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Legal update

Renewing fixed-term employment contracts: Spoken words fly away, written words remain

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Employment and labour

On February 1, 2016, the Superior Court of Quebec issued a judgment affecting businesses that use fix-term employment contracts containing restrictive covenants (non-solicitation, confidentiality and non-competition clauses).[1] The court found that restrictive covenants are not clauses essential to an employment contract and therefore, unless they are expressly stipulated in writing, they are not tacitly renewed when the fixed-term contract is tacitly renewed. As a result, if there is nothing in writing reconfirming them, they will cease to apply if the fixed-term contract is tacitly renewed, leaving the duty of loyalty under Article 2088 CCQ as the employer's sole protection.

The facts

A transportation specialist accepted employment with an employer in the transportation sector, bringing much of his book of business with him. Upon joining the company, he signed a three-year employment contract containing a non-solicitation clause and a confidentiality clause.

More than a year after the initial contract expired, a second employment contract was entered into for a fixed three-year term that also contained a non-solicitation clause and a confidentiality clause. Even though the employee asked for a second agreement in writing to be provided after the second contract expired, the employer did not take the time to set down the worker's employment terms and conditions in writing: their relationship continued in this way for several years.

Frustrated by circumstances at work, the employee decided to accept an offer from a competitor. He asked three members of his team to come with him. Attracted by the favourable terms offered by the competing firm, they quickly agreed to do so. The next morning, the employee submitted their four letters of resignation effective immediately and left the premises.

A formal demand reminding him of his duty of loyalty and calling upon him to comply with the non-solicitation and confidentiality clauses in his employment contract was delivered to him a few weeks later. The employer sought redress before the Superior Court and the employee responded by filing a cross-application.

The judgment of the Superior Court

The judge recognized the principle set out in Article 2090 CCQ whereby a contract of employment is tacitly renewed where the employee continues to carry on his work for five days after the expiry of the term, without objection from the employer. However, he stated that such renewal applied only to the essential conditions of a fixed-term employment contract.

He stated that, except for salary and working hours, no other conditions could be qualified as essential "[translation] because they do not reflect or bear any relationship to the principal characteristics of said contract, such as compensation, the relationship of subordination, the performance of work in dignity and the protection of workplace health and safety."[2] The court determined that the non-solicitation clause could be considered a restrictive covenant subject to Article 2089 CCQ, which requires such clauses to be stipulated in writing and in express terms. Therefore, if an employment contract like the one in this instance were tacitly renewed, the restrictive clauses could not be renewed.

Analysis

This reasoning is surprising because it necessarily implies that Article 2089 also applies to non-solicitation clauses, which has never clearly been the case. It is important to remember that Article 2089 CCQ applies to stipulations pertaining to "compet[ing] with" and "participat[ing] in any capacity whatsoever in an enterprise which would compete with" the employer, which does not clearly involve solicitation as such. Henceforth, employees do not owe any obligation to the employer beyond those arising out of the CCQ under the duty of loyalty.

It is important to note that the judge acknowledged the employee should have given his employer reasonable prior notice of resignation, i.e. notice at least equal to the notice of termination to which the employee would have been entitled under the *Act respecting labour standards*. The judge also found that the employee had failed in his duty of loyalty by inviting the members on his team to follow him to the competing company when he had not yet resigned.

However, the affirmation of the principle that non-solicitation and confidentiality clauses are not essential clauses of a fixed-term employment contract and therefore cannot be tacitly renewed could have major repercussions. Going forward, employers using fixed-term employment contracts should seriously consider protecting themselves by making sure that employment terms they deem important, particularly restrictive covenants, are set down in writing when the contract is renewed. It is the only way for employers to adequately protect themselves when key employees leave. It will be interesting to watch developments in the case law to see whether non-solicitation clauses will henceforth be governed by Article 2089 CCQ, which would involve systematically adding a territory to such clauses, contrary to the latest Supreme Court teachings in *Payette v Guay*[3] and current trends.

Philippe Bélisle
Marianne Plamondon

Footnotes

1. *Traffic Tech inc.* c. *Kennell*, 2016 QCCS 355.
2. *Idem*, para 48.
3. *Payette* v *Guay inc.*, [2013] 3 SCR 95, 2013 SCC 45.

For further information, please contact one of the following lawyers:

> Marie-Hélène Jetté	Montréal	+1 514.847.4650	marie-helene.jette@nortonrosefulbright.com
> Marianne Plamondon	Montréal	+1 514.847.6036	marianne.plamondon@nortonrosefulbright.com
> Gilles Rancourt	Québec	+1 418.640.5036	gilles.rancourt@nortonrosefulbright.com