

## Case In Point

# Court Uses Expanded Fact-Finding Powers to Grant Summary Judgment in Departing Employee Case

**Date:** November 16, 2018

The Ontario Superior Court of Justice recently considered the obligations of departing employees to their former employers with respect to fiduciary duty, confidential information and solicitation of former customers.

In [\*OIBC v. KO\*](#), Ms. Ko had worked with Overseas Insurance Brokers Corporation (OIBC or Plaintiff) for 23 years as an insurance broker. She gave her notice that she intended to resign to spend more time for herself. The next day, she changed her mind and contacted Broker Team Insurance Solutions. Ms. Ko was hired and began working for it within a week. Over time, a significant number of OIBC customers transferred over to Ms. Ko at Broker Team.

The Plaintiff brought a claim against Broker Team and Ms. Ko (Defendants) for breach of contract, interference with contractual relations and breach of fidelity and fiduciary duty. The Defendants moved for summary judgment and the Plaintiff brought a cross-motion for summary judgment and a motion to amend the statement of claim.

In finding for the Defendants, the Court considered the following issues:

### **Was this Case Appropriate for Summary Judgment?**

The Court considered whether the matter could be determined on a summary judgment motion. It held that it could apply its expanded fact-finding powers to resolve a number of evidentiary issues and “confidently come to a just and fair result.” Justice Nakatsuru clarified that even if “there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under rule 20.04.” He rejected the Plaintiff’s argument that the cases relied upon by the Defendants were inapplicable because they were not summary judgment motions: the cases were settled law and all he had to was apply that law to the facts.

### **Was there a Restrictive Covenant?**

Justice Nakatsuru found that the issue of whether an employment contract was signed need not be determined as there was no evidence a restrictive covenant was ever entered into.

The Court also considered the timing of Ms. Ko's resignation and departure. It held that while the timing "raised a red flag," Ms. Ko's motivation for moving quickly to a competitor could be resolved on a summary judgment motion.

### **Was Ms. Ko a Fiduciary?**

Relying on his expanded fact-finding powers, Justice Nakatsuru determined that the mere title of "Assistant Manager" was insufficient to create a fiduciary relationship. While the legal test was flexible to capture employees other than top management or the directing minds of corporations, the record as a whole did not support a finding that Ms. Ko played any such role. Her key responsibilities were the same as an insurance broker. The relationships she built with customers were from her long career and she was "far from being a primary contact for customers or a person OIBC significantly relied upon to obtain new business or keep existing business." Regardless, that was only one factor to consider. There was no significant evidence that Ms. Ko had a unique function or knowledge gained through her employment that no one else had and that made her indispensable to the Plaintiff.

### **Did Ms. Ko Take the Plaintiff's Confidential Information?**

Justice Nakatsuru found that Ms. Ko had not taken confidential information to solicit the Plaintiff's customers. In particular, he found that her use of the names and addresses of former customers in her personal cellphone was not a violation of her obligations as a departing employee.

While departing employees cannot misappropriate a former employer's confidential information, they may rely on the information stored in their memory. That principle extended to things used to augment memory as an "*aide-memoire*." Accordingly, it was not unacceptable for Ms. Ko to use a cellphone for that purpose. However, Justice Nakatsuru emphasised that the nature of the information in the aid was also significant. The Plaintiff could not be said to have a proprietary interest in the names, addresses, and telephone numbers of former customers; it was information the Defendants could obtain through public sources. Accordingly, Justice Nakatsuru found that Ms. Ko had not taken and misused the Plaintiff's confidential information.

### **Did Ms. Ko Solicit her Former Customers?**

Justice Nakatsuru concluded that, even if he was wrong about the issue of confidential information, it was irrelevant because there had been no solicitation. Ms. Ko sent letters to her former customers stating that, "current policies are not affected at all and they will continuously be looked after by my previous employer, OIBC." Justice Nakatsuru found that the letters were "informative, assuring, and professional" and that they did not "ask for anything." Accordingly, she did not inappropriately solicit the Plaintiff's customers.

### **Conclusion**

*OIBC v. KO* is a helpful and significant restatement of a motion judge’s expanded fact-finding powers on a motion for summary judgment. Even in relatively complicated cases, where costly trials could help to resolve various disputes or there may appear to be “genuine issues for trial,” such trials could be avoided or made unnecessary by the motion judge’s proper exercise of the expanded fact-finding powers to determine the majority of issues and resolve the dispute. Parties should keep this in mind when strategizing whether or not to proceed to trial.