The Superior Court Applies a Penal Clause to Sanction an Employees Solicitation

November 01, 2017

In a recent Superior Court of Québec decision1, a former employee, as well as one of the employer's customers, were condemned jointly and severally to pay the employer a substantial penalty provided for by a service agreement, for breaching a non-solicitation clause governing the employees.

Mr. Louhaur worked for Groupe SL inc. ("SL") and was bound by a confidentiality agreement prohibiting him, in particular, from soliciting any of SL's customers during the term of his employment. Mr. Louhaur advised SL that he was resigning from his position, but he continued working for the company beyond his notice period so as to facilitate a smooth transition.

During his notice period, Mr. Louhaur attended a selection interview with Groupe ABS inc. ("ABS"), one of SL's customers. He never told SL that he had done that. Moreover, the service agreement between SL and ABS included a penalty clause applicable in the event that ABS decided or attempted to retain the services of anyone working for SL.

Following his interview with ABS, Mr. Louhaur agreed with SL that, thereafter, he would perform his duties as an independent worker. The obligation not to solicit SL's customers and the obligation of loyalty remained unchanged. Mr. Louhaur then ceased performing any services for SL. Two months later, SL learned that Mr. Louhaur was working for ABS.

Madam Justice Marie-Claude Armstrong condemned SL and Mr. Louhaur jointly and severally to pay the penalty provided for by the agreement, corresponding to an amount of $104,751.96, equivalent to two years of Mr. Louhaur's salary. Although he was a third party with respect to the agreement between SL and ABS, Mr. Louhaur had assisted ABS in breaching its obligations thereunder.

ABS, by attempting to retain Mr. Louhaur's services during the term of the service agreement, had contravened its contractual obligations under that agreement. Although Mr. Louhaur had been hired by ABS after his employment with SL had ended, his first selection interview, occurring while he was still employed, constituted solicitation.

Mr. Louhaur, for his part, had breached his contractual obligation to behave loyally (*i.e.* faithfully and honestly) in regard to SL. He had also breached his duty to act in good faith. Citing a recent Québec Court of Appeal decision2, Justice Armstrong recalled that the *Civil Code of Québec* enshrines a broad notion of good faith, namely, the standard of acceptable conduct.

Mr. Louhaur and ABS had therefore jointly breached their obligation of good faith in failing to act transparently. The Court drew an inference by presumption that Mr. Louhaur and ABS had agreed to alter the employee's status while he was continuing to work for SL, in order to hire him thereafter without contravening the agreement.

Finally, the Court enforced the penalty clause, since the parties had specifically agreed on the liquidated damages to which SL would be entitled. In fact, this "poaching" of the employer's clientele caused the supplier to suffer damages on two levels: it was forced to look for and train a new technician and its needs for customer service were reduced.

This type of scenario occurs frequently. An employer who assigns an employee to service a customer is certainly entitled to protect its staff from being poached by that customer. This decision confirms that the Superior Court of Québec is inclined to uphold penalty clauses intended to safeguard the obligations of loyalty and good faith of both customers and ex-employees, however substantial may be the amount of the liquidated damages agreed to by the parties. Courts hold that in the case of a clause contracted by mutual consent, whichever contracting party breaches the clause is making an enlightened business decision, with a full understanding of the amount that it risks having to pay. As a result, customers who sign this type of clause must be prudent and realize that attempting to escape their obligations under the agreement, such as by changing an employee's status to that of an independent contractor, will not necessarily suffice to elude the enforceability of the penalty clause.

1 *Groupe SL inc. c. Groupe ABS inc.*, 2017 QCCS 4411.

2 *Droit de la famille-171197*, 2017 QCCA 861, at para. 90 *et seq*.

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