

Non-Disparagement Clauses in Québec: A Case Study

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In *Digital Shape Technologies Inc. v Walker*, 2018 QCCS 4374, the Québec Superior Court considered the application of a non-disparagement clause in a severance agreement, the general civil law post-employment duty of loyalty and civil law defamation principles.

The employee was terminated without cause in the context of a workforce reduction exercise that had led to the elimination of her position.

She was offered and accepted a severance package, qualified by the court as generous, and in consideration of that package agreed, among other things, to be bound by a confidentiality and non-disparagement covenants. Those covenants were simple and straight forward:

12. The Employee represents and warrants that she will not use, communicate, divulge, sell, transfer, circulate or otherwise distribute to any person or otherwise disclose to the public any information relating to the private or confidential affairs of the Company or relating to any trade secrets of the Company.

13. The Employee undertakes not to make any negative or disparaging comments about the Company, its management, services and products, nor do anything that may harm their reputation.

After accepting her severance package and agreeing to its terms, the employee published disparaging remarks on RateMyEmployer.ca, including false or exaggerated statements about the employer not providing training, an 80 per cent staff turnover rate, socializing being frowned upon, a private and confidential investigation within the organization and privacy violations.

The court found that the clause was “neither unreadable nor ambiguous.” It clearly implied a restriction on the former employee’s freedom of expression, while she had undertaken not to make negative or disparaging comments about her former employer, its management, services and product. The terms used were “simple and precise, those found in this type of clause, which do not leave any doubt as to the real consequences and effects on the freedom of expression of the person signing the Transaction.”

The clause was an extension of the duty of loyalty provided for at Article 2088 of the *Civil Code of Québec*:

The employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work.

These obligations continue for a reasonable time after the contract terminates and permanently where the information concerns the reputation and privacy of others.

Finally, the employee had breached her civil duty of care and had defamed the employer.

The employer did not have to prove specific damages suffered and benefited from a doctrine recognizing general but modest damages between \$1,000 and \$15,000 in such cases; \$10,000 in that case.

The court also recognized that the violation was intentional and in breach of corporate *Charter* rights. It awarded \$1,000 in that regard.

Two takeaways: You don't need a fancy clause to protect your rights and there are remedies in such frustrating situations for employers.

Note: The employer was represented by BLG's Hugo Babos-Marchand and Hugo Saint-Laurent.

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