Restrictive Covenant A Factor In Lengthening Notice Period

A recent case out of British Columbia signals restrictive covenants may be a factor supporting extensions in common law notice periods for terminated employees.

When an employee is terminated without notice or cause, they will be entitled to either what is specified in their employment contract, if applicable, or notice (or pay in lieu of notice) at common law. Traditionally, following the decision of **Bardal v. Globe and Mail**, courts have looked to a number of factors when determining the appropriate notice period at common law, including the nature of employment, length of service, age and availability of comparable employment.

In Ostrow v. Abacus Management Corporation Mergers and Acquisitions, the court also considered the non-competition clause in the employee's contract of employment when determining the appropriate notice period.

The plaintiff was employed as a Senior Manager in the company's Structured Financial Solutions group, where he specialized in US taxation. He initially provided services as a consultant. When he became an employee, he was asked to sign an employment agreement which contained a six month non-competition clause.

The plaintiff had been employed with Abacus Management for only 9 months when his employment was terminated. Upon termination, the plaintiff was provided with a letter which reminded him of the non-competition clause in his employment contract.

Ultimately the court determined that the appropriate notice period was six months, due in part to the non-competition clause.

The company had argued that it did not attempt to enforce the clause, nor had it done so in the past with other employees. The court did not accept this argument, finding that the non-competition clause was relevant because the

plaintiff was led to believe that he was bound by it. The company also argued that it had assisted the plaintiff in his job search. The court found that this reduced the impact of the clause, but did not negate its effect.

A similar conclusion was reached in an Ontario decision from a few years ago. In Dimmer v. MMV Financial Inc., the plaintiff had also signed a non-competition agreement. Upon termination, he too was reminded of its terms. The court found that the plaintiff believed that he was bound by the non-competition agreement. The court held that the non-competition agreement, which was for a period of one year, effectively eliminated any opportunity for the plaintiff to obtain employment during that year and also impeded his ability to find employment at all, even in fields beyond its reach. The plaintiff, who had been employed for a period of four years, was provided with a 12 month notice period.

One troubling aspect of these decisions is that, at least in Canada, the reasonableness (and so enforceability) of a non-competition provision has rarely been tied to whether the employer agreed to pay the employee during its term. In the US and UK this is a common practice and is often referred to as a “garden clause” or putting the employee “on the beach”. In other words, Canadian courts appear less willing to permit employers to simply pay an employee to remain unemployed and refrain from competing, but stand ready to diminish if not eliminate the employee’s obligation to mitigate in the face of a non-competition provision, without reference to whether the temporal length is reasonable.

These cases highlight the importance of using non-competition agreements only where reasonably necessary, and ensuring careful thought is given to their temporal length. Employers should consider relying instead on a non-solicitation provision. Not only are courts more willing to enforce these clauses, it also minimizes the risk of a lengthier notice period being imposed as a result of a non-competition provision.

Employers who nonetheless have imposed non-competition agreements on employees, but who decide not to enforce them in a particular termination, should advise that employee as such clearly and expressly in the termination letter, or risk unintentionally putting the employee on the beach.

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