Restrictive Covenants

Restrictive Covenant clauses aim to prevent workers from engaging in their trade or profession after employment.

From an organisation's perspective the goal of the restrictive covenant is to protect its legitimate commercial interests.

However, all restrictive covenants are initially deemed **void** as they are regarded as restraints of trade. It is for the ex-employer to satisfy the court that a covenant is reasonable, and not for the employee to show that it is unreasonable. Therefore the clauses need to be drafted very carefully, customised to each contract and it must be "*demonstrated (that they are) necessary for the protection of the employer's legitimate interest." Hinton & Higgs (UK) Ltd v Murphy and Valentine* [1989] *IRLR 519*

Even if an employer has a legitimate business interest to protect, any restrictive covenant which goes further than is reasonable to protect them e.g. which strays into restriction for restrictions sake- will be struck down by the Courts.

Nevertheless in recent years, Courts have shown a willingness to enforce restrictive covenants and accordingly provided employers (and their lawyers) draft the clauses carefully, they can be successfully enforced.

The importance of careful drafting cannot be overemphasized as although a restraint may well be reasonably necessary to protect a legitimate business interest, it will nonetheless be unenforceable if it is unreasonably wide.

Thus the restrictive covenant must be reasonable in terms of subject-matter, geographical location and time.

Factors that businesses and their lawyers need to consider when the clauses are being drafted are:

- What is the commercial interest being protected?
- What is the seniority of the employee?
- What are the scope of the job duties of the employee?
- What is the geographical area of where the employee worked?
- Did the employee bring any clients with them?
- What is the length of time of the restriction being sought?

<u>Types of Clauses:</u>

There are 3 types of clauses:

(a) Non-Compete of Staff Clauses
(b) Non-Solicitation and Non-Dealing Clauses
(c) Non-Poaching Clauses

Non-Compete of Staff

These clauses prevent a key worker from setting up a competitive business within a defined area and over a set period of time.

The basis for non-compete clauses is that confidentiality clauses would not go far enough to protect the employer's business interest.

Preparing to work for the competition is not a breach of contract nor a sackable offence:

Laughton and Hawley v Bapp Industrial Supplies Ltd [1986] *IRLR 245*

Non-Solicitation and Non-Dealing Clauses

These clauses prevent the employee, during "garden leave" or after they have left employment, from actively contacting clients, customers, suppliers etc with whom that they have built up a working relationship.

The rationale for such a clause is that it gives the employer the opportunity to allow a member of staff to build relationships with such customers, suppliers etc without the ex-employee using their knowledge for their own commercial advantage.

The key again is for the clause to be **reasonable** – As long as the restraint is reasonable i.e. not longer than is necessary and the restriction applies solely to those individuals or firms with whom the employee has personally dealt over a reasonable period of time before leaving (say 12 months) excluding any clients, customers etc introduced by that employee upon joining, then such clauses should be enforceable.

Non-Poaching of Staff

These are clauses which ensure that key personnel do not leave their employment after the departure of another key worker**.**

Increasingly Courts are now asserting that employers do have a legitimate business interest to protect in maintaining a stable workforce.

Therefore a clause which prevents ex-employees from soliciting people that they worked with and persuading them to join a new enterprise should be enforceable.

Again, it is important to limit the restriction and do no more than is reasonable to protect the employer's legitimate business interest:

Alliance Paper Group v Prestwich [1996] *IRLR 25.*

The Extent of the Covenant

The extent of the area must be reasonable within subject-matter, geographical location and time.

Any clause should define but in a limited as way as possible, the occupation/profession that the ex employee is to bed restrained from engaging in.

In order to avoid the clause being struck down, the employer will need to show that the restriction is not too wide.

The reasonableness of any geographical restriction will depend on the nature of the trade and the competition.

In ***Office Angels Ltd v Rainer Thomas and O'Connor*** [1991] ***IRLR 214***, the area covenant attempted to stop the defendants, who worked in the Bow Lane, London Office, from working within 3,000 metres of their office and from opening an office within 1.2 square miles of their old office. This included most of the City of London. The covenant was struck down by the Court of Appeal because it was not appropriate or necessary.

In contrast, a radius of 10 miles was held in *Hollis & Co. v. Stocks* [2000] IRLR 712, CA to be a fair restriction for an assistant solicitor, because the area involved no major commercial centres.

Tip – With respect to time and location, go for safety and be conservative in how wide you want the covenant to be. Never extend beyond 12 months and never go beyond 10 miles. If you go beyond this point you are going to having difficulties in enforcing the covenant. Also, be careful upon the non solicitation element regarding the category of employees specified. Overall it really does pay to be cautious in drafting the restrictive covenant clauses.

<u>Outside Employment</u>

Employers cannot prevent an employee from doing things within their spare time which do not compete with the employer: *Nova Plastics Ltd v Froggatt* [1982]*IRLR 146*

However an employer is entitled to stop an employee from having a business interest which competes directly or indirectly with the employer's business*: Hivac v Park Royal Scientific Instruments Ltd* [1946] *Ch. 169, CA*

Case Study

David is a lawyer based in town of Wareford. There are 3 significant commercial towns within 15 miles of Warford namely Hexham(3 miles away), Hoddesford (8miles) and Charlow (11 miles)

He recruits a lawyer, John to work for him and after 2 years John sets up a new law firm based in Hexham. John subsequently recruits David's PA and he starts working with clients that he worked with at John's firm.

There is a non solicitation /non compete clause which specifies David would not work within 15 miles within a 10 month period and would not recruit any staff at all.

Can David stop John from setting up his business?

Can David stop John from recruiting his PA?