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Enforcing restrictive covenants

As we noted above employers may wish to consider including restrictive covenants in the contracts of employees, particularly those at a more senior level. There are, however, a number of issues concerning enforceability that will need to be considered. There have been two recent judgments concerning the enforceability of restrictive covenants.

The first case (*Patsystems Holdings Ltd v Neilly*) concerned covenants, including a 12-month non-compete covenant, which had been entered into in 2000 when the employee was first employed as a junior account manager. Five years later the employee was made a Director of Global Accounts on a salary of £80,000. At that time he signed a letter agreeing that the terms and conditions in his original contract remained unchanged. A further seven years later, when the employer came to try and enforce the covenants, the employee was being paid over £190,000.

The High Court confirmed that enforceability must be judged as at the date the covenant was entered into. As at that date the covenant could not be justified for an employee with the status and responsibilities that the employee had in 2000 and was therefore unenforceable. It remained unenforceable despite the fact that the employee had subsequently been promoted and the covenant would have been reasonable for an employee at that level. The Court rejected the employer's argument that when the employee's job title, remuneration and notice period were changed in 2005 the employee should be treated as having entered into the covenant afresh.

In the second case (*CEF Holdings Ltd v Munday*) the High Court, in a lengthy and detailed judgment, held that six-month covenants restraining solicitation of employees and competition were too wide to be enforceable. The covenant restraining solicitation of employees applied to all 3,000 employees in the business and was not restricted to employees with whom the defendants had dealt. The non-compete covenant was too wide and its drafting was unclear. The employer would be adequately protected by a covenant restricting solicitation of customers.

In refusing to uphold the covenants, the Court was influenced by the fact that senior employees were not subject to the same covenants as the more junior employees. This undermined the employer's contention that it had a legitimate interest to protect. If there was such an interest then senior employees should have also been subject to express restrictions. The Court also took into account the fact that the employees in question were on a week's notice. If these employees were so difficult to replace and solicitation was a risk then why, asked the Court, were their notice periods so short? The employer's case was unsuccessful.

Action points

The lesson to employers from the Neilly case is to ensure that covenants are re-stated as promotions occur. The promotion should prompt a review and, if necessary, amendment of the covenants, which should be the subject of a specific re-agreement. A letter simply stating that the terms of the previous contract will apply is not enough.

The second case is interesting for the factors that the Court took into account but it should be noted that neither the length of the notice period nor the fact that more senior employees were not subject to the same level of restraint were determinative. They were persuasive in this case in the absence of a plausible explanation from the employer. The case is a reminder that litigating restrictive covenants is a risky business and employers need to have addressed the drafting in a clear and coherent way tailored to the particular employee and in a way that accords with other aspects of their business.

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