

ONTARIO COURT OF APPEAL FINDS RESTRICTIVE COVENANT UNREASONABLE

Mason v. Chem-Trend Limited Partnership, 2011 ONCA 344

The Ontario Court of Appeal recently determined that a worldwide one-year restrictive covenant was unenforceable, overturning the lower court's ruling that the restriction was reasonable.

Background

The appellant, Tom Mason, was employed as a technical salesperson by Chem-Trend, an American chemical manufacturer that operated globally. When he was hired in 1992, Mr. Mason signed a restrictive covenant that he would not, for a period of one year following the termination of his employment, provide services or products to, or solicit business from any entity that was a customer of Chem-Trend during his employment with the company.

When his employment was terminated by Chem-Trend seventeen years later, Mr. Mason commenced an action for wrongful dismissal. Chem-Trend counterclaimed that Mr. Mason had breached the restrictive covenant. Mr. Mason then brought an application to have the restrictive covenant declared unenforceable.

The judge who heard the application held that the restrictive covenant was unambiguous in its wording and that Mr. Mason understood what he was agreeing to when he was hired. In light of the global nature of Chem-Trend's business, he held that it was reasonable for the covenant to be broad, both geographically and in terms of the types of activities that were restricted. The application judge further held that the scope of the covenant was balanced out by the one-year temporal limitation, which he characterized as relatively short. Mr. Mason appealed to the Ontario Court of Appeal.

The Ontario Court of Appeal set out the following principles governing restrictive covenants in employment:

- To be enforceable, the covenant must be reasonable between the parties and with reference to the public interest;
- The balance is between the public interest in maintaining open competition and discouraging restraints on trade on the one hand, and on the other hand, the right of an employer to the protection of its trade secrets, confidential information and trade connections; and
- The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances.

In the context of these principles, the Ontario Court of Appeal identified three factors to be considered in determining the reasonableness of a restrictive covenant:

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1. Did the employer have a proprietary interest entitled to protection?
2. Are the temporal or spatial limits too broad?
3. Is the covenant overly broad in the activity it proscribes because it prohibits competition generally and not just solicitation of the employer's customers?

While the Ontario Court of Appeal agreed with the lower court that the restrictive covenant was unambiguous, it did not agree that the covenant was reasonable. The agreement prevented Mr. Mason from dealing with any entity that was a customer of Chem-Trend during his 17 years of employment with the company, which would make it virtually impossible for him to identify with whom he was permitted to do business. Noting that he was a sales person and not an executive with significant personal knowledge of Chem-Trend's clients, the Ontario Court of Appeal found that the restrictive covenant was unworkable in practice and therefore unenforceable.

Commentary

The decision of the Ontario Court of Appeal highlights the importance of careful drafting of restrictive covenants in order to ensure that they conform to the general principles and factors that courts will apply in the employment context. As is always the case with restrictive covenants, it is the party seeking to enforce the covenant that will have the onus of establishing that it is reasonable in the circumstances. This decision demonstrates that, in order to be enforceable, restrictive covenants may need to be limited not only temporally but also geographically or with respect to an employee's actual business contacts. It is also worth noting, however, that the Court of Appeal commented in its decision that there may be more justification for a broader prohibition on competition for executives or other highly placed employees who leave the company.

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