

# Fiduciary employees – Can you poach?

*Certain key employees with important knowledge have limits on what they can do after resigning*

BY RONALD MINKEN

**RESIGNING** from a job does not completely sever an employee's responsibilities towards her former employer. There can be remaining requirements that past employees need to respect, such as not disclosing any confidential information gained while working for that employer. Further, there is a type of employee that has even more limitations on its actions after resigning — a fiduciary employee. In the recent Ontario Superior Court of Justice decision *Cosolo v. Geo. A. Kelson Limited*, the court outlined the responsibilities of a departing fiduciary employee when there isn't a written employment agreement involved.

Louie Cosolo worked for the engineering firm Geo. A. Kelson Limited for approximately 10 years. After several promotions, he attained the position of Vice President, Supply Chain & Procurement in 2014 — making him one of the five senior executives of Kelson. On Oct. 30, 2015, Cosolo resigned from his employment with Kelson in order to become the CEO of ENGIE, another engineering firm. There was no written employment agreement between Cosolo and Kelson.

During his employment, Cosolo acquired and sold 43,000 Class E common shares of Kelson for \$891,820, for which he was to receive 10 payments of \$89,182, plus interest on the outstanding balance. He received the first payment while he was still working for Kelson but after he resigned, the payments stopped.

Kelson refused to pay the remaining instalments, claiming Cosolo breached his fiduciary duty by soliciting Kelson employees.

Between Jan. 9 and May 16, 2016, five employees of Kelson left the company to start working for ENGIE. Kelson alleged Cosolo enticed the employees to leave. However, Cosolo argued that the employees approached him about work opportunities at ENGIE.

Cosolo sued Kelson for the remainder of

money owed for his shares.

## Fiduciary duties

Considering Cosolo's role within Kelson, the court found that Cosolo was a fiduciary employee. Since Cosolo did not have a written employment agreement with Kelson, his duties as a departing fiduciary employee were based purely on common law.

The court gave a helpful overview of the duties of a departing fiduciary employee.

Generally, a departing employee has the right to compete with her past employer. The employee can also solicit business from the former employer's customers if: there is no valid restrictive covenant in the employment agreement that prevents this action; material isn't used that has been acquired from the former employer through fraud; and, the employee does not misuse the employer's confidential information.

A fiduciary employee, on the other hand, may not directly solicit her former employer's customers for a reasonable period of time that is necessary to allow the former employer to retain the loyalty of its customers and to fix any disruption that the departing fiduciary employee may have caused.

What constitutes a reasonable period of time is determined on a case-by-case basis. Some of the factors to consider when determining the reasonable period were outlined in the 1973 Supreme Court of Canada case *Canadian Aero Services Ltd. v. O'Malley*, and quoted by this court:

"Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty

where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge."

While fiduciary employees must wait for the reasonable period to end before they can solicit customers, they are able to directly compete with their former employer unless they have a valid employment agreement that states otherwise. Further, they are able to accept business from former clients of their former employer, as long as they do not directly solicit them.

In the end, the court determined that Cosolo did not breach his fiduciary duties since the Kelson employees approached him. Cosolo was entitled to damages for Kelson's repudiation of its contract.

## Lessons for employees

A fiduciary employee owes extra responsibility to the employer upon ending the employment relationship. While the employee can compete, if there is no employment agreement that says otherwise, the employee is not able to solicit business from the past employer's clients until the reasonable period has passed.

## Lessons for employers

Employment agreements are essential to ensuring employers' business interests are protected after a fiduciary employee leaves the company. Properly drafted restrictive covenants can provide some clarity and protection over how the fiduciary can impact the business after the employee leaves.

## For more information see:

- *Cosolo v. Geo. A. Kelson Limited*, 2017 CarswellOnt 10589 (Ont. S.C.J.).
- *Canadian Aero Service Ltd. v. O'Malley*, 1973 CarswellOnt 236 (S.C.C.).

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