

# Paranoid employer goes too far

*Court chastised employer for ‘forcing’ employee to sign contract with restrictive covenant limiting future work prospects*

| BY DANIEL LUBLIN |

**NOTHING INFURIATES** a company more than news of an ex-employee soliciting away its most prized assets: the clients. But clients, much like those employees, are not sedentary. Seldom are they attracted to one company or another exclusively by virtue of the services they are offered. Rather, their loyalty often lies with the relationships built and the key employees who have built them.

Courts recognize business relationships follow the employees who possess them and, therefore, they permit employers to protect their most valuable assets through contractual and equitable limits. But what happens when those limits go too far?

## **New restrictive covenant given to employees**

When Stephanie Keeling first started work with the Travel Company in Lethbridge, Alta., she was its most inexperienced travel agent. However, she soon became the company’s most senior employee, handling some of its best accounts.

Some time after Keeling started work, the Travel Company became concerned that, should its employees ever leave, they would try to take their clients with them. Acting on the advice of its lawyer, the Travel Company drew up employment contracts for Keeling and its other employees stipulating that, upon their departure, the employees would not solicit their old clients or compete with the company for an eight-month period, within a 100-mile radius of Lethbridge.

Although Keeling felt uncomfortable signing a contract that limited her legal rights, she believed she would lose her job if she didn’t agree to its terms. Critically, the Travel Company did not advise Keeling that she was free to refuse the

contract, point out the impact of the restrictive covenants or encourage her to seek legal advice so she understood its terms. Three days after receiving the contract, Keeling signed her name to it.

Following a blowup at the office, Keeling was dismissed. Within three days she had landed a job at a competing travel agency in Lethbridge. When the Travel Company learned Keeling had secured work with a competitor and she had contacted her former clients and informed them where she could be found, it sued both Keeling and her new employer, relying on the contract she had signed as evidence of the alleged wrongs.

## **Circumstances and language of contract were troublesome**

The Alberta Court of Queen’s Bench found the contract was simply not an enforceable agreement. The court was particularly troubled by the manner in which the contract was introduced and the language of the restrictions that would have effectively prevented Keeling from working in the industry for an eight-month period of time.

Although Keeling signed the agreement, the court found the Travel Company’s failure to encourage her to seek legal advice and the implication she would lose her job if she did not agree to the terms were problematic enough to strike the contract down.

In addition, even if the contract was enforceable, the court could not conclude that by simply advertising her new co-ordinates to her former clients Keeling had actively solicited them to leave the Travel Company and join her at her new employer.

## **Tips for employers**

Canadian courts are reluctant to enforce employment agreements that cross the line. If an employer wants to

create a contract to protect itself from departing employees, there are a few rules.

First, the agreement should be made before the employee begins work. If the contract is given even one day after, it could be set aside.

If the contract must be given to an employee after she has started work, then something of value should be offered that the employee was not already entitled to, in exchange for signing the contract.

Second, the employee should always have an opportunity to discuss the terms with legal counsel and confirm this advice directly into the offer letter or contract.

Third, the employee should be advised there will be no consequences if she does not accept the contract.

Finally, a “kitchen sink” approach to drafting restrictive covenants does not work. Specialized counsel knows less is more when drafting this language. Had the Travel Company specified Keeling was free to work elsewhere, subject only to a non-solicitation of its clients, the court’s decision may have been different.

## **For more information see:**

■ *Travel Co. v. Keeling*, 2009 CarswellAlta 1057 (Alta. Q.B.).

## **EMPLOYMENT CONTRACTS**



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