
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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EDITORS:

Nancy Shapiro, nshapiro@kmlaw.ca

Phone: (416) 595-2108

Arleen Huggins, ahuggins@kmlaw.ca

Phone: (416) 595-2115

Sales Staff do not owe a Fiduciary Duty of Non-Solicitation – No Matter How Good they Are

That was the finding recently on a motion for an injunction brought to prevent two departing employees from moving to a direct competitor and from soliciting the customers of the Plaintiff company. The departing employees did not deny that they intended to solicit the Plaintiff's customers.

One of the departing employees was the most successful sales representative the company had. He was the most highly paid employee of the company and his sales accounted for 67% of the company's total sales. The second departing employee was his son-in-law. It was conceded that the son-in-law did not owe a fiduciary duty to the Plaintiff; however, the Plaintiff sought to have the Court find that the fiduciary duties of the father-in-law were impressed upon him in these circumstances.

The Court considered whether or not the top sales representative of the company could be considered a "key employee" and as such owed fiduciary duties to the company akin to those of management. It concluded that the employer failed to demonstrate a strong *prima facie* case that he was a "key employee":

"What this case seemed to boil down to was that Mr. Harfst had a long history with the grocers, as a result of which he possessed a good feel for them and their decision-making structures. He knew who the real decision-makers were, and those who simply occupied titles. A salesperson who does his job properly should possess such information. No doubt the information is of value to his employer. But the accumulation of such information does not reflect, in and of itself, a higher than normal degree of trust or confidence reposed by the employer in the salesperson. In my view, it simply reflected a salesman doing a good job. I do not read the cases as going so far as to impose a fiduciary obligation on a good salesman, who knows well the decision-makers of its employer's customers, to refrain from soliciting those customers after his departure from the company. If the employer wants to protect the value of such information, it can negotiate the appropriate restrictive covenants." [emphasis added]

The Court also found that the employer had failed to demonstrate a strong *prima facie* case that there was likely to be a misuse of its confidential information. No injunctive relief was granted.

Boehmer Box L.P. v. Ellis Packaging Ltd. [2007] CarswellOnt 2726 (Ont.S.C.J.), per. Brown J.

Independent Contractor for Tax Purposes – Still May be an Employee

The Honourable Mr. Justice Perell refused to grant a Defendant company's request for the striking of a claim on the basis that it did not disclose any genuine issue for trial on the basis that the Plaintiff had already been determined to be an independent contractor by Revenue Canada.

Perell J. held that there could not be any issue estoppel as the individual Plaintiff had not participated in the appeal taken by the company of the initial finding by Revenue Canada that he was an employee. While the Plaintiff did not take further appeal of that finding, it was not binding upon him as it was made for a different purpose, not in the context of his termination, and without his active involvement.

It was concluded that in the circumstances of this case, it simply would not be fair to apply the abuse of process doctrine and accordingly Perell J. declined to do so.

Engels v. Merit Insurance Brokers Inc. et al. (2007), 84 O.R. (3d) 647 (Ont.S.C.J.), per Perell J.

Wallace Damage Award May Far Exceed Period of Reasonable Notice

In a decision released on September 14, 2007, a Plaintiff employee with a six month tenure of employment as a crane operator with the Defendant was awarded one month pay in lieu of notice together with *Wallace* damages of six months.

Three months after she started work, the female Plaintiff was sexually assaulted by the largest grossing sales person the Defendant company had. The perpetrator was termed the "rainmaker" of the organization. He had been with them for fifteen years. He was criminally charged and convicted of sexual assault. The company moved him to another location and gave him a one-week suspension from work with pay. When the Human Rights Manager and her Supervisor attempted to provide her assistance with the situation they were terminated.

The Plaintiff was thereafter subjected to a course of harassment by the person appointed as her new supervisor, a close personal friend of the perpetrator. Needless to say, after a further three months she refused to return to work on the basis of what the Court accepted to constitute a constructive dismissal.

The Court had little difficulty in finding that the employer's course of conduct was intentionally designed to get the Plaintiff out and get the Defendant back. The Court in an expression of admonishment for the company's conduct held "the amount to be awarded for *Wallace* type damages need bear no relation to the amount awarded for damages in lieu of reasonable notice; although there is often some parallel between the two, there is no need for it; the damages are very much akin to general damages...." Six months of *Wallace* type damages were awarded.

Mercey v. Consolidated Recycling Inc. (2007), 61 C.C.E.L. (3d) 69 (Ont.S.C.J.) per Herold J.

Liquidated Damages Clause for Breach of Non-Competition Upheld

Two commercial insurance brokers resigned their employment, as did their assistants, and immediately joined a competitor brokerage firm. They had signed employment contracts with their former employer which contained restrictive covenants for a two year term, preventing them from conducting business with any customers of their former employer that were serviced by them at the date of their resignations. The contracts further provided that in the event of breach, damages suffered by the employer would be equal to 1.5 times the commission earned by the new employer from the clients who transferred their business as a result of the breach of the restrictive covenant.

The Court concluded that both the covenant (based on the doctrine established in *Elsley et al. v. J.G. Collins Insurance Agencies Ltd.* (1978), 83 D.L.R. (3d) 1 (S.C.C.) and the liquidated damages clause (as it was not considered a penalty based on the doctrine established in *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.* (1974), 54 D.L.R. (3d) 385 (S.C.C.)) were enforceable. It held the employees liable for damages accordingly. It also held their new employer responsible for damages for inducing breach of contract (based on the doctrine established in *Posluns v. Toronto Stock Exchange and Gardiner*, [1964] 2 O.R. 547 (H.C.) aff'd [1966] 1 O.R. 285 (C.A.) aff'd [1968] S.C.R. 330) as it hired the brokers with full knowledge of the terms of their respective contracts with the competitors and entered into an agreement to indemnify them for any damages as a result of a finding of any breach, as well to provide and pay for legal representation in relation to any lawsuit which was commenced.

Consequently, almost \$900,000 in damages was awarded against the departing employees and a further amount of close to \$1 million against the new employer.

The Court distinguished this case from that of *Merrill Lynch Canada Inc. et al v. RBC Dominion Securities Inc.*, (2007), 275 D.L.R. (4th) 385 (B.C.C.A.) as in the *Merrill Lynch* case there was no restrictive covenant. The Court held that the case does not stand for the proposition that restrictive covenants that have the result of limiting a client's ability to deal with his or her chosen adviser are unenforceable as being contrary to public policy.

H.L. Staebler Co. v. Allan [2007] O.J. No. 3460 (Ont.S.C.J.).

Settlement “Frustrated” by Death of Employee

A decision of the British Columbia Court of Appeal earlier this year concluded that a settlement entered into by an employee which contained provision for a salary continuance and that required the employee to take positive steps to attempt to find alternate employment during the period of that salary continuance was frustrated by the employee’s death prior to the completion of the settlement. The settlement included a reporting function as well as a deduction for mitigation earnings through the notice period.

The Court concluded that the promise to search for alternate employment was a fundamental term and constituted consideration for the promise to make salary continuance payments. Upon death, the employee became incapable of performing his obligation, which his estate was incapable of performing. Accordingly, the settlement agreement was held to be frustrated.

Rickards Estate v. Diebold Election Systems Inc. [2007] Carswell BC 865 (B.C.C.A.) per Rowles, Ryans, Smith J.J.A.

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