IN FACT AND IN LAW

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CAN THE REFUSAL TO SIGN A NON-COMPETITION CLAUSE CONSTITUTE JUST AND SUFFICIENT CAUSE FOR DISMISSAL?

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IN A RECENT DECISION, *JEAN C. OMEGACHEM INC.*[1], THE COURT OF APPEAL ANSWERED THAT QUESTION BY RULING THAT AN EMPLOYEE'S REFUSAL TO SIGN A NON-COMPETITION AGREEMENT DURING EMPLOYMENT, WHICH HAD BEEN DISCUSSED WHEN THE EMPLOYEE WAS HIRED BUT PRESENTED TO HIM THREE YEARS AFTER COMMENCEMENT OF EMPLOYMENT, IS NOT A JUST AND SUFFICIENT CAUSE FOR DISMISSAL. THIS JUDGMENT OVERRULES THE TWO DECISIONS RENDERED BY THE COMMISSION DES RELATIONS DU TRAVAIL[2] (HEREINAFTER "CRT") AS WELL AS THE JUDGMENT RENDERED BY THE SUPERIOR COURT OF QUÉBEC[3] IN THIS CASE.

THE FACTS

In 2002, Mr. Patrick Jean is hired by Omegachem Inc. (hereinafter "Omegachem"), a company specialized in organic chemistry doing business with the world's leading pharmaceutical corporations.

When hired, Mr. Jean was told that a confidentiality and non-competition protocol, which is mandatory for all employees, would be presented to him. However, when he started employment, Mr. Jean only signs a confidentiality protocol. A non-competition agreement was submitted to him three years later. Initially, this agreement was for a duration of 24 months and applicable to Canada, the United States and Europe. Mr. Jean refuses to sign the agreement and demands in exchange of a severance pay agreement equivalent to the salary which would be paid to him during a period of 24 months. Omegachem puts the projects on hold.

One year and a half later, Omegachem comes back with a new draft for the non-competition agreement. The proposed agreement is now of a duration of 12 months but applicable worldwide. Once again, Mr. Jean refuses to sign this document. Omegachem puts him in default and orders him to sign the agreement, alleging that Mr. Jean's refusal to do so jeopardizes their relationship of trust. Mr. Jean still refuses to sign unless Omegachem accepts to offer him a financial compensation. Omegachem refuses.

Omegachem dismisses Mr. Jean in April 2007. In May, Mr. Jean files a complaint with the Commission des relations du travail in accordance with section 124 of the *Act respecting labour standards*[4].

[1] 2012 QCCA 232 (C.A.).

[2] 2009 QCCRT 0076 (C.R.T.) and 2009 QCCRT 0368 (C.R.T.).

[3] 2011 QCCS 1059 (S.C.).

[4] R.S.Q., c. N-1.1.

The different levels of court were required to answer the following question: does Mr. Jean's refusal to sign the non-competition agreement proposed by Omegachem constitute a just and sufficient cause for dismissal?

THE DECISION OF THE CRT

The CRT considers that Mr. Jean accepted the terms of the contract of employment, which provided for the signature of a non-competition agreement as a condition for continued employment. The financial compensation demanded by Mr. Jean has no basis in Quebec law. By refusing to sign the non-competition agreement, Mr. Jean breaches an essential condition of the contract of employment, which constitutes a just and sufficient cause for dismissal. On administrative review, the CRT confirmed that decision.

On judicial review, the Superior Court confirmed the CRT decisions and stated that they had all the attributes of a reasonable decision and fall within a range of possible, and acceptable outcomes that are justified in view of the facts and the law.

THE DECISION OF THE COURT OF APPEAL

In contrast, the Court of Appeal annulled the judgment of the Superior Court and reversed the two decisions of the CRT.

At the time of his arrival in 2002, no non-competition agreement was presented to Mr. Jean. It was only in 2005 that Mr. Jean was invited to sign such an agreement. The Court of Appeal is of the view that to conclude, as the CRT did, that Mr. Jean had breached an essential condition of his contract of employment, the non-competition agreement should have been submitted to him at the time of his arrival, as provided for in his letter of employment. According to the Court of Appeal, the failure of the CRT to consider these specific factual elements constitutes an important deficiency in the justification of its decision, which affects its reasonableness.

The Court of Appeal is of the view that the CRT should have also considered the formalism of article 2089 of the *Civil Code of Québec*[5] (hereinafter "C.C.Q."), which notably provides that in order to be valid, a non-competition clause must be stipulated in writing and in express terms. Furthermore, according to the law of contracts, a contractual obligation, in order to be valid, must be determinate or determinable[6]. Mr. Jean could therefore not have legally committed himself while ignoring the importance of the obligation to which he would have been subjected. According to the Court of Appeal, by failing to consider these statutory provisions, the CRT made a "proposition that is unacceptable in law".

Lastly, the CRT should have considered the lawfulness of the non-competition agreement with regards to article 2089 C.C.Q. On its face, the second version of this agreement was problematic regarding the territory it covered, i.e. "everywhere in the world".

In accordance with article 2089 C.C.Q., a non-competition clause is valid only if it is limited as to time, place and type of employment. According to the Court of Appeal, it therefore cannot be said that a clause is limited if it is made applicable "everywhere in the world".

In addition, the CRT could not reasonably conclude that Mr. Jean's refusal to sign the non-competition agreement presented to him by Omegachem, and whose validity was *prima facie* suspect, constituted a just and sufficient cause for dismissal. Whether Mr. Jean would have consented to the wording of the non-competition agreement, in return for the payment of an indemnity, did not remedy the illegality of this agreement.

Considering that the dismissal of an employee is a significant matter entailing serious consequences, the Court explains that an employer may terminate a contract of employment unilaterally and without prior notice only if he is able to demonstrate that he is doing so for a serious reason or if there is a just and sufficient cause for dismissal. However, the decision to dismiss without prior notice an employee who refuses to sign a non-competition clause during employment, which is presented to him for the first time three years after he has been hired, is clearly not a just and sufficient cause for dismissal. If Omegachem considered this non-competition agreement so important that it decided to terminate the contract of employment of an employee who had refused to sign such an agreement, the company could only terminate the contract of employment if it offered an indemnity to the employee.

[5] S.Q., 1991, c. 64.

[6] Article 1373 C.C.Q.

COMMENTS

This judgment reiterates a general rule of contract law according to which a person cannot undertake to perform his duty to do his work without knowing its terms or without them being "determinate or determinable". In addition, when a contract of employment makes reference to a duty of an employee to do or not to do something, this duty must be reasonably identified. Needless to say, the content of this duty must not be contrary to the law. Omegachem should not have waited three years and the proposed non-competition agreement should have been respectful of the parameters established by article 2089 C.C.Q.

This judgment emphasizes that such non-competition and non-solicitation agreements should involve strategic planning. In fact, an employer is generally better positioned to demand that such agreements be signed at the inception of the contractual relationship. Furthermore, during employment and under certain circumstances, an employee may be prepared to sign such an agreement, as in view of a promotion. Let us not forget that if an employee is terminated without serious reason, the employer may not invoke a non-competition agreement concluded at the time of hiring or during employment.[7] However, in such a situation, an employer and a former employee can agree on reiterating or rephrasing the non-competition agreement in a transaction or an employment termination agreement, which on the other hand must comply with the parameters established by article 2089 C.C.Q.

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[7] Article 2095 C.C.Q.

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