Non-Competition Clause May Increase Reasonable Notice Period

A recent decision from British Columbia is the latest in a small number of cases that have considered the impact of a non-competition clause in an employment agreement to the plaintiff's ability to find alternative work and ultimately the length of the reasonable notice period awarded at trial.

In *Ostrow v. Abacus Management*, 2014 BCSC 938 (CanLII), the plaintiff, a specialist in international and U.S. tax, had been employed with Abacus for five months at the time of the termination of his employment. Prior to that, he had served as a consultant for a related entity for approximately nine months. During the contract negotiation discussions, the court found that the plaintiff had successfully negotiated out of the contract a termination provision providing him with only the minimum standards under the applicable employment standards legislation and that he had received various assurances about job security. The plaintiff's contract also included a six month non-competition covenant. The plaintiff mitigated approximately 16 months after his termination.

In considering the length of the applicable reasonable notice period, the court considered the impact of the non-competition provision, noting the following:

[79] There is a surprising lack of jurisprudence on the relationship between a non-competition clause in the employment contract and the length of the reasonable notice period. However, this issue has been dealt with at least once by the British Columbia Court of Appeal, in *Watson v. Moore Corporation Ltd.*, [1996] B.C.J. 525 (C.A.) [Watson] and in some Ontario cases …. Despite the lack of cases on this point, there is consistency among them: a non-competition clause in the employment contract is a factor which may increase the length of the reasonable notice period.

Relevant to the court's determination in this case was Abacus' conduct post termination, which included the fact that Abacus gave the plaintiff a letter reminding him of his obligations to the company arising from the non-competition clause in his contract. Accordingly, the court concluded that it was reasonable for the plaintiff to have believed that he was bound by the clause regardless of whether Abacus had enforced such agreements in the past or would do so in his own case. As a result, the court dismissed Abacus' argument that the restrictive covenant should not be taken into account because Abacus did not seek to enforce it.

The court went on to find that the assistance the plaintiff received from Abacus with his job search lessened the impact of the clause, but that this help did not entirely negate the effect of the clause and the plaintiff's reasonably held belief that the clause was enforceable. The court ultimately concluded that the existence of the non-competition clause in the plaintiff's contract lent support for a higher period of reasonable notice.

Courts in Ontario have applied similar reasoning in concluding that the existence of a non-competition clause may result in a lengthier notice period than might otherwise be awarded in the circumstances. A recent example was *Dimmer v. MMV Financial Inc.*, 2012 ONSC 7257 (CanLII). In this case, the court concluded that a 12 month non-competition provision that the defendant had required as a term of the plaintiff's employment weighed in favour of a longer notice period because it "effectively eliminated any opportunity to obtain similar employment during that year and it seriously impeded his ability to obtain employment at all, even in fields beyond the reach of the non-competition agreement."

Despite these rulings, it is not the case that the existence of a non-competition clause will always result in a higher notice period. Indeed, an Ontario court confirmed that a non-competition covenant did not relieve a terminated employee from the legal duty to mitigate.

In *Link v. Venture Steel Inc.*, 2008 CanLII 63189, affirmed by 2010 ONCA 144 (CanLII), an issue before the court with respect to the determination of the applicable notice period was whether the plaintiff had taken all reasonable steps to secure alternate employment. The plaintiff (who was also a shareholder of the defendant) argued that he was afraid to accept any position that might violate his contractual obligation to the defendant and disentitle him to amounts under the shareholders agreement. In assessing the issue, the court was not entirely satisfied that the plaintiff's fears were determinative. However, the absence of sufficient evidence of available comparable and suitable alternate employment from the defendant resulted ultimately in no reduction to the damages awarded to the plaintiff for reasonable notice.

These cases illustrate the need for employers to consider yet another reason as to whether they wish to implement non-competition provisions in their employment agreements. Employers requiring such restrictions should be mindful of the potentially costly consequences to the reasonable notice period to which the employee may be entitled upon termination. In addition, upon termination, employers should not only consider whether there is any legal or strategic basis to try to enforce a non-competition clause, but if there is any actual business necessity for doing so.

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