Look before you leap – does your employment contract prevent you from starting a new job?

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Employment Law News

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Look before you leap – does your employment contract prevent you from starting a new job?

With the economy entering what we hope is a recovery phase we

are seeing an increase in senior employees looking to start new jobs running up against restrictive covenants in their employment contracts.

If you are in a role where your employer may want to prevent you from competing with them (for example a senior management or sales role) then you should take advice on your obligations at an early stage because:

- **Restrictive covenants are not always unenforceable**: Post termination restrictions are only enforceable if they are reasonable and go no further than is necessary to protect the employer's legitimate business interest. However, what that means in practice requires a detailed review of your role and the confidential information, clients etc. you interact with.
- **You need the complete picture**: In addition to your employment contract there may also be post-termination restraints in other documents you have signed up to, such as share schemes or other incentive plans. These documents may well be subject to foreign law, adding a further layer of complexity. We frequently work with foreign qualified lawyers to assist clients in this situation.
- **The documents are not the full story**: You will also owe a series of implied obligations to your employer depending on your seniority, that must be carefully navigated. What, for example, can you say to clients about your move to a competitor without getting into difficulty? What can you say on LinkedIn?
- **You might be able to escape your restrictions (and your notice period) altogether**: This can be the case if you have been "constructively dismissed" by your employer but your resignation must be handled promptly and in the right way for this to work.
- **You need to get your new employer onboard**: Understanding your obligations will enable you to negotiate, for

example: coverage from the new employer in relation to any dispute about your restrictions, and, if we do take the view that you need to spend some time on the bench, something from the new employer to plug the lost income from doing so.

- **There is usually <u>not</u> safety in numbers**: If more than one person from a team is moving to a new employer at the same time, then the risks of a dispute can increase significantly, particularly for the person who heads the team. We often guide teams through such moves, and we can help reduce the scope for litigation and risk.
- **The stakes are high:** If your former employer decides to start proceedings against you in respect of a breach of a restrictive covenant (such as by way of an injunction) this could disrupt the relationship with your new employer. The costs of defending such proceedings can be high, and the remedies available to employers could prevent you from taking up your role and may even require you to make a payment to your former employer on account of profits.
- **Many people leave it too late**: Better outcomes can often be achieved if advice is taken at an early stage rather than waiting until you have fallen into dispute with your current employer.

If you would like a discussion about any of these issues, please contact Tom McLaughlin (tommclaughlin@bdbf.co.uk) or your usual BDBF contact.

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