WilhelmGilliéron
AVOCATS

Auteur: Sandra Gerber | Le : 15 March 2022

The non-competition clause – When does it end?

A recent decision of the Federal Court provides an opportunity to review the non-competition clause in an employment contract and the cases in which it ceases (TF 4A_109/2021).

The principles governing the non-competition clause in an employment contract are set out in Articles 340 et seq. of the Swiss Code of Obligations (CO).

According to Article 340 CO, "*the employee who has the exercise of civil rights may undertake in writing to the employer to refrain after the end of the contract from competing with him in any way whatsoever, in particular from operating for his own account a competing business, from working in it or from taking an interest in it.*

The prohibition of competition is only valid if the employment relationship allows the employee to have knowledge of the employer's clientele or manufacturing or business secrets and if the use of this information is likely to cause the employer significant harm".

According to Article 340a paragraph 1 CO, "*the prohibition must be appropriately limited as to place, time and type of business, so as not to jeopardise the economic future of the employee contrary to fairness; it may only exceed three years in special circumstances*".

The judge may also reduce a non-competition clause that he/she deems excessive in terms of duration, geographical scope or type of business (Art. 340a para. 2 CO).

The non-competition clause therefore ceases to have effect (or falls away) with the passage of time, i.e. when its duration (which is a maximum of 3 years after the end of the employment relationship and which can be reduced by the judge) has expired.

The non-competition clause also ceases to have effect in two situations less known to employers and employees.

Indeed, according to article 340c paragraph 2 CO, "*the prohibition also ceases if the employer terminates the contract without the employee having given him a justified reason or if the employee terminates the contract for a justified reason attributable to the employer*".

In other words, the non-competition has no effect if the employer terminates the employment contract and this termination is not based on a justified reason. It also falls if it is the employee who terminates the employment contract for a justified reason attributable to the employer.

In the above-mentioned decision, the Federal Court recalls that "*any event attributable to the other party which, if reasonably considered, could give rise to a substantial termination is considered to be just cause within the meaning of Art. 340c para. 2 CO. It is not necessary that it be a genuine breach of contract [...]. Similarly, the prohibition of competition falls, for example, in the case of dismissal by the employee if this is due to remuneration that is significantly below the market rate, chronic overwork despite a warning,*

constant reproaches or a generally bad atmosphere in the company" (free translation of the judgment).

The case that the Federal Court had to decide concerned an employee who was a member of the management and responsible for a personnel placement agency. His employment contract contained a non-competition clause according to which "*the employee was prohibited, for a period of twelve months after the end of the employment relationship, from assuming a function or participation in an enterprise in the personnel sector in certain cantons or from exercising a self-employed or salaried activity in this sector. A contractual penalty was provided for in the event of a breach of the non-competition clause. It was also agreed that the employer could demand the removal of the situation contrary to the contract*" (free translation of the judgment).

In this case, it was the employee who terminated his employment contract on 29 March 2016 for the end of May 2016. Two months later, the employee worked for a competitor company active in the field of personnel placement.

The former employer first applied to the court to have the temporary employee prohibited from working for the competitor company. He then applied to the court for payment of the penalty clause.

The court of first instance and then the court of second instance ruled in favour of the employer but reduced the geographical scope and the amount of the penalty clause.

As a defence, the employee argued that he had terminated the employment contract for good cause attributable to his employer.

The employee invoked three reasons "*which would have given him just cause for termination: firstly, a commission model was introduced, which resulted in a reduction in salary; secondly, fees were unilaterally and retroactively reduced; and thirdly, his work file was secretly searched*" (free translation of the judgment).

The lower courts – and this was upheld by the Federal Court – rejected these arguments as being protective or defensive. They therefore did not consider that the employee had terminated his contract for a justified reason attributable to the employer and therefore did not consider that the non-competition clause ceased to have effect for this reason.

In this case, the lower court "*first found that the employee had failed to prove that his employer had secretly searched his work file. Secondly, the lower court considered that the employee had not accepted the change in the commission model and the reduction in fees"*.

According to the lower court, the employee had in fact "*decided to switch to the competing company*" by participating in the creation of the competing company at the end of 2015, by having regular exchanges with the chairman of the board of the competing company, by helping to draft the GTC, by participating in the design of the homepage, by registering a web domain or by creating PDF forms for the competing company.

The first judges also found that the employee had sent various documents from his former employer to two private e-mail addresses. These included framework agreements with companies that were renting services from his former employer, as well as salary statements, work certificates, cover letters and CVs of temporary employees of the company.

According to the first judges, "*the employee's statement that he only saved this data on the e-mail accounts concerned for a possible breakdown of the computer system was deemed implausible*" (free translation of the judgment).

This was confirmed by the Federal Supreme Court in its decision of 20 July 2021.

While some previous decisions of the Federal Supreme Court may have given the impression that the non-competition clause in a work

agreement and the contractual penalty provided for in such a clause are at an end, the ruling of 20 July 2021 shows that this is not the case. Employers are therefore still well advised to include such a clause in employment agreements if employees have knowledge of customers or manufacturing or business secrets. Employees should also keep the clause in mind when they leave the company and go to a competitor.

Source : https://www.wg-avocats.ch/en/actualites/contract-law/the-non-competition-clause-when-does-it-end/