RECENT CASES CONFIRM OBLIGATIONS WHEN HOLDING FORMER EMPLOYEES TO NON-COMPETITION COVENANTS

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Two recent decisions, one from the Ontario Superior Court of Justice and another from the B.C. Supreme Court, provide employers with further insight into what is required if one is to hold a former employee to a non-competition covenant.

United Rentals of Canada Inc. v. Brooks

The first decision, *United Rentals of Canada Inc. v. Brooks*, involved a delivery company attempting to hold a former driver to a non-competition agreement that had been signed approximately four years after he began working for the company. After Brooks left United to work for a competitor, United sued for breach of the non-competition agreement. In response, Brooks brought a motion for partial summary judgment, arguing that the agreement was unenforceable because he signed it without receiving consideration from United.

The Court's decision is a good reminder of the importance of ensuring that proper consideration flows to employees anytime they are asked to execute a new contract. While United argued that Brooks received the benefit of notice of termination in excess of the statutory minimum in exchange for signing the non-competition agreement, prior to that point Brooks did not have a written employment contract. As such, he was previously entitled to common law notice and the new notice entitlement actually decreased the value of his entitlement. The excess notice was, therefore, not new consideration at all. The Court also dismissed United's argument that it agreed to forego the opportunity to terminate Brooks when he signed the agreement, finding that there was no evidence that United ever held back on a plan to terminate him.

Lastly, United claimed that Brooks condoned the non-competition agreement by working under it for 11 years. Here, the Court distinguished between condoning in constructive dismissal cases – in which employees risk surpassing a reasonable notice period by refusing to treat employment as being at an end right away – and condoning in restrictive covenant cases. The Court found no evidence that Brooks acquiesced to the non-competition agreement's terms. Unlike in a constructive dismissal case where an employee is immediately aware of a legal wrong and ignores it for a period of time, Brooks was only affected by the non-competition agreement's enforceability once he left the company.

IRIS The Visual Group Western Canada Inc. v. Park

Whereas *United Rentals v. Brooks* reminds of the need to provide employees with good consideration in exchange for a restrictive covenant agreement, the B.C. Supreme Court's decision in *IRIS The Visual Group Western Canada Inc. v. Park* provides useful instruction on the proper scope of a non-competition agreement.

There, IRIS sued former employee Dr. Park after she set up a competing optometry business fewer than 5km from IRIS' Vernon, BC location. After finding that Dr. Park was an IRIS employee, the Court examined Dr. Park's non-competition covenant to determine whether or not its terms were enforceable.

The Court upheld the non-competition covenant's three-year term because IRIS was able to rationally connect that period to the time required to find and train a new optometrist. Similarly, the Court found a 5km geographic restriction reasonable because IRIS had a legitimate interest in protecting its client base in that area.

However, the non-competition covenant was nevertheless struck down because it was not clear as to which activities it prevented Dr. Park from carrying out. For example, the Court found that IRIS had a reasonable interest in individuals seeking prescription glasses, but not those seeking non-prescription glasses, while the non-competition agreement covered both.

While the Courts' points of focus in *United Rentals of Canada Inc. v. Brooks* and *IRIS The Visual Group Western Canada Inc. v. Park* differ, both cases are instructive on the risks and obligations of employers seeking to establish and enforce non-competition covenants. These cases are a useful reminder that a non-competition covenant is likely to be deemed void unless the covenants are both carefully drafted and executed. Employers should ensure that a restrictive covenant's restrictions are rationally connected to business requirements, are clearly and unambiguously drafted, and that employees are both aware of and compensated for executing any such agreement.

by Kyle Lambert

A Cautionary Note