

Protecting your business when an employee leaves for a competitor

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Ogier's Employment Law team recently represented an employer in an action against two former employees to enforce a restrictive covenant that prevented those employees from working for a competing business for 12 months following the end of their employment.

This is the first occasion that the Royal Court has had to consider specifically a "non-compete" clause which makes this case important not only because the last case on post termination restrictions (in that case a non-solicitation clause) was as long ago as 2000 but also because such clauses are common amongst nearly all contracts of employment, particularly senior contracts.

What is important?

1. **Non-compete restrictions are enforceable** in Jersey, and could be upheld as an appropriate means of policing obligations to preserve confidentiality and prevent solicitation, but this will ultimately depend on the facts.
2. The **burden** is on the employer to show that the covenants were no wider than necessary and that they protected a legitimate interest.
3. An **enforcement period** of 12 months is likely to be enforceable but is not definitive. Ultimately it is defined by the legitimate interest being protected.
4. A non-compete covenant is the most invasive of all post-termination restrictions (the others being non dealing and non solicitation clauses as well as confidentiality), and **the Court will scrutinise** them with great care.

5. There must be **clear evidence** of what business interest is being protected. Even if an employee's new employer is held to fall within the meaning of a competing business and the duration of the covenant is reasonable, if there is not a legitimate interest to protect a trade secret, the clause may have no binding effect.

The last point is perhaps the most critical. A distinction will be drawn between general knowledge and a trade secret. Only the latter could be protected and, without sufficient evidence to identify this and separate it out from the employees' general knowledge and skill, difficulties as to enforceability will arise.

What to consider

- When drafting a contract and reviewing the application of a non-compete clause, challenge and articulate why such a restriction is needed and in respect of what legitimate interest, and what evidence you have to support that interest.
- Examples of the types of interest and how they could be evidenced would include trade secrets, business plans, company processes or other information that can be properly regarded as confidential and therefore capable of being protected.
- If challenged at a later date, a post termination clause will be reviewed in respect of the interest being protected at the time it was entered into albeit in the context of whether that interest should still be protected at the date of enforcement.
- Whenever a change in role or promotion occurs, the covenant needs to be reviewed and the legitimate interest assessed for relevancy.

Applying to Enforce by Injunction

If an employer looks to apply for an injunction at the commencement of proceedings to enforce the covenant on an interim basis (on the assumption that attempts to seek undertakings from the outgoing employee not to join the competitor in question have been unsuccessful), the employer must produce convincing evidence to demonstrate the existence of the legitimate interest it seeks to protect. An employer will also need to demonstrate clearly why the particular employee joining a competitor represents a risk to that interest.

Collating and presenting the evidence to meet those requirements could prove time consuming and costly (as it would likely involve having to analyse specifically by detailed reference to the experience and role of the employee in question how that employee's employment with the competitor will present a threat to the employer's legitimate interest). Therefore making notes made at the time of entering into the covenant could form an important means of limiting this process.

For an employer to be able to make an application for an immediate injunction on an ex-parte

basis, it will need to demonstrate a real and present risk to its business that would warrant such an urgent approach and the risk the employer would face in delay. Absent such features, the application would need to be on notice to the employee.

We recommend:

- The basis for the employer's legitimate interest that it seeks to protect is documented at the time the contract of employment is entered into or when it is renewed on promotion or otherwise;
- Relevant documents that evidence the employer's legitimate interest and the employee's position in relation to it are retained;
- There be an evaluation of the scale of the immediate risk presented by the departing employee joining the competitor and therefore whether an ex-parte application for an injunction is justified;
- Contracts are reviewed and relevancy and enforceability of covenants assessed.

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