STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0485

AutoUpLink Technologies, Inc.,
Appellant,

vs.

Lynn Clark Janson,
Respondent.

Filed December 4, 2017
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CV-16-14383

Wm. Christopher Penwell, Siegel Brill, P.A., Minneapolis, Minnesota (for appellant)

Michael L. Puklich, Neaton & Puklich, P.L.L.P., Chanhassen, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

After respondent Lynn Clark Janson was terminated from appellant AutoUpLink Technologies, Inc. for refusing to accept a pay cut, he took many of his former company's clients with him to a new company. AutoUpLink brought this action against Janson to enforce a noncompete agreement. Because Janson signed that agreement after he had

already started employment, the district court denied a request for a temporary injunction to enforce it. On appeal, AutoUpLink argues that the district court erred by determining Janson did not receive independent consideration to support the noncompete agreement. We affirm.

FACTS

Appellant AutoUpLink provides on-the-lot services to car dealerships, which consists of taking photos, making videos, and applying labels to vehicles. AutoUpLink also sells software to dealerships, which gives it a competitive edge over its competitors. In early June 2006, respondent Lynn Clark Janson met with AutoUpLink co-founders Bruce McHoul and Mike Baker in Las Vegas. They offered him a job that included a base salary and a commission, with the intended goal that he build a market for the company in Michigan. AutoUpLink did not give Janson any written terms for the position. And AutoUpLink did not mention a noncompete clause at this meeting. Janson did not accept the offer at the time, but he did a few days later over the phone.

On July 23, 2006, Janson travelled to AutoUpLink's headquarters in Charlotte, North Carolina, to begin training for his new job. On his first day, Janson learned the basics of AutoUpLink's products and software, as well as some job responsibilities, such as taking pictures for car dealerships. On July 24, Janson's training continued as he toured an AutoUpLink facility.

On the night of July 24, Janson visited co-founder McHoul at his home. Seated together at the dining room table, McHoul asked Janson to sign an employment agreement. This agreement included a base pay of $3,500 a month and 12% commission on monthly

revenue that exceeded $5,500. These terms were similar to what was discussed previously in Las Vegas, but there were several benefits that AutoUpLink had not mentioned before, including a 401K plan, a computer allowance, a mobile phone, and internet reimbursement. This was the first time Janson was told about the 401K plan. Janson testified that he recognized that the 401K plan could be a valued benefit, although it was not very significant to him at the time he started work at AutoUpLink and he did not participate in it for several years.

The employment agreement also contained restrictive covenants that AutoUpLink had not previously discussed with Janson. This included a noncompete clause.[1] The noncompete clause stated, in part:

> Employee will not, directly or indirectly, individually or as an employee, director, officer, partner, consultant, financier, or shareholder of any other person, partnership, associate, corporation or entity do any of the following:
>
> a. provide services which compete with those offered by the Company or its agents; by way of example, without limiting the forgoing, services offered by the Company or its agents shall include acquisition data services, window sticker and inventory publishing applications in the automobile industry;
>
> b. become employed by, solicit the business of or do business with any licensee or customer of the Company, including dealers located within the District who have utilized the services of the Company during the term of this Agreement ("District Dealers"), unless such

[1] The employment agreement also contained a nondisclosure of confidential information clause. While this was part of the original temporary restraining order and AutoUpLink argued for its enforcement at the evidentiary hearing for the temporary injunction, this was not specifically argued on appeal and is forfeited. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating arguments not adequately briefed are forfeited).

> employment, solicitation or business concerns a business not in competition with that of [AutoUpLink]. . . .
>
> Employee acknowledges that this non-competition agreement is an absolute prerequisite to employment with the Company. Employee also recognizes that the foregoing limitations are reasonable and properly required for the adequate protection of the Company's business.

Janson did not ask for time to read the agreement in detail, and he signed it.

After his training ended, Janson performed on-the-lot services and started finding new customers and developing the Michigan market. Within a few months, he had enough customers that AutoUpLink hired a new employee to perform on-the-lot services, and Janson focused solely on developing the market. Throughout his employment, AutoUpLink continued to hire employees for Michigan, but Janson was the highest-level employee in the state, and he directly brought in the vast majority of AutoUpLink's Michigan customers. AutoUpLink's Michigan business blossomed under Janson's guidance. In 2008, AutoUpLink increased Janson's base salary from $3,500 to $3,850 a month. Janson attributed the increase to his hard work and the company's quick growth. Because he received commissions, Janson's income increased dramatically as the Michigan market grew. His commissions increased from approximately $3,000 in 2007, to $15,500 in 2008, and to over $90,000 in 2015.

