Sir Martin Sorrell: Ramifications of a Breach of his Restrictive Covenants

[et_pb_section bb_built="1" background_color="#ffffff" fullwidth="on" custom_padding_last_edited="on|desktop" _builder_version="3.0.99" custom_padding_tablet="50px|0|50px|0" transparent_background="off" padding_mobile="off" custom_padding="|||" next_background_color="#000000" global_module="136"][et_pb_fullwidth_header global_parent="136" title="Employment Law News" _builder_version="3.0.99" background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" background_layout="dark" title_font="||||||||" subhead_font="||||||||" background_color="rgba(255, 255, 255, 0)" /][/et_pb_section][et_pb_section bb_built="1" admin_label="section" prev_background_color="#000000"][et_pb_row admin_label="row" background_position="top_left" background_repeat="repeat" background_size="initial"][et_pb_column type="3_4"][et_pb_text use_border_color="off" border_color="#ffffff" border_style="solid" _builder_version="3.12.2"]

Sir Martin Sorrell: Ramifications of a Breach of his Restrictive Covenants

In April 2018, Sir Martin Sorrell resigned as Chief Executive Officer of WPP Group. This followed more than three decades spent at the helm of the multinational advertising and PR company. It came after WPP's board commissioned an inquiry

into a whistleblower's allegation. The whistleblower accused Sir Martin of 'personal misconduct' and misuse of company assets, which he has denied. In addition, WPP claims he is in breach of restrictive covenants.

Recently, Sir Martin agreed a deal to acquire MediaMonks, a digital production company worth £300 million. According to WPP, this breaches a confidentiality agreement he had with them. In doing so, he is using information gathered when he and WPP were looking at acquiring the business. This was before he resigned and could lead to him losing stock awards worth over £20 million pounds.

This is a timely reminder of the value of confidentiality agreements combined with restrictive covenants. As such, here are some of the key factors to consider:

10 Key Points about Restrictive Covenants

Enforcing Restrictions

1. Don't start from a false premise – some may consider that post-termination restrictions are unenforceable. However, this is not the case. Generally, restrictive covenants are enforceable provided there is a legitimate and protected business interest. What's more, it is important that the scope of the restrictions is not too wide as to be unreasonable in achieving that aim.

2. Reasonableness and enforceability depend upon a number of factors. For example, the business interests that are protected, the way the restrictions are drafted and their length, the geographical reach and the employee's role or seniority.

3. Restrictions apply to the role the employee held when the employer initially applied the restrictive covenants. Although lengthy and onerous restrictions may be reasonable for a senior role, a junior role may be held when leaving the

company. Therefore, such restrictions would not be reasonable for the role held when the restrictions were applied. What's more, they may not be enforceable and so it is important for employers to keep restrictions under review.

Check contracts carefully

4. Beware of off-the-shelf contracts – the wording used in the restrictions should be bespoke to the individual and the company. Additionally, the role performed and the legitimate aim being pursued, although, this is not guaranteed if employers use a template contract. The restrictions may have a deterrent effect. However, they may be meaningless when it comes to enforcing them.

5. Always check share plan rules and other deferred remuneration schemes as post-termination restrictions are found in these too. What's more, restrictions in these arrangements may be more enforceable than in contracts of employment, even when they are more onerous.

6. Consider post-termination restrictions at the start of your employment relationship, not just the end. The most secure way of understanding your obligations and negotiating these restrictions is to do this at the outset. By the time the employment relationship ends you will already be bound by the restrictions. As such, any actions taken can already be in breach of these. Moreover, if you are seeking to join a competitor, or set up in competition, to be forewarned is to be forearmed.

7. Sometimes employers impose or amend restrictive covenants during the life cycle of an employment relationship. For example, at the point of promotion. Although, employees may overlook this at the joy of receiving a promotion, which comes with a pay rise. However, the pay rise acts as the consideration for entering into post-termination restrictions. Understandably, whilst an employee may wish to forego the perks of the promotion, they should seek advice on the

restrictions, especially as they may be negotiable at that point. Importantly, a time to take advice would be before entering into them and accepting the promotion.

Breach of contract

8. Post-termination restrictions are not enforceable if the employer has acted in serious (or 'repudiatory') breach of the employment contract. Also, in cases where the employee does not accept the breach. For example, this can occur if the employer fails to pay notice due under the contract of employment. Alternatively, if they act so poorly that they have breached the contract of employment insofar that the employee is entitled to resign and claim constructive unfair dismissal. Consequently, such behaviour can be a get-out clause for the employee of their post-termination restrictions.

9. Employers should consider whether to offer a settlement agreement in cases where senior employees are leaving and there are no restrictive covenants. At that stage they can impose new or improved restrictive covenants. However, in these circumstances the employer will need to offer some form of compensation or incentive for the employee to agree.

10. Be mindful of the implications of being in breach. For example, Sir Martin found this could result in WPP withholding contractual payments and valuable shares, and deferring compensation. Whilst this may not hurt Sir Martin's pockets, most pockets are not so deep.

