COURT OF APPEAL FOR ONTARIO

CITATION: EF Institute for Cultural Exchange Limited v. WorldStrides Canada, Inc., 2023 ONCA 566
DATE: 20230829
DOCKET: COA-22-CV-0436

Lauwers, Zarnett and Thorburn JJ.A.

BETWEEN

EF Institute for Cultural Exchange Limited

Plaintiff (Appellant)

and

WorldStrides Canada, Inc. and David Conklin

Defendants (Respondents)

Bryan Fromstein, for the appellant

Bradley Berg and Alysha Li, for the respondents

Heard: August 23, 2023

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated August 25, 2022, with reasons reported at 2022 ONSC 4920.

REASONS FOR DECISION

[1] Both corporate litigants are the Canadian arms of global companies competing in the educational tour business. The respondent, David Conklin, was employed by the appellant, EF Institute for Cultural Exchange Limited ("EF"), most recently as president. After his termination without cause, he was hired by the

respondent, WorldStrides Canada, Inc., as General Manager to open a Toronto office and build the Canadian end of the business.

[2] Mr. Conklin began his employment with EF in May 2005 and rose to the position of president in October 2011. In 2012, he signed an Employment Agreement that contained a “Confidential Information” clause and a “Restrictive Covenant”. Mr. Conklin was dismissed without cause on September 9, 2014. He negotiated and signed a Severance Agreement, effective September 30, 2014. He joined WorldStrides on October 1, 2015, the day after the expiry of the Restrictive Covenant, which had limited his ability to compete with EF.

[3] EF sued Mr. Conklin and WorldStrides for alleged breaches of the Employment Agreement and the Severance Agreement on November 13, 2015. WorldStrides’ motion for injunctions was dismissed on November 18, 2015 by Stinson J. for oral reasons. After several procedural skirmishes and full discoveries, and after the case was scheduled for trial, Mr. Conklin and WorldStrides successfully moved for summary judgment. The appellant asks this court to set aside the judgment and remit the matter to the Superior Court of Justice for trial.

[4] We recite the procedural history. EF’s initial statement of claim, issued on November 13, 2015, was broad. It claimed damages against Mr. Conklin in the amount of $5,000,000 for breach of contract, breach of confidence, and breach of

fiduciary duties and $5,000,000 against WorldStrides for knowing assistance of breach of fiduciary duties and inducing breach of contract. EF also sought disgorgement and accounting of profits earned because of the impugned conduct, forms of interim, interlocutory injunction pending trial, and certain permanent injunctions against the respondents offering, advertising, or marketing programs for travel to Vimy Ridge, among other relief sought.

[5] The case has significantly narrowed over time. On January 10, 2016, EF amended and significantly narrowed its statement of claim. The amendments included: removing injunction-related claims, reducing the amount of damages sought from Mr. Conklin and WorldStrides from $5,000,000 each to $300,000 each, abandoning its allegation of breach of confidence against Mr. Conklin, and limiting its claim for disgorgement to the amounts paid to him in the Severance Agreement.

[6] After a motion by EF to compel financial disclosure from WorldStrides on August 28, 2017, EF narrowed its claims further, dropping its claim for damages. Instead, EF opted to pursue the return of the $225,000 in payments it made to Mr. Conklin and the disgorgement of $35,657 by WorldStrides.

[7] EF’s case has dwindled and now seems to take the form of a corporate grudge match that does not deserve to be prolonged further. This was plainly the motion judge’s perception and we share it.

[8] We dismissed the appeal with reasons to follow. In these reasons we address the appellant's arguments after setting out the factual background and the motion judge's findings.

The Factual Background

[9] Mr. Conklin began his employment with EF in May 2005 and rose to the position of president in October 2011. His Employment Agreement contained a Confidential Information clause and a Restrictive Covenant. The latter clause provided that:

> for a period of **one year** following termination of Employee's employment with the Company, Employee will not directly or indirectly…
>
> (b) … interfere in any way with the employment relationship between such employee ["any person employed by the EF at the date of the termination of Employee's employment"] and EF.
>
> (c) engage or participate or in any way render services or assistance to any business that competes directly with any product or service that Employee participated, engaged in or had confidential knowledge of during the Employee's employment with the Company.