In April 2016, AutoUpLink proposed to change Janson's compensation structure, providing a new monthly salary of $9,500 a month, but taking away any commissions. This would have lowered Janson's income significantly. And the new terms proposed to extend the length of the noncompete agreement from one year to two years. The discussion

of the extension of the noncompete clause was the first time Janson and AutoUpLink actually discussed a noncompete clause. Janson refused to sign the agreement, and later that month, he was terminated.

In August 2016, Janson's wife started Rush Marketing, a business similar to AutoUpLink, located in Michigan. Janson started working for Rush Marketing after it was formed, as did three other former AutoUpLink employees. With a few exceptions, Rush Marketing's customers were AutoUpLink's customers at the time Janson left AutoUpLink. The loss of customers resulted in a decrease of approximately $200,000 in AutoUpLink's revenue.

In September 2016, AutoUpLink filed a lawsuit against Janson alleging breach of the noncompete clause of the employment contract. Janson filed several counterclaims, alleging in part that AutoUpLink breached the contract first and therefore cannot enforce it. AutoUpLink filed a motion for a temporary restraining order, and it was granted in October 2016. AutoUpLink filed a motion for a temporary injunction to keep in place the terms of the temporary restraining order, and in November 2016, an evidentiary hearing was held. At the hearing, Janson and AutoUpLink's CEO, Christian Thornton, testified. Janson testified that he did not receive any benefit during the course of his employment that he did not anticipate when he accepted the position.

After the evidentiary hearing, the district court denied AutoUpLink's motion for the temporary injunction. The district court held, after weighing the *Dahlberg* factors, that the likelihood-to-prevail factor was at the heart of the dispute and that, because the employment contract containing the noncompete clause was given to Janson after he

started employment, the noncompete clause required independent consideration.[2] *See Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965) (setting forth the five factors to be considered for granting temporary injunctions). But because Janson never received unanticipated *additional* benefits during his employment, the district court found no independent consideration to support the noncompete clause. Given that the noncompete clause was unenforceable, the district court denied the temporary injunction. This appeal follows.

D E C I S I O N

AutoUpLink argues that, because the noncompete clause was supported by independent consideration, the district court erred by denying its motion for a temporary injunction. This court reviews the denial of temporary injunctions for abuse of discretion, and the district court's findings are not set aside unless clearly erroneous. *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 666 (Minn. App. 2009) (reviewing the district court's denial of a temporary injunction to enforce a noncompete clause for abuse of discretion). There are five factors in determining whether to issue a temporary injunction: (1) the relationship between the parties preexisting the dispute; (2) the harm to be suffered by the parties

[2] The court also weighed the other four factors. The court weighed the parties' relationship factor in favor of Janson, as AutoUpLink was the dominant party who had the bargaining power. For the potential-of-harm factor, the court determined that AutoUpLink would suffer harm if the injunction was denied, and Janson would suffer harm if the injunction was granted. The court however weighed the factor "slightly" in favor of AutoUpLink, taking into account the large amount of money it lost and will continue to lose to Rush Marketing. The court weighed the public-policy factor in favor of Janson as noncompete clauses interfere with trade and one's ability to make a living. Lastly, the court held any administrative burden effects were de minimus.

depending on the outcome of the injunction decision; (3) the likelihood that one party or the other will prevail on the merits; (4) public policy; and (5) the administrative burdens in supervising and enforcing the injunction. *Dahlberg Bros.*, 272 Minn. at 274–75, 137 N.W.2d at 321–22. Of these factors, the most important to the analysis is the likelihood of prevailing on the merits. *Softchoice, Inc.*, 763 N.W.2d at 666. It is this likelihood-to-prevail factor that the parties dispute on appeal and is the focus of our review.[3]

Noncompete clauses entered into at the start of employment do not require any independent consideration. *Overholt Crop Ins. Serv. Co. v. Bredeson*, 437 N.W.2d 698, 702 (Minn. App. 1989). At oral argument, AutoUpLink conceded that the employment agreement was entered into after the start of employment.[4] If a noncompete clause is not ancillary to the initial oral employment contract, it must be supported by independent consideration. *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982). The adequacy of consideration is a fact-dependent analysis. *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980). AutoUpLink contends it provided Janson independent consideration in three ways: (1) AutoUpLink provided benefits that Janson first learned about when he signed the written contract, including a 401k plan, computer allowance, and mobile phone and internet reimbursements; (2) AutoUpLink provided

[3] The parties do not dispute the district court's weighing of the other four factors. Furthermore, the record sufficiently supports the district court's determination regarding these factors.

[4] AutoUpLink argued in its brief that the noncompete clause was entered into at the inception of Janson's employment because he had only started training—not actual job duties—before signing the employment contract containing the noncompete agreement.

Janson continued employment at the company, with both increased pay and responsibilities; and (3) even if the first two reasons are not enough to support sufficient consideration alone, then cumulatively they are sufficient. We address each argument in turn.

