable tasks, such as attending "pitch" meetings with prospective clients to answer technical questions. His title did not change, and he was not asked to sign a new noncompete.

Donahue claimed the parties agreed he would get a 5- to 10-percent commission for new clients he signed, but NBI disputed that contention. Donahue acknowledged that no final agreement was reached, and he was not paid commissions.

In July 2017, Donahue secured a SharePoint contracting job at Raytheon through a contract labor provider. He began the onboarding process through NesTek, a business entity he incorporated at that time.

That summer, NBI asked Donahue to sign a revised employment contract including a non-solicitation provision, but Donahue resigned from NBI instead. During an exit interview three weeks later, NBI told him he was still bound by his noncompete.

Before his departure, Donahue, through NesTek, pitched his own SharePoint services to contacts at Raytheon and two other NBI clients and secured their business.

NBI subsequently sued Donahue in Superior Court, alleging breach of his noncompete. Donahue filed counterclaims for Wage Act violations, alleging he was not paid on a bi-weekly basis and that he was owed commissions. Both parties moved for summary judgment.

Now Business Intelligence, Inc. v. Donahue, et al., Lawyers Weekly No. 12-026-20 (18 pages)

THE ISSUE: Did a project manager's temporary reassignment to different duties constitute a "material change" that would invalidate his noncompete agreement?

DECISION: No (Middlesex Superior Court)

LAWYERS: Samantha C. Halem of Marshall Halem, Wellesley Hills (plaintiff)

Laura M. Moisin and Kevin T. Peters, of Gesmer Updegrove, Boston (defense)

Enforceable agreement

Ricciuti granted summary judgment to NBI on the noncompete claim, rejecting Donahue's argument that the covenant was voided by a material change in the employment relationship.

As the judge noted, *Bartlett Tree* involved a situation in which an 18-year employee received a promotion, different titles, different job duties, a change in pay, and changes in sales territory.

Unlike in Donahue's case, that evidenced a "clear new employment contract" and the rescission of the original contract, Ricciuti said, going on to conclude that Donahue clearly violated the covenant.

Meanwhile, Ricciuti rejected Donahue's Wage Act claim for unpaid commissions.

"Donahue's argument that his commissions can be arithmetically determined using 'either' 5% or 10% would require the Court to speculate as to which number applies — the very antithesis of the concept of 'definitely determined,'" he wrote. "Therefore, Donahue may only argue his Wage Act claims as they relate to allegedly withheld salary and accrued paid time off."

LAWYERS WEEKLY NO. 12-026-20

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