A Risky Insistence: Why An Employer Should Exercise Caution When Including A Non-Compete Clause

Employers have the option of including a non-compete clause in an employment contract. The enforcement of this clause can provide an employer with the security of knowing that their former employee will not immediately join up with a competitor. The inclusion of this clause may appear to provide employers with peace of mind without any potential draw backs. The British Columbia Superior Court in *Ostrow v Abascus Management Corporation Mergers and Acquisitions*reminded employers that the enforcement, or even inclusion of a non-compete clause comes with potential risks.

In *Ostrow* an 11 month employee was awarded 6 months' pay in lieu of notice in a wrongful dismissal case in part because of the employer's inclusion of a non-compete clause. Ostrow, a 42 year specialist in international and US taxation was terminated on a without cause basis. In his termination letter he was reminded of the existence of a non-compete clause in his contract – as a result he did not take steps to mitigate by immediately beginning a job hunt. The Court took the position that whether or not the clause was enforceable was irrelevant to the question of the appropriate notice period. The key for assessing notice was whether or not the clause was included in the contract and whether or not the employee believed he was bound by the clause.

The decision to award higher notice periods to employees because of non-competition agreements is not isolated to British Columbia. In Ontario, in *Murrell v Burns International Security Services Ltd* an employee of three years was awarded 8 months' notice in part because of the existence of a one year non-compete clause in his contract. The Court again was not concerned with whether or not the clause was enforceable – the mere inclusion of a non-compete clause was sufficient to trigger a higher notice period.

This is potentially troubling for employers. The Court has essentially taken the position that an employee may benefit in terms of increased notice from a clause that the employer may not even be able to enforce. Employers would benefit from consulting with a lawyer to assess whether or not their non-compete clause will be enforceable. This is because if it is unlikely that the employer will be able to enforce the clause, it may be beneficial to inform the employee that the clause will not be enforced. This may allow for the employer to possibly benefit from the employee's failure to mitigate by beginning a job search.

If a non-compete clause is enforced, as in the Ontario decision of *Khan v Fibre Glass-Evercoat Co.,* a notice period can also be extended. In this case the employee was bound to a non-compete clause for five years. The Court compensated the two year employee for being restricted by this non-compete clause by adding an additional five months to the notice period. If the Courts were to continue to apply this approach it could mean that for each year of the enforcement of a non-compete an employer will be liable for a month of notice. Ultimately, however, any assessment of notice will depend on the specific facts of the case.

Employers should carefully assess the inclusion and enforceability of any non-compete clause in an employment contract. Employers should also be aware of the possible risks that should be weighed of such a clause in the case of a wrongful dismissal claim. The lawyers at CCPartners are experienced in dealing with the enforceability of contract provisions and with navigating the assessment of damages in lieu of notice. CCPartners can help you to make an informed assessment of the best decision for your company to make when considering whether or not to insist on a non-compete clause.