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

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.

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

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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.

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Employer given £2 in damages for misuse of confidential information

An employer has been awarded only £2 for its former employees' breaches of their confidentiality duties, rather than the £15 million it claimed.

Getting your business off to the right start

Starting up a new enterprise can be a daunting task. Read our top three employment law tips for new businesses.

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

Damages for breaches of post termination restrictions may reflect the price agreed in a negotiation to free the employee from restrictions.

Constructive dismissal inapplicable to multi-party LLP agreements

The High Court has made a significant decision which will prevent exiting members of an LLP from avoiding restrictive covenants by alleging they had resigned in response to the employer’s breach of contract.

Court tailors interim injunction to reduce client impact

An employer has been granted an interim injunction restraining its former employees’ use of confidential information and intellectual property at a competitor. However, it has limited those restraints so as not to cause harm to a customer.

Director’s duty of confidentiality did not include a duty to return confidential documents

The High Court has held that a non-executive director was not obliged to return all documents he had received during the course of his appointment which related to the company.

Employee resigning in breach

of contract held to notice period without pay

The Court of Appeal has upheld an injunction against an employee trying to walk away from a long notice period and non-compete restrictions. You may remember our coverage of this case when it was heard by the High Court in the summer.

Employee resigning in breach of contract held to notice period without pay

The High Court granted an injunction against an employee trying to walk away from a long notice period and non-compete restrictions. It held that the employment relationship was still in existence even though the employee had not been paid.

The Courts cannot re-write badly drafted contracts

An employment contract had been poorly thought through so that on a literal interpretation of the post termination non-compete restrictions within it, no protection was given to the employer. The Court of Appeal held that words could not be added to protect the employer’s interests in a badly struck deal.

Court upholds 12 month non-compete restriction

The High Court held that a 12 month non-compete restriction entered into as part of a sale of goodwill against a financial adviser was enforceable. The court allowed this long post-termination restriction on the basis that the goodwill agreement in place between Mr Cooper and Merlin was nearer to a business sale agreement than an employment contract.