[10] After his dismissal, Mr. Conklin negotiated and signed a Severance Agreement, effective September 30, 2014. Key terms included compliance with the Confidential Information clause of the Employment Agreement; compliance with the Restrictive Covenant; access to outplacement services at the appellant's expense; and the payment of $225,000 to Mr. Conklin in two tranches, the first

within 30 days of his signing the Severance Agreement and the second on the one-year anniversary, when the one-year Confidentiality Clause expired (the “Non-Compete period”).

[11] During the Non-Compete period, Mr. Conklin used the EF-provided outplacement services to update his resume. He submitted the resume to WorldStrides and other potential employers. In April 2015, Mr. Conklin attended an employment interview in Charlottesville, Virginia with several WorldStrides employees and officers including WorldStrides US’ manager of special events, Jim Creighton. After this meeting, Mr. Conklin provided WorldStrides with copies of his Employment and Severance Agreements.

[12] In June 2015, WorldStrides verbally offered Mr. Conklin the position of General Manager to be responsible for opening a Toronto office and building the Canadian end of the business. Mr. Conklin agreed in principle to the offer, with his employment to start on October 1, 2015, after the Restrictive Covenant expired.

[13] During the Non-Compete period, EF learned of Mr. Conklin’s meeting with WorldStrides and sent correspondence reminding him of his legal obligations. Mr. Conklin also discussed his interviews with WorldStrides during a June 2015 lunch with Adam Singer, Vice President of Finance for EF. Mr. Conklin confirmed WorldStrides’ offer with Mr. Singer during a subsequent lunch in September, 2015. Mr. Singer approved payment of the second tranche of the severance payment on

September 30, 2015. The following day, the Non-Compete period ended and Mr. Conklin started his employment with WorldStrides. On November 13, 2015, EF started this action against the respondents.

The Motion Judge's Findings

[14] The motion judge took the analytical approach laid out in *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98, 154 O.R. (3d) 561, at para. 24. EF's key evidence included: an email exchange between the CEO and President of WorldStrides' parent company, Jim Hall, and Mr. Conklin; Mr. Conklin's resume; notes taken by WorldStrides senior executive Jim Creighton at the interview in Charlottesville; a May 2015 email from a WorldStrides regional sales manager, David Shriver, promoting a "massive campaign" to celebrate the 100th anniversary of Vimy Ridge; and an email exchange with a terminated EF employee.

[15] The motion judge found that this evidence did not amount to any breach of the confidentiality commitments Mr. Conklin made to EF: the correspondence with the WorldStrides CEO and Mr. Conklin's resume contained no sensitive financial information; Mr. Creighton's interview notes did not disclose any breach; there was no evidence linking WorldStrides' planning for the Vimy Ridge centennial to Mr. Conklin; and Mr. Conklin's advice to the former EF employee was not connected to changes in the terms of her termination, any loss by EF, or increased payment to the former employee.

The Appellant's Arguments

[16] The appellant argues that the motion judge made four errors. The first error was that he failed to consider, "at all, EF's argument that Mr. Conklin breached the Separation Agreement by assisting a competitor during the relevant one-year period". The appellant points out that most of the motion judge's observations were about breaches of the Confidential Information clause, that he made no reference to the Restrictive Covenant under which Mr. Conklin was not to "provide assistance" to any competing business and that he made no findings on this issue.

[17] In our view the motion judge was alive to the competition issue. He noted, at para. 15, that on August 7, 2015 Mr. Conklin spoke to a senior vice-president of WorldStrides about the location of office space in Toronto. This was not related to confidentiality. In the context, the motion judge found this to be a *de minimis* communication. The Toronto location had figured into Mr. Conklin's employment interview, as set out in Mr. Creighton's notes, and at that point, Mr. Conklin had accepted WorldStrides' employment offer in principle. Neither the notes of the interview, which consist mostly of questions that would be expected at a job interview, nor the resume, contain EF's "sensitive" confidential information, as the motion judge noted at para. 22. The motion judge concluded implicitly that such non-sensitive information had little if any impact on competition.

