MANAGEMENT
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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Planning for future employment with a competitor, not a breach of fiduciary duty - So says Court of Appeal for Ontario

In *EF Institute for Cultural Exchange Limited v WorldStrides Canada, Inc.*,[1] the Court of Appeal for Ontario held that an employee had not breached his fiduciary duty to his former employer when he met with a future employer post employment but during a one-year confidentiality and non-competition period. Nor, the court said, was it a breach of the employee's fiduciary duty to have accepted employment during the one-year restricted period, with a start-date one day after the non-competition period expired.

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What happened?

David Conklin ("Conklin") was employed as the President of EF Institute for Cultural Exchange Limited ("EF"), a company in the educational tour business, when his employment was terminated without cause. His employment contract contained a confidentiality clause and a one-year restrictive covenant that limited his ability to compete with EF. On termination, Conklin negotiated a severance agreement in which he agreed to comply with both provisions.

During the one-year non-compete period, Conklin used outplacement services provided by EF to update his resume, including disclosing certain of EF's growth metrics during Conklin's tenure. He also met with WorldStrides, a competitor of EF, to discuss potential employment, including potential office space in Toronto. Ultimately, WorldStrides offered Conklin employment to start on October 1, 2015, one day after the restrictive covenant expired.

Motion for summary judgement

After sending letters to Conklin reminding him of his post termination obligations, EF brought a claim against Conklin and WorldStrides for alleged breaches of Conklin's employment contract and severance agreement. EF also brought a motion for injunctive relief regarding a planned education trip organized by WorldStrides for the 100th anniversary of the Vimy Ridge Battle.

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EF's statement of claim originally sought $5,000,000 in damages against Conklin for breach of contract, breach of confidence, and breach of fiduciary duties, and a further $5,000,000 in damages against WorldStrides for knowingly assisting Conklin to breach his fiduciary duties, including breach of contract. By the time the matter had gone to trial, the damage claims had been reduced to $225,000 against Conklin and $35,657 against WorldStrides.

EF asserted Conklin violated the non-competition covenant by "assisting" WorldStrides during the restricted period and disclosing EF's growth metrics. EF further alleged that Conklin had advised another former employee of EF on her termination package, in violation of Conklin's fiduciary duty to EF.

The judge found the evidence did not establish a breach of confidentiality, and dismissed the action. Regarding the disclosure of EF's growth metrics, the judge found no breach of confidentiality because the financial information was not sensitive, and was shared by other current EF employees on their LinkedIn profiles. The judge also found that there was no evidence to support the allegation that Conklin had provided confidential information to WorldStrides regarding the Vimy Ridge trip.

The judge did express concern that Conklin had given advice to a recently terminated employee of EF about her termination package but found no evidence that this resulted in a loss to EF.

The Court of Appeal

EF appealed to the Court of Appeal for Ontario which dismissed the appeal and affirmed the lower court's decision. On the issue of whether Conklin's pre-employment meeting with WorldStrides breached his fiduciary duty to EF, the Court of Appeal held it did not:

> … the motion judge, at para 27, cited Guzzo v. Randazzo, 2015 ONSC 6936 for the proposition that meeting with a prospective future employer that is a competitor is not, on its own, a breach of fiduciary duties. The paragraphs cited by the motion judge in Guzzo deal directly with the issues of competition raised in this appeal: preparing for future employment with a competitor, sharing qualifications, and maintaining confidentiality. Although the motion judge judge's [sic] reasons could have been more explicit, fair reading of the reasons and record make it clear that the motion judge considered and resolved the issue of Mr. Conklin's non-compete obligations…

…while litigation may and can be used to advance and protect legitimate business goals and interests, a claim that has little merit may expose a party to unnecessary and unpredictable risk.

Takeaway for employers

The reasons of both the lower court and Court of Appeal suggest the respective courts may have been irritated with EF for having brought the action in the first place. As the Court of Appeal put it, *"EF's case has dwindled and now seems to take the form a of a corporate grudge match that does not deserve to be prolonged further. This was plainly the motion judge's perception and we share it."* The Court of Appeal ordered $25,000 in costs against EF.

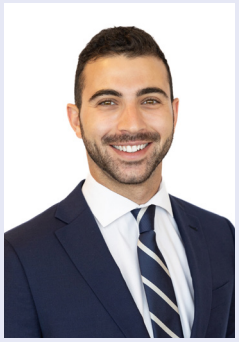
The decision is a good reminder of the risks associated with improvident litigation. Specifically, that, while litigation may and can be used to advance and protect legitimate business goals and interests, a claim that has little merit may expose a party to unnecessary and unpredictable risk.

To learn more or for assistance, contact Sherrard Kuzz LLP.

[1]2023 ONCA 566.

DID YOU KNOW?

The Fighting Against Forced Labour and Child Labour in Supply Chains Act came into force on January 1, 2024. Under it, certain entities involved in producing, selling, distributing, and importing goods into Canada are required to report annually on the steps taken to reduce and prevent the risk that forced or child labour was used at any step of production, or importation of goods into Canada. Entities with at least $20 million in assets, $40 million in revenue, and 250 employees have to file their first report as of May 31, 2024. For more information, contact Sherrard Kuzz LLP.



