March 29 2022

No hire, no foul: anti-competitive analysis of "no-hire" clauses in franchise agreements

Lapointe Rosenstein Marchand Melançon LLP | **Franchising - Canada**

BRUNO FLORIANI

MARISSA CARNEVALE

MARIA BECHAKJIAN

Introduction

The Supreme Court of British Colombia (SCBC), in *Latifi v The TDL Group Corp*,[(1)] recently struck down portions of a class action lawsuit, rejecting allegations that employee wages are suppressed as a result of the standard "no-hire" clause found in the Tim Hortons franchise agreement, in violation of section 45 of the Competition Act.[(2)]

More particularly, the SCBC considered that agreements between employers imposing restrictions such as those contained in the Tim Hortons franchise agreement against hiring employees of another Tim Hortons location would not be subject to a private right of action or penalties pursuant to the relevant provisions of the Act. The impact of this conclusion may extend beyond the specific conduct at issue in this case.

Facts

The defendant, The TDL Group Corp (TDL), is the owner of the Tim Hortons brand and franchisor for Tim Hortons restaurants in Canada. TDL also owns various corporate Tim Hortons restaurants and as a result is in direct competition with its franchisees. The plaintiff, Mr Latifi, had been employed at a Tim Hortons franchise in British Colombia for several years. He tried to obtain employment at another Tim Hortons franchise but to no avail, as the Tim Hortons franchise agreement included a "no-hire" clause prohibiting the franchisee from employing any person currently employed at another Tim Hortons location.

The plaintiff brought a class action claim on behalf of all Tim Hortons employees in Canada alleging that, among other things, this "no-hire" clause violated section 45 of the Act by unlawfully suppressing employee wages. The crux of the plaintiff's argument was that alleged violators of this provision could simultaneously be competitors and customers with respect to a given product or services which, in this case, consisted of employees' services and wages.

Conversely, TDL argued that the foregoing approach was inconsistent with the legislative history of section 45 of the Act as well as its express wording, noting in particular that this legislative provision governs "the supply of the product" and "the production or supply of the product".

Decision

The SCBC's analysis began by reiterating the principles of statutory interpretation based on prior case law, which essentially require that the words of legislative text be read in their entire context and ordinary sense harmoniously with the object of the legislation and the intention of the legislator.

The SCBC then analysed the legislative history of section 45 of the Act by echoing the principles set forth in the case of *Mohr v National Hockey League*,[(3)] whereby the court determined that section 45 of the Act only applies to "sell-side" and/or "supply-side" agreements and that arrangements between partners or organisations with respect to the hiring of employees do not violate the rule. Moreover, the SCBC agreed with the court's conclusion in *Mohr* that the removal of the term "purchase" from the text of the predecessor of section 45 of the Act strongly indicated the legislator's intention to limit the ambit of section 45 to penalising anti-competitive sell-side agreements (such as oligopoly arrangements).

Applying these principles to the case at hand, the SCBC determined that a plain reading of section 45 of the Act suggests that this provision defines the types of agreements to which it applies – namely, production or supply agreements, as opposed to agreements for the purchase of goods or services. The SCBC further stated that the purpose of this section is to prohibit conspiracies among suppliers of products leading to price-fixing, but that it is not intended to deal with competing employers potentially fixing wages for employees.

Finally, the SCBC concluded that the plaintiff's interpretation of section 45 of the Act was illogical in that this section does not apply to circumstances where competitors (ie, franchisees and/or TDL with respect to employees of Tim Hortons locations) are distinct from suppliers of the products or services (ie, the employees themselves).

In light of the foregoing, the SCBC held that the plaintiff's claim that the "no-hire" clause violates section 45 of the Act was bound to fail.

Comment

Following the *Latifi* decision, franchisors and franchisees alike may be relieved that no-hire clauses have once again survived the scrutiny of section 45 of the Competition Act – *Latifi* serves as a reminder that the courts will narrowly interpret this provision given its penal nature. Moreover, this decision is another demonstration that the courts are reticent to manipulate the express wording of statutes in order to correct an alleged injustice within a franchised network.

The *Latifi* decision also comforts franchisors in its conclusion that plaintiffs cannot bring a private action under the Act directly against franchisors for violations resulting from the alleged anti-competitive effects of provisions of a franchise agreement, but must instead file

a complaint with the relevant government agency, which will determine whether to apply to have such provisions reviewed by the Competition Tribunal of Canada.

Interestingly, the SCBC determined that the "no-hire" clause contained in the Tim Hortons franchise agreement should be considered an agreement "among buyers", which appears to be an overly broad characterisation given that the franchise agreement, by its nature, governs only the relationship between the franchisor and the franchisee, and does not create bilateral arrangements among the franchisees themselves.

It would accordingly seem that certain agreements between employers with respect to employees are akin to buy-side agreements, wherein certain conduct such as the fixing of "purchase" prices for goods or services (which, in this case, would have consisted of employee wages) would not be considered a proscribed anti-competitive practice.

However, interested parties should not interpret the *Latifi* decision as ensuring the blanket enforceability of all restrictions on hiring contained in franchise agreements, as these types of restrictive covenants continue to come under scrutiny in Canada. In particular, franchise employees may seek to challenge these clauses by relying on other provisions of the Act. As such, franchisors are strongly advised to err on the side of caution when drafting "no-hire" clauses in franchise agreements and to seek guidance from specialised counsel in respect thereof.

For further information on this topic please contact Bruno Floriani, Marissa Carnevale or Maria Bechakjian at Lapointe Rosenstein Marchand Melançon LLP by telephone (+1 514 925 6300) or email (bruno.floriani@lrmm.com, marissa.carnevale@lrmm.com *or maria.bechakjian@lrmm.com). The Lapointe Rosenstein Marchand Melançon LLP website can be accessed at www.lrmm.com.*

Endnotes

(1) *Latifi v The TDL Group Corp*, 2021 BCSC 2183.

(2) *Competition Act*, RSC 1985, c C-34.

(3) *Mohr v National Hockey League*, 2021 FC 488.