



What's New in HR Law

Court Denies an Employer's Request to Enforce a Restrictive Covenant Against Former Fiduciary Employee

April 22, 2021

Bottom Line

In a recent decision, the Ontario Superior Court of Justice denied injunctive relief to an employer seeking to restrain its former fiduciary employee from competing with its business contrary to his written employment contract and common law fiduciary obligations.

Facts

In 2013, Fabio Folino began working as a salesperson at Labrador Recycling Inc., a brokerage in the business of purchasing and selling scrap aluminum ("**Labrador**" or the "**Company**").

Mr. Folino signed an employment contract containing a restrictive covenant that stated he was prohibited from soliciting and accepting business from any of Labrador's current or prospective customers that he personally had direct or indirect contact with, or access to confidential information about, during the last two (2) years of his employment.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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In 2020, Mr. Folino resigned from his employment providing sixty (60) days' notice to Labrador, and, subsequently, opened his own scrap aluminum company, Sempris Trading Inc. ("**Sempris**").

Labrador brought a motion in court seeking an injunction to prevent Mr. Folino and Sempris from competing with it contrary to Mr. Folino's contractual and fiduciary obligations.

The Test for an Injunction

A court will grant an injunction to a party that establishes the following three-factor test:

1. Is there a strong *prima facie* case for injunctive relief?
2. Will the moving party suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience favour granting the injunction?

Court Denies Injunction to Employer

In applying the foregoing three-factor test, Justice Akbarali denied injunctive relief to Labrador.

1. No *Prima Facie* Case

Labrador argued that it had a strong prima facie case for injunctive relief based on Mr. Folino's alleged breach of fiduciary duty, breach of restrictive covenant, and misuse of confidential information.

No Breach of Fiduciary Duty. First, Labrador argued that it had a strong prima facie case for injunctive relief since Mr. Folino was a fiduciary employee and, as such, he breached his common law duty to the Company when he opened Sempris. In applying the well-established test for a fiduciary relationship from *Frame v. Smith*, [1987] 2 S.C.R. 99, the Court held that Mr. Folino, in his role as a lead salesperson, did have the scope to exercise some discretion or power at Labrador since he had "significant responsibilities" and was a "key player". However, on the facts of this case, the Court held that Labrador was not "peculiarly vulnerable" or dependent on Mr. Folino's exercise of power, including on his departure since, among other things, Labrador retained all of its contacts, and was able to continue to compete within the scrap aluminum market. In the end, Mr. Folino was not found to be a fiduciary employee.

No Breach of Restrictive Covenant. Second, Labrador argued that it had a strong prima facie case for injunctive relief because Mr. Folino acted in breach of a contractual restrictive covenant. Ultimately, the Court held that the impugned restrictive covenant was unreasonable because the one (1) year time limit on non-solicitation was too long; no geographic limit was set out in the clause; the terms of the clause were unclear and ambiguous; and Mr. Folino was prohibited from accepting work from "anyone" with whom he personally had direct contract in the last two (2) years of his employment.

No Misuse of Confidential Information. Finally, the Court, on its own accord, considered whether Labrador demonstrated a strong *prima facie* case for injunctive relief based on Mr.

Folino's solicitation of Labrador's customers that the Company alleged amounted to a misuse of confidential information. The Court reviewed the relevant evidence and held that the identity of customers/vendors/purchasers in the aluminum scrap market is widely available and, as such, no misuse of confidential information was found.

In light of the foregoing, the Court held that Labrador did not establish a *prima facie* case for the requested injunction, and the Company's request for relief was dismissed.

2. No Irreparable Harm

Labrador argued that without the injunction it would suffer irreparable harm including the permanent loss of market share, substantial loss of revenue, damage to its business reputation, and the disclosure, misuse or misappropriation of its confidential information. However, the Court held that the evidence indicated otherwise and, as such, the Plaintiff's position and evidence was largely "speculative, exaggerated, unsupported, or not forthright".

3. Balance of Convenience Favoured Mr. Folino

In weighing the relevant factors, the Court held that the balance of convenience favoured Mr. Folino who spent his "entire working life in the aluminum scrap industry" and would be seriously impeded from earning a living if the injunction was granted.

As such, the Court dismissed Labrador's request and awarded costs to Mr. Folino to be payable by Labrador in the amount of \$47,488.82.

Check the Box

This decision has several key takeaways for employers:

- (i) employers should ensure that restrictive covenants are drafted in a manner that is clear, unambiguous, and sufficiently narrow in scope;
- (ii) a temporal limit of one (1) year *may* be too long depending on the surrounding circumstances, including the specific industry and nature of the job in question;
- (iii) while geographical limitations are commonly not included in non-solicitation provisions, this case highlights that where a non-solicitation clause contains elements of, or acts like, a non-competition clause, the provision should be limited in geographic scope; and
- (iv) an employee with significant responsibility may not necessarily be considered a fiduciary employee unless the employer is particularly vulnerable to the employee's exercise of power.

Date: March 23, 2021

Forum: Ontario Superior Court of Justice

Citation: *Labrador Recycling Inc. v. Folino*, 2021 ONSC 2195

Need more information?

For more information regarding drafting or enforcement of restrictive covenants, or for representation in related litigation, please contact [Janeta Zurakowski](#) at 905-972-6876 or your regular lawyer at the firm.



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