Minimal! - Court of Appeal Reduces the Post-Employment Duty of Loyalty

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Suppose that your best employee, the up-and-comer you've been training for several years, resigns. It's terrible news for you, especially amid a labour shortage. And, to top it off, their new employer is your main competitor.

How long has the employee been planning to leave? Did they plan during working hours? Using your company's resources? What about the knowledge and contacts gained over the past few years: Will the employee share them with your competitor? If they did so, would it be illegal?

At this point, one of your main concerns would be whether the resigning employee's employment contract contains restrictive covenants, such as non-competition, non-solicitation or confidentiality undertakings. If it did, it would bode well for you provided that the covenants are valid and enforceable.

You would otherwise have to rely on the duty of loyalty provided for in article 2088 of the *Civil Code of Québec*, a safety net that employers have relied on until a recent decision of the Court of Appeal

of Québec limited its scope.

Sahlaoui c. *Médicus*[1]

Mr. Sahlaoui, an orthotist-prosthetist, had been working for Médicus for about ten years, during which time he had built a relationship of trust with clients thanks to the quality of his services. He informed Médicus that he was resigning to start a competing company, Evo.

Accusing Mr. Sahlaoui of breaching his duty of loyalty, Médicus sued him and his new company, claiming damages for one year's lost profits, for hardship and inconvenience.

The Superior Court awarded Médicus damages in the sum of $135,238, plus interest.

However, the Court of Appeal dismissed Médicus' recourse in its entirety and reaffirmed the right to freedom of work, concluding that the former employee, both before and after his resignation, had not breached his duty of loyalty.

The Court thus considers that the duty of loyalty provided for in the *Civil Code of Québec* must be assessed in two stages, namely during and after employment.

Duty during employment

In the course of employment, an employee's duty of loyalty is significant, especially for key employees and those with a great deal of professional discretion. The close ties that Mr. Sahlaoui had developed with clients during his employment were not enough to convince the Court that he had held a key position in his employer's business, which, it should be noted, had approximately 350 employees at 15 branches.

The Court is of the opinion that seeking new work does not in itself constitute a breach of the duty of loyalty, as it is an extension of the freedom of work. There are legitimate limits to the openness and transparency required under the terms of an employment contract, such that an employee may keep both their intention to change jobs and the steps taken to do so secret.[2]

On the other hand, the employee, while still employed, must not prepare their departure during working hours with tools provided by the employer. Stealing or hacking confidential information, withholding or misappropriating the employer's business opportunities, taking client lists and recruiting clients for the employee's benefit are examples of disloyal acts that the Court mentions. The judges cite with approval a 2007 decision of their court, which held that retaining or "*refusing to turn over a former employer's property in some cases constitutes outright theft, regardless of the notion of loyalty*."[3]

Duty after employment

The Court of Appeal believes that the duty of loyalty is considerably reduced after an employee's departure.

The duty of loyalty set out in the *Civil Code of Québec* does not impose restrictions on an employee equivalent to those resulting from a well-drafted non-competition clause,[4] particularly in terms of duration, because the duty of loyalty remains in effect for only a reasonable amount of time, which rarely exceeds a few months (three to four months).[5]

In this case, although Mr. Sahlaoui had signed a loyalty, confidentiality and non-competition undertaking to govern his post-employment conduct, the Court disregarded it because such undertaking did not meet the requirements for restrictive covenants established by the courts. Mr. Sahlaoui's actions were therefore analyzed in terms of the duty of loyalty set out in article 2088

of the *Civil Code of Québec*.

As the Court of Appeal points out, an employee who is not subject to a non-competition clause (or a non-solicitation or confidentiality clause having a term that exceeds the end of employment) may use their personal professional experience, i.e., their expertise, knowledge, network and skills acquired and developed with the former employer, as they see fit. Such employee may compete with their former employer, by soliciting its clientele, for example, without committing a fault.[6]

In short, the duty of loyalty under the *Civil Code of Québec* does not prohibit competition, but requires that it be exercised in moderation and only for a short time after employment ends.

What it means

Because the duty of loyalty is “rather minimal,” to quote the Court of Appeal, any organization would be well advised to protect itself by using restrictive clauses and having a clear plan of action for when an employee leaves to join the competition.

To be enforceable, restrictive covenants must be specific and contextual. They must not exceed what is reasonable to protect the legitimate interests of the employer.

The following questions are worth considering:

> When preparing an employment contract, is it possible to predict whether the employee in question will have direct relations with clients or suppliers?
> Will the employee learn, for example, the manufacturing processes or techniques that the organization strives to safeguard?
> If so, what restrictive clauses should be included in the employment contract, in particular regarding the nature of the employee’s tasks, reporting level and unique expertise?
> What needs to be protected? Examples include the confidentiality of information and the business’ reputation and services. The business should also protect itself against competition and solicitation of its clientele, suppliers and employees. To avoid unpleasant surprises, it is important to understand the purpose of each restrictive clause. They should also not be confused between them or thought to encompass the restrictions of another.
> Do the restrictive clauses meet the reasonable criteria necessary to be enforceable? Will they withstand contestation to the extent possible?
> Once the employee’s departure is announced, who will take over with clients or suppliers in order to maintain their trust?
> What security measures will be put in place when the departure is announced to ensure and preserve the confidentiality of certain information?

The absence of restrictive covenants at the time of hiring is not disastrous, as the parties may negotiate such undertakings during the course of employment. While an employee cannot be forced to accept them, it is easier to reach an agreement when discussing a salary increase, promotion or other consideration, always making sure that the restrictive clauses are reasonable in light of the employee’s work context and the employer’s legitimate needs and rights. The parties may also agree to certain restrictions as part of an exit agreement.

The Médicus decision has, at the very least, clarified the scope of the duty of loyalty provided for in the *Civil Code of Québec*.

The members of our Labour and Employment Law group are available to advise you and answer your questions.

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1. *Sahlaoui* c. *2330-2029 Québec inc. (Médicus)*, 2021 QCCA 1310, see paragraph 59.
2. See paragraph 35.
3. *Concentrés scientifiques Bélisle inc.* c. *Lyrco Nutrition inc.* 2007 QCCA 676.
4. See paragraph 44.
5. See paragraph 48.
6. See paragraph 53.