

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

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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.

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