# The "Golden Handcuffs" — Enforceable or a Restraint of Trade?

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In the recent application, *Levinsky* v. *Toronto-Dominion Bank,* 2013 ONSC 5657, 2013 CarswellOnt 12655 (Ont. S.C.J. [Commercial List]), the court was required to determine whether Mr. Levinsky, after having resigned his employment, was entitled to payment representing the value of certain Restricted Share Units ("RSUs") which he had been granted in previous years. When Mr. Levinsky resigned in January 2010, the bank stated that he thereby lost his entitlement to the RSUs allocated to him in 2007, 2008 and 2009, the cash equivalent of which, the parties agreed, was $1,600,766. Mr. Levinsky sued the bank for that amount, arguing that the language of the RSU Plan, specifically the forfeiture-on-resignation provision, was in the nature of a restrictive covenant, was unreasonable, and was therefore unenforceable. The bank argued that the forfeiture provision was not a restrictive covenant and, in any event, was reasonable. The court dismissed Mr. Levinsky's application.

In 1999, Mr. Levinsky joined the bank as an Associate in the Banking Group at TD Securities Inc. In January 2006 he was promoted to Managing Director, Institutional Equity Sales and Training, and he held that position until his resignation in January 2010.

One of Mr. Levinsky's key compensation terms was participation in the bank's Long-Term Compensation Plan ("LTCP"). At trial, the bank led both *viva voce* and documentary evidence, which outlined that the primary objective of the LTCP was to support the retention of highly qualified executives who would contribute to the long-term success of the business. The LTCP involved allocating a number of plan units (RSUs) to an employee in respect of a year's performance, with the units maturing into a cash equivalent three years later. In order to receive a cash payment on the maturity of an RSU, the person would need to remain an employee of the bank until the date of maturity and meet other vesting requirements. The provision relied on by the bank. Article 6.5, stated, "a Participant's entitlement to a Particular Award will be Forfeited without notice by the Bank, if the Participant resigns from Service prior to the Maturity Date of such Particular Award".

On January 7, 2010, Mr. Levinsky resigned from the bank to establish his own hedge fund. Shortly thereafter, he wrote to the bank, stating that, notwithstanding Article 6.5, "the RSUs I was given annually were for past services provided in the prior fiscal year and therefore cannot be forfeited by resignation". Mr. Levinsky took the position that the RSUs were earned benefits at the time of their issuance or award. The bank agreed that a benefit had been earned; however, the cash award was only payable if the employee met the vesting requirements at the date of maturity, including remaining an employee of the bank.

The central issue was whether Article 6.5 of the LTCP, under which Mr. Levinsky's entitlement to the RSUs awarded in 2007 to 2009 became forfeited upon his resignation in early 2010, was unenforceable as an unreasonable restraint of trade.

In its decision, the court devoted considerable time to a fulsome review of the relevant case law, which included a number of non-Canadian decisions. Based on that review, the court concluded that, when examining a clause in an employment contract which operates to forfeit deferred compensation upon or following the cessation of the contract, *a court must assess whether the clause ties the forfeiture to the event of termination, or whether it ties it to the employee's conduct following the end of employment.* If the forfeiture results simply from the cessation of employment, without more, the clause does not operate as a restraint of trade because it does not impede the employee's ability to choose where he or she decides to work.

The threshold question then became whether Article 6.5 of the LTCP constituted a restraint of trade. Did it tie the forfeiture of the award to the event of termination or to Mr. Levinsky's conduct following the end of his employment?

The court noted that, on its face, Article 6.5 does not reference any type of post-employment commercial activity an employee may or may not undertake. By its express terms, Article 6.5 is -

agnostic as to the participant-employee's post-resignation conduct". What the employee may do following his or her resignation has no bearing on the employee's entitlement to the payout of an allocated award on its maturity. It is the fact of the resignation, not the nature of the post-resignation conduct of the employee, that triggers the forfeiture of entitlement.

By contrast, the court noted that the other provisions of the LTCP specifically addressed the impact of a participant's post-departure conduct on his or her entitlement to the payout of an award. For example, a participant may forfeit an allocated award if he or she engages in post-termination client solicitation (Article 7.3), the unauthorized disclosure of confidential information (Article 7.3) or post-termination competitive activities (Article 7.5). The presence of express restrictive covenants in Article 7 undercut Mr. Levinsky's argument that Article 6.5 operated as a restraint of trade on the choice of post-termination activity.

Mr. Levinsky argued that the terms of the LTCP were imposed upon him and he therefore had no choice but to sign the LTCP participation agreement. The court, however, rejected that argument, stating that Mr. Levinsky was a well-educated, sophisticated businessman. Commencing in November 2003, he annually signed the participation agreements, which all contained the term, and acknowledged having "reviewed and understood all of the terms and conditions set out in the Plan" and he agreed and consented "to be bound by the terms and conditions of the Plan as it may be amended or supplement[ed] from time to time". Mr. Levinsky admitted that he knew the terms of the plans, and consequently the court found that the terms of the LTCP formed part of the terms of his contract of employment.

Moreover, after joining the LTCP in 2003, Mr. Levinsky received significant cash payments in the several following years when his allocated RSUs matured. He took those benefits and made no complaint about the terms of the LTCP. As such, the court found that he was offered a significant benefit, he understood the terms (which included the forfeiture-on-resignation), and he took the benefit freely and voluntarily.
Based on the above findings, the court held that Article 6.5 did not act as a restraint of trade, was reasonable, and therefore enforceable.

This decision, like many others involving an employee's right to deferred compensation, is a classic case of contractual interpretation. Notwithstanding the court's well-reasoned decision, it is plausible to see how, at least in practice, Mr. Levinsky could have subjectively (and perhaps even reasonably) felt that the LTCP's forfeiture-on-resignation condition acted as a restraint of trade, given the considerable value of his RSUs. That said, as the court correctly found, the terms and conditions of the LTCP were made clear to him, which he voluntarily accepted, and in fact received the benefit of in prior years. Accordingly, this is a key decision for employers, highlighting the critical importance of not only ensuring that the terms and conditions of written employment agreements, including related bonus, commission and stock option agreements, are clear, but that they be expressly agreed to by employees. Otherwise, in cases such as *Levinsky,* an employer may be legally required to provide a departing employee with a very handsome "parting gift", even in situations where the employee voluntarily resigns.