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DOES A WRONGFUL DISMISSAL RELIEVE AN EMPLOYEE FROM RESTRICTIVE COVENANTS?

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There are generally two types of "wrongful dismissal". The first type involves cases where an employer, believing it has cause for termination without notice, dismisses an employee for cause only to have a court subsequently decide that there were insufficient grounds to establish just cause for termination. In that sense, the dismissal was "wrongful" because notice of termination without cause should have been given.

The second type of wrongful dismissal involves cases where an employer fails to give sufficient notice, or pay in lieu of notice, for a termination of employment without cause. The "wrongful" act is the employer's failure to give proper notice of termination, contrary to an express or an implied term of the employment contract.

The employee's remedy in both types of wrongful dismissal is to seek compensation for the employer's breach by bringing an action for payment in lieu of notice.

Impact of Wrongful Dismissal on Restrictive Covenants

Are there other consequences to an employer, however, for a wrongful dismissal? For example, does that breach of contract by the employer entitle the employee to ignore employment contract provisions (known as "restrictive covenants") which restrict the employee's right to compete with, or to solicit customers from, his former employer? According to a recent decision of the Alberta Court of Appeal, if the breach signals a clear intention by the employer not to be bound by the employment contract (i.e. a repudiation of the contract), and if the employee accepts that repudiation, then the answer to that question is "yes". When an employee is wrongfully dismissed without cause or proper notice, the employer cannot enforce a restrictive covenant in a contract, against the employee: *Globex Foreign Exchange Corporation v. Kelcher*, 2011 A.B.C.A. 240.

The decision in *Globex* is based upon an old English House of Lords decision in a case known as *General*



Billposting Co. Ltd. v. Atkinson, [1909] A.C. 118, which held that the wrongful termination of the employment contract by the employer rendered the restrictive covenants in the employment contract, unenforceable against the employee. Part of the rationale behind that principle is that it would be morally unjust to permit an employer to benefit from restrictive covenants which may prevent its former employee from competing with, or soliciting customers from, the employer after it has acted wrongfully by refusing to honour its side of the bargain. If the employment contract requires the employer to give notice of termination or pay in lieu of notice, and the employer deliberately fails to do so, then why should the employee be held to a promise not to compete with, or solicit customers from, the employer?

Reasons to Uphold Restrictive Covenants in Wrongful Dismissal Cases

It is not clear whether a court in British Columbia would take the same approach as the courts in Alberta on this issue. There are a number of reasons why a BC court might still enforce a restrictive covenant against an employee, even when the employer has failed to honour its obligation to give notice of termination without cause. For example:

1. Just because one party has breached a contract doesn't mean that the entire contract comes to an end. Many clauses in contracts are only intended to arise after one party has already breached the contract (e.g. arbitration clauses or clauses which limit or exclude liability for certain types of damages after a breach has occurred).
2. A breach of contract give remedies to the non-defaulting party but shouldn't result in a complete forfeiture of all rights under the contract. Just because an employer may fail to give proper notice of termination shouldn't give the employee the right to avoid his own contractual promises and obligations not to compete, or not to solicit his employer's customers, provided the restrictive covenants are reasonable.
3. If the employer fails to given reasonable notice of termination, then the employee's remedy is to seek damages for pay instead of notice. That remedy should fully compensate the employee for any loss. There is no justification for saying that, in addition to receiving pay instead of notice, the employee need not comply with other portions of the employment contract that were clearly intended to operate after the date of termination to protect an employer's legitimate proprietary interest in its customer base.

Fiduciary Duties May Not Survive a Wrongful Dismissal

If, however, a court in British Columbia came to the same conclusion, and struck down restrictive covenants simply because the employer failed to give reasonable notice of termination without cause, an employer



should still have some protection based on an employee's common law, and in some cases fiduciary, duties which are separate duties, independent of the employment contract. For example, all employees have a duty after their employment comes to an end, not to misuse confidential information belonging to their former employer. Key management or fiduciary employees, are prevented from soliciting customers of their former employer. Even if the benefit of restrictive covenants is lost because the employment contract is repudiated, these common law protections and fiduciary duties should survive. Recently, however, courts in Ontario and Alberta have found that an employer's wrongful dismissal of a fiduciary employee will release that employee from post-employment fiduciary obligations: see for example, *Zesta Engineering Ltd. v. Cloutier*, [2001] O.J. No. 621 (Ont. S.C.J.).

Protective Measures Employers Should Take

The risk to an employer's business, of having former employees soliciting the employer's customers, and competing without any restrictions, post-termination, underscores the importance of two protective measures which all employers should adopt:

1. Use written employment contracts, with clear, reasonable and enforceable restrictive covenants, that make clear they are intended to survive regardless of how a termination of employment occurs.
2. Rather than alleging just cause for termination in "border line" cases, present a reasonable severance package and negotiate a settlement that contains an acknowledgment by the employee of his or her continuing fiduciary obligations.