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The Court of Appeal Rules on an Action for Damages for Breach (or Not!) of a Non-Solicitation Covenant

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On August 20, 2018, the Court of Appeal of Québec rendered an interesting decision in the case of *Lemieux c Aon Parizeau inc.*[1], concerning damages that may be claimed by an ex-employer in cases where a notice of resignation and a non-solicitation clause, as well as the employee's obligation of loyalty, have been violated.

The Facts

Mr. Guy Lemieux was a damage insurance broker. When he joined the insurance firm of Aon Parizeau inc. (Aon) in 1999, he signed a contract of employment that required him to give a two-week notice in the event of his resignation, as well as a clause prohibiting him from soliciting Aon's customers and from competing with Aon for a term of twelve months following the termination of his employment.

In 2013, Mr. Lemieux resigned his job at Aon, without giving any prior notice, and joined a competitor, the firm Renaud Assurances et Gestion de risques inc. (Renaud). At the time of his departure, Mr. Lemieux's book of business consisted of some 83 clients. He admitted that he had contacted 17 of his clients in the days preceding his resignation, in order to inform them that he was leaving Aon and that someone else would be taking over their files.

Twenty-five clients opted to follow Mr. Lemieux to Renaud. Some of them left Aon several months after Mr. Lemieux's departure. In all cases, and at his clients requested, Mr. Lemieux did all he could to facilitate the transfer of their files to Renaud.

Aon, in its originating application, claimed damages from Mr. Lemieux, which it assessed at more than $3,000,000, alleging his planned departure without notice or serious grounds, as well as the breach of his non-solicitation covenant.

The Superior Court's Decision in First Instance[2]

The trial judge accepted the evidence that Mr. Lemieux had breached his duty of loyalty by failing to give Aon the notice provided for by his employment contract. Such disloyal behaviour justified condemning Mr. Lemieux to the payment of two weeks of his annual salary.

Next, the judge held that the non-competition obligation imposed by Article 2089 of the *Civil Code of Québec* was unreasonable and inapplicable. As regards the non-solicitation covenant, the judge found that communicating with a former client to inform the client of his departure did not violate the principle of the non-solicitation obligation. Furthermore, she also allowed the testimony of different clients who had followed Mr. Lemieux, to the effect that they were bound for life to their broker but not to Aon. In the circumstances of this case, Aon had failed to submit proof of any direct damages.

The judge, nevertheless, concluded that awarding Aon twelve months of Mr. Lemieux's salary as a damage equivalent was justified, since after the expiry of that period, the clients would have followed him. In addition, she condemned Renaud and Mr. Lemieux, jointly and severally, to pay $200,000 in damages to Aon.

The Court of Appeal's Decision

The Court of Appeal, for reasons stated by Justice Lévesque, as well as by Justice Bouchard, allowed Mr. Lemieux's appeal and quashed the judgment of the Superior Court. The appellate judges found that the evidence of non-performance of a contractual obligation did not in itself suffice to support a claim for damages and that a certain injury (harm) directly connected with the non-performance also had to be proven.

Even had notice been given, Aon had not proven, by a preponderance of evidence, that it would have held onto Mr. Lemieux's clients. At the very most, Aon had proven only that it could have profited from the required period of notice to try to retain Mr. Lemieux's clients, but that there were no actual damages caused, nor was there any causal link between the damages and the fault in question.

The judge of first instance had therefore committed an error by compensating Aon on that head. Simply to rely on Mr. Lemieux's lack of loyalty and the application of the notice of resignation clause did not suffice. Some kind of damages had to have resulted from those facts. Similarly, since the evidence did not establish that Mr. Lemieux had breached his non-solicitation obligation, awarding damages against Mr. Lemieux and Renaud jointly and severally was unjustified.

The loss of an opportunity could become a compensable injury if it was proven on a balance of probabilities that but for the fault committed, the opportunity would have materialized. The opportunity that Aon had to convince some of the 25 clients to remain, during the two-week notice period, was, however, neither real nor serious.

Conclusions

In consequence, the Court of Appeal reiterated in this case that non-solicitation covenants do not shelter ex-employers from losses of customers caused when one of their employees resigns and goes to work for a competitor. Indeed, if the bond of trust between the employee and his or her clients is clearly established, they may follow him or her without ever being the subject of any active, direct, pressing or repeated communications. Under such circumstances, the non-solicitation clause will be respected and the employer may not claim any damages.

One may well wonder whether, given the facts adduced in evidence, the decision would have been the same had the contract contained a clause prohibiting "the carrying on of business", in addition to the non-solicitation clause.

[1] 2018 QCCA 1346.

[2] *Aon Parizeau inc. c Lemieux*, 2016 QCCS 3098.

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