Planning for future employment with competitor not a breach of fiduciary duty

Competitor offered job to start one day after restrictive covenant expired

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In *EF Institute for Cultural Exchange Limited v. WorldStrides Canada, Inc.*, 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.

David 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 Oct. 1, 2015, one day after the restrictive covenant expired.

Motion for summary judgment

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.

EF's statement of claim originally sought $5 million in damages against Conklin for breach of contract, breach of confidence, and breach of fiduciary duties, and a further $5 million 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.

Employer's appeal dismissed

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…"

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.

See *EF Institute for Cultural Exchange Limited v. WorldStrides Canada, Inc.*, 2023 ONCA 566.

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