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ARE YOUR PROMOTION LETTERS UP TO SCRATCH?

EMPLOYMENT

We all like being promoted, and in the excitement employers often get new business cards and email signatures set up, but fail to pay enough attention to the state of their contractual documentation. This publication covers a recent case which emphasises the dangers of ignoring what should be a fundamental part of any promotion.

THE PROBLEM

Most well-drafted contracts, especially for senior executives, will contain restrictive covenants which impose limitations on what an executive may do when he leaves his employer for pastures new. The basic principle is that post-termination restrictions will be treated by the Courts as an impermissible restraint of trade unless they go no further than is necessary to protect a legitimate business interest. Legitimate interests have been held to include: the protection of customer connections, maintaining the stability of the workforce and protecting confidential information.

Importantly, the Courts will judge whether a restriction is reasonable as at the date the particular covenant is entered into rather than the date the employee leaves the business. This means that significant changes in an employee's duties, contact with customers and clients, or access to confidential information should be accompanied by a new employment contract with restrictions reflecting his or her new responsibilities.

The High Court case of *PAT Systems v Neilly* [2012] EWHC 2609 (QB) shows what can happen if these basic principles are overlooked.

MR NEILLY'S CASE

Mr Neilly started work for PAT Systems, a trading software company, in 2000. He was an account manager, and had a relatively standard employment contract with a number of post-termination restrictive covenants including a covenant not to compete with PAT Systems' business for a period of 12 months after termination.

Over time, Mr Neilly received various promotions and in 2005 his job title was changed to "Director – Global Account Management". He was sent a letter setting out his new role and salary, and confirming that the remaining terms of conditions of his original employment contract would remain unchanged.

In April 2012, Mr Neilly resigned to work for a company operating broadly in the same market, and the question for the Court was whether the covenants in the original contract were enforceable.

There were three stages to the Court's answer:

- First, it was held that the non-competition restriction might have been reasonable for an employee in Mr Neilly's position in 2005, but was not reasonable for an employee in his position in 2000, when he started with the company.
- Second, since the restriction was void in 2000, when the covenant was entered into, Mr Neilly would only be bound by it if the 2005 promotion letter could be said to amount to a fresh covenant.
- Third, the promotion letter was too vague to be a clear contractual intention to be bound by new covenants and so, in conclusion, Mr Neilly was not bound by any restrictive covenants.

WHAT ARE THE IMPLICATIONS FOR EMPLOYERS?

It is vital that employment contracts and job descriptions are reviewed regularly throughout the employment life-cycle, and especially on promotion. If there is a risk that the restrictions (or any other aspect of the documentation) could be said to have been unreasonable at the point they were originally signed, a promotion gives an employer the chance to remedy this. In those circumstances, employers should:

- insist that the employee signs a new service agreement with the revised terms; or
- expressly repeat in full the original restrictive covenants in a promotion letter.

WHAT IF AN EMPLOYER FAILS TO SIGN THE NEW AGREEMENT?

It is not all bad news for employers. In another recent case (*FW Farnsworth Ltd and another v Lacy and others* [2012] EWHC 2830) the High Court found that an employee who failed to sign his new contract nevertheless became bound by the post-termination restrictions in it.

He had accepted some of the benefits only available in his new promoted role, which the Court concluded was enough to show he had accepted all the terms of the promotion, including the restrictive covenants.

While having the employee sign up to new terms expressly is by far the best approach, employers may wish to consider including a benefit requiring positive acceptance in their promotion package, just in case the new agreement never gets signed.

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