AutoUpLink first directs us to the benefits Janson learned about when he signed the written agreement: a 401k plan; computer allowance; and mobile phone and internet reimbursements. While a 401K plan and other benefits could potentially serve as consideration, it was not an abuse of discretion to determine that they do not meet the legal threshold here. There is no independent consideration unless the benefits received go beyond what was already obtained in the initial employment agreement. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993). And Janson explicitly testified that he did not ever receive anything that he did not anticipate when he accepted the position. The district court credited this testimony, and we defer to its credibility determinations. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) ("the district court found respondent's testimony credible. We defer to this credibility determination."). Further, there is no evidence in the record suggesting any of the benefits listed in the contract were more generous than expected in the industry, or in any other way atypical or unexpected. Indeed, details about the scope of these benefits are scarce. For example, AutoUpLink emphasized the importance of the 401K, but the details of the 401K plan are confined to one paragraph attached to the employment agreement. The plan itself is not in the record. The record supports the determination that Janson would expect, from the moment he was offered a job, to be able to participate in any benefits AutoUpLink offered.

As a result, the district court acted within its discretion in determining that the employment benefits do not provide independent consideration for the noncompete agreement.

The district court's thoughtful decision in this regard accords with precedent. In *Nat'l Recruiters, Inc.*, the employees were orally offered a job and were never told they would need to sign a noncompete clause. 323 N.W.2d at 738-39. Two days after reporting to work, but before any meaningful training occurred, the employees were presented a contract containing a noncompete clause. *Id.* This contract stated training would serve as the consideration. *Id.* at 741. But training was not sufficient consideration, the court held, as it was expected based on the oral employment agreement. *Id.* Like training, a benefits package is generally expected in an employment agreement, particularly for employees in Janson's higher-ranking position. Consequently, it was not an abuse of discretion for the district court to determine that the specific benefits Janson first learned about at the time he signed the employment agreement were not sufficient to serve as independent consideration.

Second, AutoUpLink argues that it provided consideration to Janson in the form of continued employment. But continued employment, without more, does not constitute consideration. *See Sanborn Mfg. Co.*, 500 N.W.2d at 164 (stating proof of continued employment is not enough to show sufficient consideration for a noncompete agreement). AutoUpLink points to Janson's increased pay and responsibilities as the "more" it provided. We disagree. While Janson's pay certainly increased, the formula that drove the increases (including the 12% commission rate) remained essentially static. And Janson did not receive a promotion. As we held in *Sanborn Mfg. Co.*, continued employment with

raises and increased responsibilities, but no promotion, generally is not sufficient to serve as consideration. *Id.*[5]

AutoUpLink contends that *Satellite Indus., Inc. v. Keeling*, not *Sanborn Mfg. Co.*, should guide this decision. *Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635 (Minn. App. 1986), *review denied* (Minn. Jan. 21, 1987). In *Satellite Indus.*, we held that continued employment of 11 years with promotions, training, and the ability to gain substantial knowledge in a specific field constituted independent consideration. *Id.* at 639. But the defendant there received a promotion, while in this case Janson only received increased pay and responsibilities, which Janson testified was not due to the noncompete clause. Under these facts, it was not an abuse of discretion for the district court to determine that continued employment with increased pay and responsibilities was insufficient to serve as independent consideration here.

Third, AutoUpLink argues that, if neither continued employment with increased pay and responsibilities nor the employee benefits are sufficient on their own to constitute independent consideration, then, taken cumulatively, they are sufficient. We reject this argument. There is nothing in the record that would suggest any of the benefits were unexpected at the time Janson accepted the employment offer. The district court concluded

[5] AutoUpLink contends *Davies & Davies Agency, Inc.* supports its argument that the continued employment present here is sufficient to serve as consideration. There, the court held that mere continuation of employment could serve as consideration when it leads to benefits only available through the signing of a noncompete agreement. *See Davies & Davies Agency, Inc.*, 298 N.W.2d at 130-31. But here there is no evidence suggesting that Janson's continued employment with increased pay and responsibilities would not have been available to him unless he signed the noncompete agreement. Therefore, *Davies & Davies Agency, Inc.* is distinguished from the facts here.

that Janson never received a benefit he did not expect, which is supported by the record. Janson's base pay remained in the same range throughout his decade of employment. And Janson's bonus formula remained exactly the same. We acknowledge that the significant growth in compensation and dramatic expansion of duties, in addition to benefits first mentioned in the context of the noncompete clause, could in some circumstances provide adequate consideration. But we review for an abuse of discretion and are limited to the evidence produced at the hearing. Based on the evidence presented, the district court appropriately exercised its wide discretion to determine that these benefits and continued employment could not serve as independent consideration.

Affirmed.