[18] Further, the motion judge, at para. 27, cited *Guzzo v. Randazzo,* 2015 ONSC 6936 for the proposition that meeting with a prospective future employer that is a competitor is not, on its own, a breach of fiduciary duties. The paragraphs cited by the motion judge in *Guzzo* deal directly with the issues of competition raised in this appeal: preparing for future employment with a competitor, sharing qualifications, and maintaining confidentiality. Although the motion judge judge's reasons could have been more explicit, fair reading of the reasons and record make it clear that the motion judge considered and resolved the issue of Mr. Conklin's non-compete obligations. The reasons as written are adequate for appellate review.

[19] The appellant argues that the motion judge's second error was "requiring that EF prove damages on EF's claim that Mr. Conklin assisted a departing EF employee in negotiating a termination package". During the Non-Compete period, a recently terminated employee of EF contacted Mr. Conklin seeking his advice about the terms of her termination. In his responding e-mail, he noted that the proposed termination agreement looked "pretty standard" and raised the question of whether there were any bonuses accrued. The motion judge considered that this could be an issue, at para. 24, but he ultimately decided: "Again, applying what is reasonable in the particular case, there was no actionable breach by David Conklin of his confidentiality duty." This reference seems to misspeak since it was Mr. Conklin's assistance to the employee that was said by EF to trigger the

Restrictive Covenant and its non-competition obligations. However, given that during subsequent litigation, no evidence came up that this perfunctory exchange changed the terms of this employee's termination or resulted in any loss to EF, the motion judge found that it would not be reasonable to consider this *de minimus* action a breach of Mr. Conklin's obligations. The motion judge's instinct that the advice provided by Mr. Conklin was innocuous, if not entirely obvious advice, was sound.

[20] The appellant argues that the motion judge's third error was in "reversing the onus on the summary judgment motion". The complaint is that WorldStrides did not tender affidavit evidence from Mr. Creighton to explain his notes from his employment interview with Mr. Conklin in Charlottesville or from Mr. Shriver to explain the genesis of his Vimy Ridge email, and from other individuals as well. The respondents assert that it was up to EF to secure this evidence and that the motion judge was entitled to assume that the record contains all the evidence the parties will rely on if there is a trial.

[21] The reasons show that the motion judge properly understood and applied the onus at para. 19. Further, he was alive to the lack of affidavit evidence concerning the Creighton meeting, noting at para.10 that for the "key meeting in Charlottesville…notes (but no evidence) have been produced." Relying on these notes, it was open to the motion judge to find that the Creighton meeting did not

disclose the potential for a triable issue. On the issue of the origin of the Shriver email, the motion judge noted, at para. 23:

> Again, there was no evidence linking any activity by David Conklin to this business decision. It was a logical, if not obvious, decision given the existence and success of the 95th anniversary tours to Vimy Ridge. Further, it included being behind Explorica, a competitor at the time as well as the plaintiff. I find it unreasonable in these particular circumstances to conclude any breach of David Conklin's confidentially duty occurred.

[22] Having had full discoveries and after seven years, the appellant's inability to substantiate these arguments tells against it. Both parties were called to put their best foot forward. While the onus was on the respondent on the motion, the respondent's evidence met the evidentiary burden to the motion judge's satisfaction. There was not enough evidence to require a further response. This assessment is entirely within the motion judge's area of responsibility, and we defer.

[23] The appellant argues that the motion judge's fourth error was in granting summary judgment "when it was not in the interests of justice to do so". This is related to the claimed third error, which, having failed, negates this fourth argument. It was clearly in the interests of justice to grant summary judgment. The expenditure of additional resources by the parties, and the additional use of scarce judicial resources is not warranted in this case.

[24] The appeal is dismissed with costs payable by EF to the respondents in the amount of $25,000 all-inclusive.

“P. Lauwers J.A.”
“B. Zarnett J.A.”
“Thorburn J.A.”