When can employers get “negotiation damages” from a former employee?

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The Courts have indicated that where an employee has breached restrictions relating to their conduct after they leave their employer, an appropriate remedy will quite often be the price employees would have had to have paid in negotiation to buy

their way out of the contractual obligations.

Karen Morris-Garner became a director at One Step having sold her own supported living business to it. Ms Morris-Garner owned 50% of the shares in One Step, the other 50% belonging to Mr and Mrs Costelloe. The relationship between Ms Morris-Garner and the Costelloes deteriorated and, in 2006, Ms Morris-Garner and her civil partner incorporated their own company. Later, Ms Morris-Garner resigned as a director of One Step and sold her 50% shareholding in it to Mr Costelloe. The contractual documents surrounding the sale contained non-competition and non-solicitation covenants binding Ms Morris-Garner and her civil partner. Some months later, Ms Morris-Garner's competing company began to trade.

The High Court found that Ms Morris-Garner and her civil partner were in breach of the restrictive covenants which bound them after the share sale was completed. As a result, it awarded to One Step negotiation damages, being the price which the parties would have agreed in return for One Step releasing Ms Morris-Garner and her civil partner from their restrictions.

The Court of Appeal upheld the High Court's decision. It held that the award of negotiation damages is appropriate where it is a just response to a situation where it is very difficult (but not necessarily impossible) for the old employer to identify the loss it has suffered due to the breach. The case need not be exceptional in order for those factors to be present.

Negotiation damages were just in the present case considering that: (i) Ms Morris-Garner was the public face of the company and had the strongest client relationships; (ii) competition by Ms Morris-Garner could be very damaging to One Step; (iii) Ms Morris-Garner had been paid a substantial amount of money in consideration for signing up to the restrictive covenants; and (iv) Ms Morris-Garner and her civil partner had secretly

and deliberately breached their restrictions.

Employers concerned about employee competition should take solace from this case. It is now clear that these damages may be available when it is difficult to quantify loss (or where there is no loss).

Morris-Garner and another v One Step (Support) Ltd [2016] EWCA Civ 180

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