When It Comes To Covenants, Less Is More

I've written many times on the topic of the unpredictable impact of covenants restricting employees' post-employment activities. What is certain about such covenants is the value of adhering to the "less is more" rule.

Presumption of Unenforceability

Generally speaking, in the employment context, post-employment restrictions on an individual's conduct are presumed to be unenforceable. That is the result of the fact that free labour mobility is a matter of public policy.

In practice, that means that (with some limitations) individuals can move on to ply their trade wherever, and with whomever, they choose. That includes doing so with a competitor of the former employer.

Businesses, on the other hand, have a private interest in limiting competition and some seek to bind their employees by way of various restrictive covenants. This interest in eliminating competition can drive employers to impose covenants which are unreasonable in the circumstances.

Less Is More

The enforceability of those covenants is frequently debated before the Canadian courts. And, almost universally, the less restrictive a covenant is on the employee's post-employment activities, the more receptive the courts will be to its enforcement.

A Recent (Positive) Example

A decision from Ontario's Superior Court of Justice provides an example of an employer which successfully applied the "less is more" rule.

Tom Mason was a technical sales representative who had been employed by Chem-Trend Limited Partnership for 17 years. Mason's sales territory was all of Canada and certain parts of the United States.

Chem-Trend is a company with world-wide operations and customers. Mason was required to be familiar with Chem-Trend's products and with their customers' businesses and operations and product needs.

At the time of hiring, Mason had signed a restrictive covenant in which he agreed, for a period of one year following termination, not to engage in competitive business activities or to solicit business from any of Chem-Trend's customers or to cause a disruption of any of Chem-Trend's customer relationships.

Mason's employment was terminated and he sued for damages for wrongful dismissal. Chem-Trend counterclaimed against Mason for breaching the restrictive covenant by "using his knowledge and experience at Chem-Trend to gain business opportunities for himself".

Mason's view was that the restrictive covenant was unreasonable and far too broad to be enforceable.

The Court considered the covenant's geographic scope, the range of restricted activities, and the duration of the restrictions. After finding the geographic scope and range of restricted activities to be reasonable (though "more onerous than the norm"), the Court turned its attention to the duration.

The Court stated that "[t]he covenant is only in effect for one year, which is considerably shorter than periods found in other restrictive covenants that the Courts have considered and upheld". Citing a leading case in which a five year covenant was upheld, the Court concluded, "[t]he restrictive covenant being in place for one year after Mr. Mason's termination is a relatively short period of time".

Notably, the Court mentioned that the short duration of the covenant balanced the fact that the geographic scope and range of restricted activities were relatively onerous. As a result, the Court found the restrictive covenant (as a whole) to be reasonable and enforceable as against Mason's post-employment activities.

Had Chem-Trend succumbed to the temptation to impose the restrictive covenant for a longer duration, it seems likely the Court would have found it to be unenforceable. As it was, Chem-Trend's shrewd application of the "less is more" rule was its saving grace.

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