

## Restraints of trade

### *What are restraints of trade?*

A restraint of trade can be found in any contract, though is typically found in an employment contract. They are included in employment contracts to try and restrict a former employee's conduct on the cessation of the employment contract. The clauses seek to protect the employer's business interests.

### *Types of restraints*

Restraint clauses can cover a range of subject matters, though typically tend to focus on the following areas:

- **Non-competition clauses:** preventing an employee from working with a competing business
- **Non-solicitation of clients clauses:** preventing an employee from approaching the employer's clients
- **Non-solicitation of employees:** preventing an employee from approaching another employee to work for them
- **Confidentiality clauses:** prohibiting misuse or disclosure of confidential information. Confidential information includes trade secrets and customer connections, however does not include their stock in trade, that is the ordinary skill and knowledge acquired throughout the course of employment.

### *Legal requirements*

Generally speaking, restraint of trade clauses are prima facie against public policy and hence unenforceable.

However, this general proposition can be rebutted. Such clauses are enforceable where they are **reasonably necessary** in the circumstances to protect the **legitimate business interests** of the employer. The employer bears the onus of showing the restraint of trade clause should be enforced.

A legitimate interest is the value of any relationships the employee develops with clients during the course of employment, relationships are beneficial to the employer. This benefit is treated as an interest justifying some reasonable protection upon the cessation of employment.

The clause must not go beyond what it is necessary to protect their interests, otherwise it will be considered unreasonable. The following factors may be considered to determine whether the clause is reasonable:

- The **duration** of the restraint: where the restraint operates for a greater period of time, this points towards the clause being unenforceable
- The **area** of the restraint: where the restraint operates across a wide geographic region, the clause may be found to be unreasonable

- **Employee's role** at the business: where the employee is senior and has had greater interaction with clients, a more expansive restrictive covenant may be justified, especially when contrasted with a junior employee.
- **Effect of restraint** on employee's ability to make a living: where the restraint impairs the employee's ability to earn a living, this points towards the restraint being unreasonable.
- **Bargaining position** of the parties in relation to each other at the time of signing the contract: where the employer had greater bargaining power when compared to the employee when the employment contract was signed, this suggests an expansive restraint may be unreasonable.
- **Extent** of the restraint clause (i.e. what kind of activity is restricted): where the restraint prohibits a wide range of activities, particularly activities unrelated to the previous employment, the clause is likely to be unreasonable.
- The **nature of the business**, and whether confidential information was obtained that was specialised knowledge: where specialised knowledge is obtained, longer or wider restraints are more reasonable
- The composition and value of the **client/customer base**: a larger client and/or customer base justifies having longer or wider restraints

*Wallis Nominees (Computing) Pty Ltd v Pickett* is a recent Victorian case involving the application of the law concerning restraints of trade. Pickett was an employee of Wallis Nominees, and he occupied the position of a specialist IT consultant. He worked with Wallis Nominees for 12 months. Over this period, his main role was to service a particular client of Wallis Nominees. After this period expired, Pickett left his role with Wallis Nominees. Shortly after, he took up a position with the client he had been servicing while at Wallis Nominees. Wallis Nominees argued Pickett's act of engaging with this client amounted to a breach of the employment contract, namely the restraint of trade clause which prevented Pickett from providing services to a former client for 12 months. The Court found that the clause was unenforceable. 12 months was considered too long as Wallis Nominees could reasonably find someone else to fill the role previously occupied by Pickett.

#### *The problem with the law*

As indicated from the above case example, employees are often able to escape from restraints of trade on the basis that they are unreasonably wide. This leaves the employee free to engage in conduct that would otherwise have been a legitimate restraint.

### *Overcoming the problem*

An unreasonable restraint can be severed. Severance involves removing the part of the restraint clause that causes it to be unreasonable. In theory severance seems quite simply, however, it must be possible to run a pen through the parts of the contract and leave behind an intelligible restraint.

Another way to deal with the unenforceability of restraint clauses is to place an employee on 'gardening leave'. This means that the employee may be asked not to attend the workplace during their termination period, as there is likely exposure to sensitive information. This is permissible provided the employer continues to pay the employee as per usual, and no other terms of the employment contract are breached.

### *Consequences of breach*

If the employee breaches a valid restraint of trade, the employer can seek any of the following:

- An **injunction** to force the employee to comply with the clause;
- Damages or an account of profit (where the employee has used a trade secret of the employer to make a personal profit)

### *Concluding remarks*

While restraints of trade are common in employment contracts, the extent to which they are enforced is much more limited. When drafting a restraint of trade, ensure it goes as far as necessary to reasonably protect the legitimate business interests. Further, ensure the clause can be severed by removing phrases within the clause. Alternatively, seek other ways to protect the businesses' interests, for instance through placing the employee on gardening leave.

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(The law as it stands in August 2015)  
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