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

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EMPLOYEE TAKES CUSTOMER LIST – BUT INJUNCTION REFUSED

The Court refused to grant an employer an interlocutory injunction preventing the use of alleged confidential information, in this case, a customer list, where the employee emailed the list to herself at home two days prior to her last day of work.

The employee was employed as an inside sales representative earning \$39,000 per year. She was found not to be involved in decision making of any significance, and was not in any sort of unique or unusual position. She did not have her own clients, or clients for whom she had sole responsibility. Accordingly, the court refused to grant injunctive relief on the common law principals of enforcement of fiduciary obligations as it refused to find her to be a fiduciary.

The court was requested, in the alternative, to grant injunctive relief on the basis of an alleged breach of the restrictive covenant not to use confidential information. The court refused to grant relief on that basis also, finding that the test for the granting of such an injunction was not met.

The court concluded that the identity of the customers of the employer was no secret. All competitors serviced the same overall client pool, there was no loyalty and long-term contracts were found to be rare with customers shopping almost every job around to obtain quotations from various competitors. Consequently, the court found that to enforce such a clause concerning restraining the use of this alleged "confidential information" would have the effect of a "non-competition" clause, curtailing the ability of a relatively low-level employee from working in the industry.

The court concluded that there was no evidence of irreparable harm, nor did the balance of convenience favour the granting of the injunction requested and refused the relief.

However, the court did conclude:

"This, of course, does not prevent the plaintiff from recovering at trial on the basis of better proof. [The employee] must also keep in mind that if the restrictive covenant is upheld at trial she may be liable for damages. Even in the absence of an enforceable restrictive covenant, non-fiduciary employees owe a duty not to use truly confidential information of a former employer and may be liable in damages for any breach of that duty. The evidence at trial may differ from the evidence before me and establish those things."

While the language of the restrictive covenant is not recited in the decision, it likely did not expressly state that customer lists were confidential information and that the employee agreed and acknowledged that fact. Such language may very well have produced a completely different result.

Employers and employees should each be concerned with the way such clauses are drafted and the possible future interpretation and impact.

SOME CLARITY FOR CUMULATIVE CAUSE

In a decision this past summer of the Honourable Mr. Justice R. Echlin, the court for the first time in recent history, considered when a pattern of undesirable conduct can amount to cause for the offending employee's dismissal.

The court clarified that it is not necessary that the incidents all be related, or similar in nature: "While there is lesser authority to the contrary, it is the quality, and not the similarity, of the accumulated misconduct that is determinative of whether the employer has evidence an intention to no longer be bound by the employment contract." wrote Echlin J.

Echlin J. went on to conclude that a contextual approach should be applied, in all situations of alleged just cause in Ontario. In applying the contextual approach the court must strike a balance between the employee's responsibility and the employer's rights. The alleged cause must be more than "a series of minor or trifling transgressions" or "insubstantial allegations".

In this case each of incidents (5) was documented, involved a threat to workplace safety, an act of misconduct, and when not viewed in isolation, fell below any reasonable standard of conduct that the employer was entitled to expect. The employee was warned and failed to correct his behaviour. The incidents continued and improvement failed to materialize which impacted the employer's operations. The court held that the employer had cause for the dismissal of the employee.

This decision provides guidance to the factors which a court will consider in this area.

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