Ontario Court Confirms No Retroactive Application Of Employment Standards Act Ban On Non-Competition Clauses

Last week we were able to share some much-needed ministry guidance on the *Working for Workers Act* (the "*Act*"), which introduced amendments to the *Employment Standards Act, 2000*. You can find our blog on that topic here. This week, we focus on guidance provided by the courts to one aspect of the *Act*: the ban on non-competition clauses in employment agreements. In particular, the decision in ***Parekh et al v Schecter et al*** answers the question of whether the non-competition provisions, which received royal assent on December 2, 2021, but were deemed effective as of October 25, 2021, can be applied retroactively to employment agreements existing prior to the *Act* coming into force.

The Decision

The plaintiffs brought an interlocutory injunction motion seeking, amongst other things, to bar the defendant from carrying on or engaging in the practice of dentistry within a 5-kilometer radius of the plaintiffs' business. The issue began in 2020 when the defendant's son sold the dental practice where he and his father worked to the plaintiffs. As part of the sale, the defendant agreed to enter into an employment agreement with the plaintiffs to continue working for the business. That agreement included a non-competition clause preventing the defendant from practicing dentistry within a 5-kilometer radius of the plaintiff's business for 2 years after the end of the defendants' employment.

In October 2021, the defendant resigned his employment with the plaintiffs and began practicing dentistry with a competitor within 5-kilometers of the plaintiffs' business. In doing so, the defendant took the position that the non-competition clause of the employment agreement was unenforceable as a result of the *Act*, which, by implication, should be applied retroactively. To find otherwise, argued the defendant, would be to create two tiers of employees, those with the protection afforded by the *Act*, and those without.

The court rejected this argument finding no explicit or implicit intent for the *Act* to have retroactive effect. To the contrary, the fact that the *Act* was deemed to be effective on October 25, 2021, despite receiving royal assent on December 2, 2021, suggested an intention that the provisions of the *Act* would only apply from that date forward. In other words, while the *Act* bans non-competition clauses from

employment agreements entered into after October 25, 2021, the *Act* does not invalidate similar clauses entered into prior to that date.

Ultimately, the Court determined that there was reason to grant the request for injunction preventing the defendant from carrying on his practice in accordance with the non-competition clause of the agreement.

Key Takeaway

While many employers were dismayed with the non-competition clause ban, this case confirms that the provisions only apply to employment agreements entered into after October 25, 2021, which is the date the provisions became effective. While they can be difficult to enforce, employers can still seek to enforce non-competition clauses entered into prior to that date.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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