Non-compete clauses are subject to rigorous scrutiny when enforced against independent contractors

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In the recent decision of *Rusha Barua Professional Corporation v Crescent Heights Optometry Inc* (Docket: P2390100538), an optometrist successfully defended against allegations that she breached a non-compete clause.

Background

In early 2022, an optometry clinic owned and operated by Dr. Steve Alfaiate, Bel-Aire Optometry (Bel-Aire), posted an associate position for its clinic. The clinic was advertised as "new", with specific optometry equipment available to its physicians. The clinic was scheduled to open in July 2022.

Dr. Rusha Barua, a registered optometrist, applied for the associate position and was offered the position, which was to begin in July 2022. Shortly before Dr. Barua was scheduled to begin work at Bel-Aire, she was notified that the clinic opening would be delayed until Fall of 2022, but that she could work at a sister clinic, Crescent Heights Optometry Inc. (Crescent), also owned and operated by Dr. Alfaiate.

Dr. Barua worked at Crescent for six-months pursuant to an Associate Agreement between her professional corporation, Bel-Aire, and Crescent. On Dec. 5, 2022, she resigned on 90-days notice (in accordance with the terms of the Associate Agreement). Shortly thereafter, due to ethical concerns, on Dec. 31, 2022, she advised Crescent that, in her view, it had repudiated the Agreement and that she would be immediately ceasing her optometry services to Crescent.

Next, Crescent withheld Dr. Barua's December 2022 wage. Dr. Barua brought a Civil Claim seeking payment of her unpaid December 2022 wages, and Crescent filed a Counterclaim alleging breach of the Associate Agreement for failing to give a full 90-days notice before resigning and alleging breach of the non-compete clause.

Following a trial of the Action, the Court found that, as of December 2022, neither the offer to work at a new clinic in Bel-Aire, nor access to the promised equipment had materialized. In fact, as of trial in December 2024, Bel-Aire was still under construction

and had not opened. Further, the Court found that Dr. Barua came to have genuine ethical concerns regarding insurance billing practices by Crescent in relation to nine of her patients, which caused her to reasonably fear that her professional reputation and integrity could be in jeopardy.

As such, the Court found that Crescent fundamentally breached and repudiated the Agreement and Dr. Barua was not bound by the 90-day termination provision in the Agreement. Further, the Court reiterated that non-compete clauses are subject to a rigorous standard of scrutiny in the employment context (including independent contractors), citing *IRIS The Visual Group Western Canada Inc v Park*, 2017 ABCA 301. In this case, the Court found that the non-compete clause was unenforceable for ambiguity. In the alternative, the Court concluded that Crescent's evidence on damages was insufficient to establish the lost revenue it alleged.

The Court awarded Dr. Barua damages for the amount of her unpaid December 2022 wage and dismissed the Counterclaim in its entirety.

The authors of this article acted as counsel for Dr. Barua and Rusha Barua Professional Corporation.

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