

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

## PUT YOUR BEST FOOT FORWARD OR PREPARE TO LOSE: LACK OF EVIDENCE FATAL TO EMPLOYER'S CLAIM OF BREACHED NON-COMPETITION CLAUSES

A recent summary judgment by the Ontario Superior Court of Justice provides a valuable reminder for employers and employees when it comes to enforcing non-competition agreements or any part of an employment contract. In *Eagle Professional Resources Inc. v. MacMullin*, the employer's claim that its former employees breached their non-competition clauses was dismissed due to a lack of evidence. While this case is not precedent-setting, it provides some useful reminders about evidence and summary judgments.

Three staff at Eagle Professional Resources quit to work for a competitor. Each of the three employees had signed employment agreements that included non-competition and non-solicitation clauses. After they left, Eagle sued the former employees, alleging that they breached these provisions by soliciting Eagle's clients and using its confidential information. The former employees denied the allegations.

The former employees brought a motion for summary judgment, seeking to dismiss Eagle's claim before it got to a trial. The Court found that Eagle's pleadings failed to disclose any "specific, detailed and first-hand allegations" that the former employees had breached their employment contracts. Given the lack of specific evidence, the Court found that Eagle had no reasonable prospect of succeeding at a trial. The Court granted the summary judgment and dismissed the claim, and ordered Eagle to pay its former employees' legal costs.

What are the lessons to take from this case? Firstly, it provides a useful reminder of the importance of presenting adequate evidence early on when making any allegations. A bald assertion that one party wronged the other is not sufficient to win in court. The party accusing the other of breaching their contract must always "put their best foot forward" by leading detailed and specific evidence, or else prepare to lose on a summary judgment motion.

Secondly, this case highlights the powers and perils of summary judgment motions. For defendants, a summary judgment motion is a tool that can be used to win a case early on, leading to significant time and cost savings. Plaintiffs sometimes make bald allegations while they wait to discover better evidence closer to the trial date. Clever defendants can take advantage of such a situation by bringing a summary judgment motion to have the case dismissed for lack of evidence before the trial actually starts.

Plaintiffs need to be sure not to leave themselves vulnerable to summary judgment motions by filing their claim too early. If a plaintiff brings a claim before they have gathered enough evidence to support it, an alert defendant can bring a summary judgment motion and potentially get the claim dismissed before it even gets to trial. In this case, the Court found that, even if it accepted the employer's entire statement of claim at face value, there would not be enough evidence for Eagle to win its case.

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### HR MANAGER'S GUIDE TO INDEPENDENT CONTRACTORS IN THE WORKPLACE

Available for purchase from  
Carswell's store.



## IN THE MEDIA

Daniel Lublin recently hosted a live Globe and Mail chat. In it he answered workplace law questions such as: What happens if you don't respond to your severance offer within the given deadline?, Should you sign the given offer on the spot?, Can an employer refuse to issue a reference letter to a terminated employee?, as well as other topics of interest. The entire chat can be read in the article: Work and the law: Your questions answered, on the Globe and Mail's website.

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David Whitten was interviewed by CHML AM900 and MooseFM regarding women's rights after their return from maternity leave. David's interview can be listened to here.

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David Whitten was interviewed by Preet Banerjee, host of "The Mostly Money, Mostly Canadian" podcast on iTunes which is one of the highest rated Business and Investing podcasts in North America. David discussed job securities for women going on maternity leave and how they can protect themselves upon their return. This interesting and informative interview is available on iTunes and Preet's blog.

## UPCOMING EVENTS

January 24th, 2014

David Whitten will be speaking about executive employment agreements at the Human Resources Professionals Association's Annual Conference and Trade Show, January 24th, 2014, in Toronto.

Learning objectives include:

- Understand the various provisions found within executive employment agreements, including equity incentive plans, change in control provisions and post-employment restrictions
- Review effective provisions in executive employment agreements from both the executive's and the employer's perspective
- Understand the dynamics of negotiating executive employment agreements
- Know when to use certain provisions and when not to
- Learn how to address common issues that arise in enforcing executive employment agreements

For more information please visit HRPAs website.

## LAW BLOG

Can the sender of text message be liable for causing a car crash?

Drunkenly crashing company vehicle just cause for dismissing long-term employee

"Simmering ball of negativity" dismissed due to unacceptable conduct

Gender discrimination claims

Read more at  
<http://blog.toronto-employmentlawyer.com/>

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