Employment

Restrictive Covenants

The importance of drafting reasonable restrictive covenants: Paying employees to enter into or be bound by restrictive covenants won't make them enforceable

Restrictive covenants are commonly used in employment contracts to protect the employer's business by restricting the activities of an employee, generally after the employment has ended.

In many civil law countries, such as France, Germany, Spain and Italy, it is normal and legally permitted to pay employees to be bound by restrictive covenants post-termination. However, it has never been the case in the UK and other common law countries. For restrictive covenants to be valid in the UK, they must go no further than protecting the employer's legitimate business interests and paying for covenants is not legally permitted, which has recently been confirmed by the High Court, as described below.

In *Bartholomews Agri Food Limited v Thornton [2016],* the High Court refused to prevent an agronomist from contacting former clients when working for his new employer, a rival agricultural business. Mr Thornton's covenant restricted him for six months post-termination from contacting any of Bartholomews's clients, even though he had dealt with clients amounting to only 1 % of his former employer's turnover. According to the Court, the fact that he would be paid by the former employer for the period of restraint made no difference. The Court said *"it is contrary to public policy in effect to permit an employer to purchase a restraint".* The Court therefore rejected the concept of buying restrictive covenants and held that, even if the employee was paid to be restricted, this would be against public policy and therefore the restrictions were not enforceable against the employee. The case also pointed out two extremely important points in relation to restrictive covenants.

Firstly, the covenants had been originally imposed on Mr Thornton when he started work for Bartholomews as a trainee agronomist in 1997, at which time he had no experience and no customer contacts. The Court stated that the covenants were *'manifestly inappropriate for such a junior employee'*. Whether covenants are enforceable is assessed at the point that they are agreed, not the point at which the employer wishes to rely on them. It is therefore extremely important that existing covenants are reviewed and redrafted or fresh covenants are entered into upon an employee's promotion or following a change in duties.

Secondly, the Court considered that the covenant was *'plainly far wider than is reasonably necessary for the protection of Bartholomews' business interests'.* The covenants applied to all customers of Bartholomews and its associated companies, regardless of whether Mr Thornton ever carried out any work for those customers. The Court suggested that the covenant might have been reasonable if it had referred only to those customers with whom Mr Thornton had himself had dealings for a period of time before leaving his employment. It is therefore always important that restrictive covenants are carefully drafted to ensure they are no longer or wider than is necessary to protect the employer's interests.

It is worth noting that Bartholomews could have achieved the same end result it sought by imposing a six month garden leave clause, rather than imposing the restrictive covenants combined with pay. The crucial difference is that an individual on garden leave remains an employee, subject to all of the rights and obligations contained in their employment contract, except the obligation to work.

This case demonstrates the importance of restrictive covenants being carefully drafted and taking specialist legal advice prior to seeking to rely on them.

If you have any enquiries, please contact the Employment Law team.

Soyoung Lee
Associate Solicitor
E: soyoung.lee@3hrcs.com