SUMMARY

2015/47 Former employee bound by confidentiality clause for one year unless other duration agreed (LI)

<p>The Lithuanian Law on Competition states that persons who, as a result of a contractual relationship with a business, have knowledge of a commercial secret may not use this information for at least one year after termination of that relationship, unless a statutory or contractual provision states otherwise. Until a recent Supreme Court judgment, it was widely held that the Law on Competition, including the one year period during which confidential information could not be used, applied only to enterprises, not to individuals (natural persons). It is now settled case law that, in the absence of an agreement to the contrary, employees are bound by a duty of confidentiality for at least one year following termination of their contract.</p>

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employees are bound by a duty of confidentiality for at least one year following termination of their contract.

Facts

This case involves three Lithuanian statutes: the Labour Code, the Civil Code and the Law on Competition. The Civil Code contains a provision that prohibits employees and former employees (inter alia) from disclosing confidential information regarding their (former) employer and entitles that employer to damages in the event this duty of confidentiality is breached. The Labour Code provides that disclosure of state, professional, commercial or technological secrets to a competitor constitutes a gross breach of work duties. Therefore, an employee who discloses such information can be disciplined. However, neither the Civil Code nor the Labour Code specify the duration of the duty of confidentiality (in the absence of any agreement). The Law on Competition, however, does specify the duration of the duty of confidentiality. Section 15(4) provides that a party that gains knowledge of a commercial secret as a result of their work for, or contractual relationship with, an undertaking may not use this information before the expiry of at least one year following the termination of the work or contractual relationship, unless the law or a contract provides otherwise. The issue in this case was whether the Law on Competition applies to a natural person, such as a former employee and, if not, how long a former employee's duty of confidentiality lasts.

The plaintiff in this case was an international cargo transportation company called UAB Big Trans ('Big Trans'). It had employed an individual, 'RK'. The contract of employment between Big Trans and RK included an obligation to keep secret any confidential information he acquired during his employment, both during and after termination of the employment contract. However, the contract was silent on the duration of this obligation. RK left the employment of Big Trans on 17 November 2015 and was hired by one of its competitors, the transportation company UAB Lietvos pervezimo bendrove ('Lietvos'). RK had started to liaise with Lietvos even before he had left the employment of Big Trans. In fact, the employment contract between RK and Lietvos was signed ten days before 17 November 2015.

Big Trans alleged that RK had disclosed confidential information to his new employer and brought a claim for damages against both RK personally and Lietvos as the entity unlawfully competing and profiting from the disclosure. Big Trans based its claim, inasmuch as it related to unfair competition and the duration of RK's duty of confidentiality, directly on said section 15(4) of the Law on Competition.

The defendants contested the claim. One of their arguments was that the Supreme Court in previous cases had held that the Law on Competition does not apply to natural persons such

as former employees, but only to undertakings and legal entities. The court of first instance ruled in favour of Big Trans, but on appeal this ruling was overturned. The Court of Appeal, basing its reasoning on Supreme Court precedent, agreed with the defendant, RK, that the Law on Competition does not apply to individuals.

Judgment

The Supreme Court, overturning the Court of Appeal's judgment, found in favour of Big Trans. It held that, unless a provision of law or a contract between the parties provides otherwise, section 15(4) of the Law on Competition can be applied to all persons who have or had a contractual relationship with the undertaking in respect of which they acquired confidential information during that relationship. That relationship can be one of employment, but it can be any other contractual relationship, such as one for the provision of services (e.g. legal, accounting or training).

The court noted that this finding was not contrary to its previous case law, reasoning as follows. The Civil Code prohibits persons, including (former) employees, from disclosing commercial secrets in breach of their employment contract and prohibits the unlawful acquisition of commercial secrets, on pain of owing full compensation to the party whose secret has been disclosed or unlawfully acquired. The defendants' liability is based on this provision of the Civil Code, not on the Law on Competition. However, given that the Civil Code is silent on the duration of the prohibition and that the Labour Code does not regulate it at all, there is a gap (lacuna) in the law, which needs to be filled by interpretation. The logical way of dealing with this is to apply section 15(4) of the Law on Competition prohibiting the use of confidential information at least one year after termination of the relationship, in addition to the provisions of the Civil and Labour Codes..

Commentary

Previous case law has been equivocal about the application of the Law on Competition against natural persons, but the case reported above has clarified that it can be applied against individuals. Further, this judgment lays down a firm rule prohibiting employees from using commercial secrets belonging to their former employers for at the least one year after termination of their employment contract.

Nevertheless, the decision is limited in the clarity it provides, as it only covers disputes arising from employment relationships under section 15(4). Neither the Labour Code nor the Civil Code regulate other sensitive issues that may arise in employment relationships, such as, for example, the solicitation of employees. This activity is only recognized explicitly as unfair competition in the Law on Competition, not in the Labour Code or the Civil Code. But, if the

provisions about non-solicitation in the Law on Competition do not apply to individuals, employers will have no legal grounds based on the Law on Competition to claim against employees or former employees for attracting ex-colleagues to work in a competitor's company.

There is, of course, scope for the Supreme Court to consider a generally broader application of the non-solicitation provisions of the Law on Competition, but meanwhile, we recommend employers conclude a separate non-compete contract with employees to protect their interests.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the Act Against Unfair Competition applies to 'entrepreneurs', i.e. any natural or legal person engaging in commercial practices within the framework of his or her trade, business, craft or profession and anyone acting in the name of, or on behalf of, such a person. This would include any employees of the company. Section 90 of the German Commercial Code provides that sales representatives must not use business or trade secrets entrusted to them or acquired in the course of their work for the employer, even after termination of the contract, insofar as this, under the circumstances, would be contrary to the professional opinion of a prudent businessman. However, this does not apply to any other kind of employee. The protection of trade secrets after the end of the employment relationship can only be guaranteed by an explicit agreement in the employment contract, the severance agreement or any applicable collective bargaining agreement.

Hungary (Gabriella Ormai): Similarly to Lithuania, in Hungary the confidentiality of the employer's business secrets is protected not only by the Labour Code, but also by the Civil Code and the Competition Act. Therefore, even without a contractual obligation, employees are obliged to keep the employer's business secrets confidential both during the employment and after termination.

The Competition Act provides that unfair access to business secrets occurs where access has been obtained by the abuse of a relationship of confidentiality (such as an employment relationship). Consequently, if a competitor solicits the employer's employee so as to gain access to the employer's business secrets, this may be treated as an unfair market practice.

There is no specific time limit on employee confidentiality and therefore this obligation is not limited in time unless the parties agree otherwise (which is rare).

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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