

ALBERTA COURT OF APPEAL FINDS RESTRICTIVE COVENANTS NOT ENFORCEABLE IN THE CASE OF A WRONGFULLY DISMISSED EMPLOYEE

On August 10, 2011 the Alberta Court of Appeal released its decision in *Globex Foreign Exchange Corporation v Kelcher*, 2011 ABCA 240. The Court found that when an employee has been wrongfully dismissed, the employer cannot then enforce a restrictive covenant that would otherwise be binding on the employee, particularly when the language of the restriction is ambiguous.

At various points during their employment with Globex, three employees had agreed to restrictions on their future work activity following the conclusion of their employment with Globex. Two of these employees agreed to restrictions during their employment but received no benefit in exchange for agreeing to the restrictions. The Court concluded that these employees were not bound by the restrictive covenants as they had received no consideration, other than continued employment.

The third employee, who agreed to the restrictions at the commencement of employment, was also relieved of his requirement to comply with the restrictive covenants, as he was wrongfully dismissed by Globex. The court noted that an employer cannot capitalize on its failure to give notice or damages in lieu of notice, by enforcing restrictions on the activities of innocent employees who have been subject to wrongful dismissal.

What does this case mean for employers?

- A restrictive covenant is a clause in an employment contract, such as a non-solicitation clause, that restricts the future activities of an employee after their employment has concluded.
- If you impose a restrictive covenant, ideally it should be included in the initial employment agreement at the commencement of the employment relationship.
- If a restrictive covenant is imposed on an employee after an employee has started working, some form of consideration must be provided to the employee in exchange for them agreeing to the restriction. If some benefit is not provided, the employee will likely not be bound by that restriction.
- The language used in restrictive covenants must be clear and unambiguous. The language of the clause must specify what activities are being restricted.

- Courts will uphold only reasonable restrictive covenants. If it is impossible for a former employee to predict when he or she is breaching the restrictive covenant, then it is likely unreasonable.
- A dismissed employee may not be required to comply with restrictive covenants if the dismissal is not properly effected.

If you have questions or would like further information on this or on other related topics, please contact any member of the Spectrum HR Law LLP Labour and Employment practice group:

Will Cascadden 403.444.8107 wcascadden@spectrumhrlaw.com

Janet Nystedt 403.444.8108 jnystedt@spectrumhrlaw.com

Shana Wolch 403.444.8106 swolch@spectrumhrlaw.com

Jamie Taylor 403.444.8114 jtaylor@spectrumhrlaw.com
(Student-at-Law)