COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-316

ALAN SMITH

vs.

DECISIONONE CORPORATION.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A trial judge found the defendant, DecisionOne Corporation, liable for failing to pay the plaintiff, Alan Smith, $122,161.04 in commissions. On appeal, the defendant argues that the trial judge erred in concluding that neither the FY2012 nor FY2013 compensation plans were effective during the plaintiff's employment. Consequently, the defendant argues, the calculation of commissions under the 2010 plan was error. Concluding that the FY2013 plan was properly in effect prior to the plaintiff's termination, we remand for a new damages calculation.

Discussion. Where an employer of an at-will employee modifies the employment terms, the employee's continued performance may be deemed an acceptance of the new terms. See Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 781 (2007) (continued work deemed to be assent to new employment terms

where there was no dispute that plaintiff knew of new terms). Implicit in this rule, however, is a requirement that the employee be made aware of the new terms prior to acceptance. See Magliozzi v. P&T Container Serv. Co., 34 Mass. App. Ct. 591, 595 (1993) (modification not binding where there was no "notice that [defendant] was extending an offer to modify the existing contract for [plaintiff's] assent"). See also Restatement (Second) of Contracts §53 comment c (1981) ("The offeree's conduct ordinarily constitutes an acceptance in such cases only if he knows of the offer"). This requirement was not met for the 2012 plan.

We do not set aside the trial judge's findings of fact unless the findings are clearly erroneous. See Demoulas v. Demoulas Super Mkts. Inc., 424 Mass. 501, 509 (1997). Here, the trial judge explicitly found that "the 2012 plan was not shown to Smith and he did not agree to it." This finding is supported by testimony from the plaintiff that he was not shown the plan, e-mails suggesting that the 2012 plan was still not finalized as late as five months after it allegedly took effect, and the absence of the 2012 plan as it appeared between April 2011 and April 2012 in the record.[1] Although there was also evidence that

[1] Notably, the versions of the plan included in the record are dated from 2014 and 2015, years after the 2012 plan ceased to be in effect.

may support a finding that the plaintiff may have been shown the 2012 plan, we will not upset the trial judge's choice between two plausible findings. See Edinburg v. Edinburg, 22 Mass. App. Ct. 199, 203 (1986), quoting Anderson v. Bessemer City, 470 U.S. 564, 573-574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"). Accordingly, we see no reason to disturb the judge's finding that the 2010 plan remained in effect through April 1, 2012.[2]

The trial judge's conclusion, however, that that the FY2013 commission plan was not supported by consideration does not withstand the same scrutiny. Continued employment constitutes sufficient consideration to modify the employment terms of an at-will employee. See Gishen v. Dura Corp., 362 Mass. 177, 183 (1972) ("there were both consideration and assent for the February modification in Gishen's continuing to work for Dura, with its knowledge and approval, at considerably lower commission rates"); Suominen v. Goodman Indus. Equities Mgt. Group, LLC, 78 Mass. App. Ct. 723, 732 n.11 (2011) ("with regard

[2] The record is clear that in the absence of a 2009 plan, the 2008 plan continued to remain in effect. Thus, although the 2010 plan stated that it would terminate on December 31, 2010, the prior course of dealing can be used to infer that the agreement continued to the next year. See Situation Mgt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 878-879 (2000) (evidence of reliance and prior course of dealing sufficient for jury to find existence of contract).

to an employee's claim based on ordinary contract, merely continuing one's employment can be sufficient consideration to accept what was effectively a standing offer about the terms of that employment").

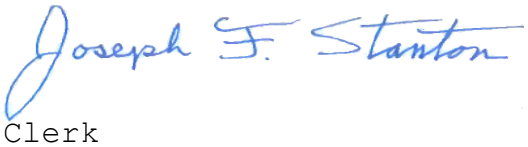
After being notified of the changes in FY2013 commission plan, the plaintiff worked under the plan for approximately four months before he was terminated. This four months of continued employment, and roughly $8,333 in additional pay,[3] is sufficient consideration to constitute his acceptance of the change in compensation under the FY2013 plan, and cannot be ignored simply because the plaintiff was ultimately terminated. Accordingly, we vacate the portion of the judgment awarding damages, and we remand the case for a recalculation of damages consistent with this court's memorandum and order and in which the judge may

[3] The FY2013 plan promised a $25,000 per year salary increase; over four months this equates to roughly $8,333.

invite further submissions on damages from the parties at his discretion. In all other respects the judgment is affirmed.[4]

So ordered.

By the Court (Green, C.J., Maldonado & Blake, JJ.[5]),



Clerk

Entered: July 31, 2020.

[4] We reject the defendant's final argument that the plaintiff withdrew his claim for a breach of the implied covenant of good faith and fair dealing. The plaintiff preserved all claims for "compensatory damages for commission payments." Because the claims of bad faith were presented solely in relation to the plaintiff's claim for compensatory damage, we see no error in the trial judge's consideration of this issue.

[5] The panelists are listed in order of seniority.