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ALTERNATIVES TO TRADITIONAL NON-COMPETITION PROVISIONS IN EMPLOYMENT AGREEMENTS

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In *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97, the BC Court of Appeal has recently upheld and enforced a clause in an employment contract requiring an employee to pay her employer a prescribed amount in the event she competed after the employment contract was terminated. Unlike a traditional non-competition provision, the clause in this employment agreement did not prohibit the employee from competing. Instead, it required her to pay a set amount to her employer in the event she chose to compete in a prescribed area and within a specified time period after her employment ended. Since the payment obligation made it difficult for the employee to compete with her employer, the clause was a restraint of trade, in the same manner as more traditional clauses which simply prohibit competition. A clause which constitutes a restraint of trade is only enforceable if it is reasonable. Such a clause is considered to be unreasonable if it imposes a penalty or if its wording is ambiguous. A restrictive covenant will be ambiguous if it is not clear as to the restricted activity, time or geographic area. In this case, the payment obligations were not characterized as a penalty and a majority of the Court of Appeal found the clause was not ambiguous. In the circumstances, the clause was valid and enforceable.

Facts

Creston Veterinary Clinic is located in Creston, BC. The greatest amount of the clinic's business is drawn from eight dairy farms in the Creston area, a business which the clinic had built over the course of many years. After graduating from a veterinarian college and obtaining a licence to practise, Dr. Rhebergen entered into a three-year employment agreement with the clinic in order to gain the necessary field training while earning an income. The employment agreement contained the following non-competition provision:

11. NON-COMPETITION



1. The Associate acknowledges and agrees that she will gain knowledge of and a close working relationship with the CVC's [Creston Veterinary Clinic Ltd.'s] patients and clients which would injure CVC if made available to a competitor or used for competitive purposes.

2. The Associate covenants and agrees that in consideration of the investment in her training and the transfer of goodwill by CVC, if at the termination of this contract with CVC she sets up a veterinary practice in Creston, BC or within a twenty-five (25) mile radius in British Columbia of CVC's place of business in Creston, BC, she will pay CVC the following amounts:

If her practice is set up within one (1) year termination of this contract - \$150,000.00;

If her practice is set up within two (2) years termination of this contract - \$120,000.00;

If her practice is set up within three (3) years termination of this contract - \$90,000.00.

The amount to be paid in the event Dr. Rhebergen set up a practice within 25 miles of Creston during the first, second or third year after the employment agreement was terminated, was calculated based on the clinic's prior experience in hiring a former associate. The clinic calculated the investment to be made in mentoring, training and equipment for Dr. Rhebergen, if she left before completing three years, would be \$90,000 or more. The clinic then calculated the impact on its goodwill and the volume of its business if Dr. Rhebergen were to compete for its clientele. The clinic expected that, after introducing Dr. Rhebergen to the clinic's clientele, she could be expected to take as much as 25% of its business, which would amount to about \$60,000 in revenue. The clinic also recognized that the amount of lost revenue would decline if one or two years passed before Dr. Rhebergen began to compete. On that basis, the payment that Dr. Rhebergen would have to make if she left the clinic before the term of the agreement expired, and set up practice within the restricted area, totalled \$150,000, declining to \$90,000.

After 14 months, differences between the clinic and Dr. Rhebergen led to her refusal to continue working for the clinic. As a result, her employment was terminated for cause. Five months after she left the clinic, Dr. Rhebergen commenced court proceeding to have the non-competition provision declared unenforceable



so that she could set up a mobile dairy veterinary practice in Creston.

The Issues

The court had to resolve the following issues:

1. Did the non-competition clause constitute a restraint of trade?
2. If so, was it a reasonable restraint such as to be enforceable?
3. Was the clause unreasonable because the payment obligations constituted a penalty?
4. Alternatively, was the clause unreasonable because it was ambiguous?

The Decision of the Court of Appeal

On the first issue, the court concluded that the non-competition clause did constitute a restraint of trade because it compromised Dr. Rhebergen's opportunity to compete with the clinic.

On the third issue, the court found the unchallenged evidence was that the amount to be paid in the event Dr. Rhebergen chose to leave and compete within the three-year term of the agreement, was not extravagant or unconscionable when compared with the potential damages the clinic could prove. Since the amount of the payment obligations had a reasonable evidentiary basis, they could not be considered to constitute a penalty.

On the fourth issue, a majority of the Court of Appeal found that the clause was not ambiguous and could not be considered unreasonable on that basis. The plain and ordinary meaning of the words "to set up a practice" implies a degree of permanency that comes from a continuous or regular provision of professional services. The only reasonable interpretation of that clause was that it would be triggered in the event Dr. Rhebergen provided veterinarian services on a regular or continuous basis.

Ultimately, a majority of the Court of Appeal answered the second issue and concluded that the non-competition provision was a reasonable restraint and should be enforceable.

Summary

The Rhebergen case is a good example of an alternative to the classic non-competition provision which tries to simply prohibit post-employment competition for a specific period of time and in a prescribed geographic region. By taking time to assess the actual potential financial impact of competition, the clinic was able to defend the payment obligations. By establishing a logical basis to the calculation of damages that would be



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incurred in the event the employee competed with the employer, the employer was able to establish that the payment amounts were not penal in nature but rather, a genuine effort to estimate the potential damages that would be sustained from competition.



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