BDBF are employment law specialists. If you have any queries about restrictive covenants, please contact Samantha Prosser, Senior Associate via samanthaprosser@bdbf.co.uk or 020 3828 0350.

[/et_pb_text][/et_pb_column][et_pb_column type="1_4"][et_pb_sidebar orientation="right" area="sidebar-1" background_layout="light" remove_border="off" show_border="on"

/][/et_pb_column][/et_pb_row][/et_pb_section]

Consideration should have been given to part-time working as an alternative to dismissal

Employers should give proper consideration to all possible alternatives before dismissing an employee for long-term sickness absence.

Why context matters in harassment claims

The EAT has made clear that context is key to the determination of whether conduct amounts to harassment.

Are some job adverts

discouraging women from applying?

[et_pb_section bb_built="1" _builder_version="3.0.100" background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" custom_padding="|||" saved_tabs="all" next_background_color="#ffffff" global_module="2165"][et_pb_row global_parent="2165" custom_padding="|||" _builder_version="3.0.100"][et_pb_column type="2_3"][et_pb_post_title global_parent="2165" meta="off" featured_image="off" text_color="light" _builder_version="3.0.99" custom_margin="||0px|" custom_padding="||0px|" /][et_pb_text global_parent="2165" background_layout="dark" _builder_version="3.0.100" text_font="||||||||" custom_margin="0px|||" custom_padding="0px|||"] [post_details] [Social-Share] [/et_pb_text][/et_pb_column][et_pb_column type="1_3"][et_pb_post_title global_parent="2165" title="off" meta="off" _builder_version="3.0.99" /][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section bb_built="1" admin_label="section" prev_background_color="#000000"][et_pb_row admin_label="row" background_position="top_left" background_repeat="repeat" background_size="initial"][et_pb_column type="3_4"][et_pb_text background_layout="light" use_border_color="off" _builder_version="3.0.106"]

It is now well known that advertising a vacancy for a "barmaid" or a "handyman" would discriminate against applicants of the opposite sex. When Human Rights Watch called out a number of Chinese tech companies for advertising for "men-only" and "men preferred" roles, the discrimination was obvious to all.

Gender-biased phrasing in adverts

However, discrimination is rarely this blatant. We all use language that is subtly 'gender-coded', and reinforced by societal expectations and behavioural norms associated with what men and women are like. 'Bossy', for example, is a word rarely ever used to describe men. Adverts may also be "gender-coded", i.e. hinting towards a male or female applicant. Totaljobs has published its analysis of 75,000 job advertisements, and it shows that gender-biased phrasing is fairly common.

Male and female-oriented phrasing

In terms of male-oriented phrasing, Totaljobs found that the three most frequently-used words are: **lead** (mentioned 70,539 times); **analyse** (35,339 mentions); and **competitive** (23,079 mentions). The three most commonly used female-related words were found to hbe: **support** (used 83,095 times); **responsible** (with 64,909 mentions); and **understanding** (29,638 uses). Totaljobs also reported that male-oriented language was more frequently used in advertisements for senior positions, such as 'head' roles, directors, and partners; on the other hand, the language in advertisements for "assistant" roles leaned heavily toward female-associated language.

The recent publication of large companies' gender pay gap data revealed significant differences between male and female pay in many instances. Employers with large gender pay gaps have often explained it on the basis that their more senior positions are occupied by men, bringing up the average for male pay.

Under-representation of women in senior roles

Could the way that companies are advertising for senior roles help to explain why women are under-represented at executive level? Totaljobs believes so, concluding that women are hesitant to apply for roles which are worded in a way which appeals to male applicants (albeit unintentionally).

Employers are under increased scrutiny in respect of equality and diversity – for example, the Investment Association recently wrote to a selection of FTSE 350 firms to inform them that shareholders are getting "restless" at the lack of female representation on company boards.

That being the case, a prudent employer may want to take a step back and think about whether the way they advertise job vacancies contains any inadvertent stereotyping or bias. In order to help employers with that process, Totaljobs has created a tool it calls the "**Gender Bias Decoder**" which will flag any gendered words in a text. Anything the tool flags up can be re-worded to sound more gender-neutral.

ACAS guidance on job advertisements

ACAS also recommends that employers or recruiters include in any job advertisements a statement that applications are welcome from all sections of the community, as well as reinforcing the employer's commitment to equal opportunities.

Small steps can lead to big changes. If employers begin to gender bias de-code their job advertisements to encourage female applicants to put themselves forward for more senior, better paid positions, they may find that their gender pay gap figures start to improve in coming years as women begin to fill the ranks of those senior, better paid jobs.

[/et_pb_text][/et_pb_column][et_pb_column type="1_4"][et_pb_sidebar orientation="right" area="sidebar-1" background_layout="light" remove_border="off" show_border="on" /][/et_pb_column][/et_pb_row][/et_pb_section]