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Who's in control? Supreme Court of Canada addresses when an owner is an employer on a construction site

A construction site involves many actors: the owner, constructor, subcontractors and workers. All have separate, but often overlapping, obligations under Ontario's *Occupational Health and Safety Act* ("OHSA") to protect health and safety on site. When an accident occurs, the Ministry of Labour, Immigration, Training and Skills Development ("Ministry") will investigate to determine if any party failed to comply with its OHSA obligations. Under section 25(1)(c) of the OHSA, the "employer" is responsible to ensure compliance with all measures and procedures prescribed by the OHSA and its regulations.

The OHSA defines "employer" as: *"a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services."*

A recent Supreme Court of Canada decision released on November 10, 2023,[1] addressed the question of when a construction site "owner" may be considered an "employer" under the OHSA, and in so doing interpreted the definition of employer to apply to an owner even when an owner does not control the workers on site. The decision is troubling and has significant implications for Ontario construction site owners.

What happened?

The City of Sudbury ("City") contracted with a constructor, Interpaving Limited ("Interpaving"), to repair a water main and repave streets. Interpaving was the general contractor on the project and provided its own employees to perform the work. The City employed two quality control inspectors to inspect the project.

During construction, an Interpaving employee tragically struck and killed a nearby pedestrian with a road grader. A Ministry investigation concluded that, contrary to the requirements of the OHSA's Construction Projects Regulation, there was no fence to separate the construction work from the public and no signaller present. The Ministry charged both Interpaving and the City as "employers" under the OHSA.

The City conceded it was an owner at the site and had sent its employees for quality control purposes. However, the City disputed being characterized as an employer of the Interpaving workers on the site as it was not in control of how work was performed; this was Interpaving's responsibility.

At trial, the City was acquitted on the basis that, while a party may be both constructor and owner, in this case the City lacked the requisite control over the project to be held liable as an employer. The Ministry successfully appealed to the Court of Appeal for Ontario which found the City to be an employer because it employed the quality control inspectors who oversaw Interpaving's workers. Significantly, the Court of Appeal did not consider the very limited control the City had over Interpaving's workers.

The City appealed to the Supreme Court of Canada which split 4-4.[2] As a result of the 'tie,' the appeal was dismissed and the Court of Appeal decision stands.

Those in favour of the City being an "employer"

Four judges dismissed the appeal on the basis the City was appropriately considered an employer of the Interpaving workers on the site. According to those judges, the purpose of occupational health and safety legislation is to protect health and safety in the workplace and, to do so, the act places overlapping responsibility on various workplace actors, *i.e.*, a "belt and braces" approach. As such, a project owner will be an employer for the purpose of the OHSA if it employs workers on a site or contracts for the service of workers on the site, regardless of 'control' over the workers.

This interpretation is consistent with the plain language definition of employer under the OHSA, which does not import a requirement of control. That said, the degree of control may be relevant to a due diligence defence which an employer may subsequently argue.

Those opposed...

Four judges held the City should not be considered an employer of the Interpaving workers under the OHSA. In their view, the definition of employer is intended to cover both a traditional employer-employee relationship and where an entity directly contracts for services. However, the definition is not intended to cover a situation where a project owner retains another party – such as a constructor – to undertake a project.

According to these judges, it would be 'absurd' to require an owner to be responsible for workers hired by a constructor, when the owner has no control over those workers. Particularly in the construction industry, where there are often several contractors and sub-contractors each performing their own specialized work, it is practically impossible for a project owner to be responsible for each and every worker, and this would lead to endless charges without a proper basis.

Takeaway for employers

The split decision of the Supreme Court of Canada means the Court of Appeal decision stands and the definition of "employer" may apply even when a project owner has no control over workers on site. This is troubling both in terms of legal implications and practical application. However, for now, it remains the law of Ontario.

To mitigate risk, project owners should be familiar with the duties of an employer under the OHSA, and appropriately screen, select, and monitor contractors, to the extent reasonable. This might include reviewing a contractor's safety records and training protocols and any steps being taken to ensure ongoing compliance with health and safety standards.

To learn more, contact the health and safety lawyers at Sherrard Kuzz LLP.

[1] *R v Greater Sudbury*, 2023 SCC 28 (CanLII).

[2] Ordinarily, nine Supreme Court of Canada judges decide a matter to avoid a split decision. In this matter, for reasons not relevant to the decision, eight judges decided the matter.

MANAGEMENT COUNSEL

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Workplace Health and Safety Update

Workplace health and safety issues, if not appropriately managed, can be a source of significant liability for an employer. Join us as we discuss these important topics, including best practices to reduce risk:

1. **Workplace Safety and Insurance (Ontario) Update**
   - Recent changes to rates and benefits.
   - Amendments to the WSIB accident reporting process and how this may impact an employer.
   - New WSIB policy on communicable disease.
   - Update on chronic mental stress claims.
   - Practical tips to manage claims and reduce liability.

2. **Health and Safety (Ontario) Update**
   - Recent trends in charges and fines.
   - The difference between a health and safety inspection and investigation – what every employer should know.
   - Impact of recent Supreme Court of Canada decision on construction site owners.
   - Due diligence in health and safety – practical tips to minimize risk.

DATE: **March 6, 2024, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Monday February 26, 2024.**

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