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LEGAL PRACTICE



Post-employment restraint of trade

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A restraint of trade clause, in various forms, may be included in an employment contract, usually at the commencement of employment. A post-employment restraint will be considered at the completion of the employment relationship. The purpose of post-employment restraints is to protect legitimate business interests of the employer. Business interests that are capable of supporting a restraint include the employer's confidential information, trade secrets, customer relationships, goodwill and staff.

What is a post-employment restraint of trade?

Post-employment restraints are express contractual provisions that attempt to restrict an employee from competing with the employer after the termination of their employment.

The operation of a post-employment restraint is usually framed by a reference to:

- a geographical area;
- a period of time;
- defined industries, businesses, or activities that the employee cannot be involved in; and/or
- former customers/clients or employees who the employee cannot contact or solicit.

Is a post-employment restraint enforceable?

When considering whether to enforce a post-employment restraint (and, in fact, any restraint of trade), the courts will weigh up several competing interests, including:

- the employer's interests in protecting its confidential information, customer connections and other legitimate business interests;
- the employee's ability to earn a living using his or her skills, experience and know-how; and
- the public interest in freedom of trade and competition.

The general rule is that all restraint clauses are void as against public policy unless it can be shown that:

- the clause protects a legitimate interest of the employer;
- the scope of the clause is reasonable to protect that interest; and
- enforcement of the clause would not be contrary to the public interest.

A court will not enforce a restraint clause that attempts merely to stifle competition from former employees. The employer must be able to identify a specific business interest which reasonably requires the protection of a restraint clause.

Invalid restraints of trade

Reasonableness of the scope of the restraint clause

If satisfied that the employer has a legitimate interest to protect, the courts will consider whether the restraint clause is reasonable in its scope. A restraint must go no further than what is reasonably necessary to protect the identified interest of the employer.

Reasonableness is assessed at the time of entry into the restraint and is to be determined by reference to the:

- nature of the activities restrained;
- duration of the restraints; and
- geographical area covered by the restraint clause.

An assessment of reasonableness requires a "broad and commonsense view" of the facts and circumstances of the case. This is especially true in relation to the duration of the restraint.

Employer's wrongful conduct

A post-employment restraint is not enforceable where an employer's own wrongful conduct has led to the termination of the employment. There is English authority in *Briggs v Oates* to the effect that a wrongful dismissal, and its acceptance by the employee as terminating the contract, will put an end to any post-employment restraint, as well as to any other obligations in the employment contract.

Similarly, the High Court held in *Kaufman v McGillicuddy* that a dentist was not bound by a post-employment restraint in circumstances where he had determined to resign following an unprovoked assault by one of the dentists in the practice and the partnership being dissolved.

Repudiatory conduct

Similarly, post-employment restraint clauses are not enforceable where the employer has engaged in repudiatory conduct, and that conduct has been accepted by the employee as bringing the employment relationship to an end.

The courts have said that an employer cannot claim the benefit of a restraint in such circumstances. Even where the contract provides that a restraint shall survive termination of employment in any circumstances and for any reason, the authorities suggest that termination of employment by the employer's repudiatory conduct will render all post-employment restraints unenforceable.

Breaching a restraint of trade provision

When an employer suspects that a current or ex-employee is breaching (or has breached) restraints of trade or obligations regarding confidential information, it is important that the employer takes protective action as soon as possible.

Except where the matter is so urgent that the employer wishes to make a without notice application to the court, in most cases, the employer (usually via its solicitors) will send a letter before claim (also known as a letter before action) to the ex-employee and also, possibly, to the new employer.

The employer may be prepared to forego or postpone court proceedings and, instead, accept undertakings from the employee (and the new employer, where relevant) on the same or similar terms to the orders that would have been sought in court proceedings.

Should the above be unsuccessful, an employer may commence a claim, including an application for interlocutory injunction.

Get help from an employment lawyer

The law dealing with restraint of trade can be complicated. Determining if a restraint is valid and enforceable will usually be down to each specific case and the scope of the restraint. If you wish to challenge a restraint or you need assistance with a breach of a restraint, you should seek advice from an experienced employment lawyer.

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