NEIL
MYERSON
LLP

SOLICITORS

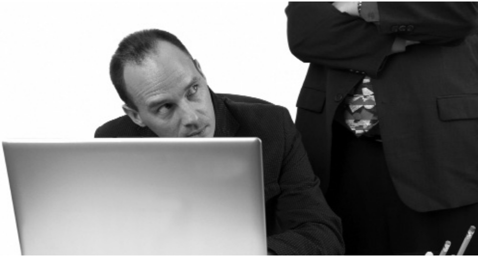
April 2010

Employment Write News

Clear, pragmatic and commercial advice on all employment issues faced by our clients.

01/02 Restrictive Covenants – Protecting Your Business
02/03 Changes in Spring 2010
04 Case Updates in Brief

The articles in this newsletter are for guidance only and do not constitute legal advice.
The firm is regulated by the Solicitors Regulation Authority



Restrictive Covenants – protecting your business

All businesses need to consider how best to protect the goodwill they have built up over the years from departing employees. Particularly in these uncertain economic times, it is essential to ensure that there are adequate safeguards in place to prevent important assets such as staff and clients from being stolen by former employees who may to choose to work for competitors or set up in competition.

The most effective legal tools at an employer's disposal in this regard are restrictive covenants. Restrictive covenants are clauses that can be incorporated into employment contracts to prevent an employee, within a reasonable geographic area and for a limited time after termination of employment, from competing against a former employer or from soliciting clients or staff away from that employer. Businesses would do well to ensure that all employment contracts for employees with enough seniority contain carefully drafted restrictive covenants.

Well drafted restrictive covenants are likely to be upheld by a court. Therefore, should the restrictive covenants be broken by a departing employee, the employer can apply to court for an immediate injunction to prevent them from competing with the business. The very presence of well drafted restrictive covenants within an employment contract will often be deterrent enough to dissuade a former employee from even considering competing with the employer until the restrictive covenants expire.

It is imperative that great care is taken to ensure that restrictive covenants are fairly drafted and comply with the law if they are to be upheld by a court. By their very nature, restrictive covenants are anti-competitive and a restraint on trade. As such, restrictive covenants will not be upheld by a court unless they fairly protect a legitimate business interest. This can include the business' confidential information, customer contacts and the stability of the employer's workforce.

The covenants must also go no further than is necessary to protect legitimate business interests. Therefore, the question that a court will often consider is whether or not the duration or territorial scope of a restrictive covenant is reasonable. For example, in the case of *Beckett -v- Hall*, the business sought to enforce a restrictive covenant with a duration of 12 months. The court decided that, given the former employee's position was very senior, a 12 month restriction in this case would be appropriate. In many other cases such a lengthy period has been found to be unreasonable and this highlights the necessity of ensuring restrictive covenants are carefully tailored to the circumstances of each individual employee and business.

In the case of *ELTE Scientific -v- Thomas* the former employee was restrained by a covenant from competing with the business globally. The court considered the nature of the business and agreed that, given the confidential information held by the former employee and the global scope of the business, such a clause was reasonable. By way of comparison, it has been held in the past that a covenant restricting a solicitor from working within 400 yards of High Holborn was unfair given the many law firms operating in that area.

Many restrictive covenants are not carefully drafted to take into account the legitimate business interests of the employer. These restrictive covenants will fail and will afford no protection to the employer's business. As such, it is imperative that any

restrictive covenants are drafted by experts at the outset to ensure their enforceability.

If there is concern that a former employee has breached a restrictive covenant, advice should be sought straight away. If the covenant is well drafted, it should be possible to prevent that employee from causing any further damage to the business and also to recover a monetary sum from the employee to compensate for the damage caused.

Initially, a letter before action should be sent to the employee in breach of the covenant (and, where appropriate, the employee's new employer) threatening court proceedings seeking an injunction unless various undertakings are given. Those undertakings would include promises to return or destroy all confidential information; to cease operating in competition; to account for any profits derived from the new business or to agree to pay a suitable sum in compensation; to abide by the terms of the restrictive covenants in the future and to pay the claimant's legal costs.

Should those demands not be met, the claimant can seek an emergency injunction from the court. The court will hold an initial hearing where a temporary injunction should be granted if the court is persuaded that the defendant is in breach of the covenants and damage is likely to be caused to the claimant. This injunction will be temporary until the court lists a further hearing at which the defendant will be allowed to attend and provide further evidence for the court to consider. At this hearing, the injunction will either be upheld or dismissed.

It is important to note that it is likely that a claimant will have to provide an undertaking to pay damages to the defendant if it is found subsequently that an injunction should not have been granted and that the injunction has caused the defendant a loss. It is therefore imperative that there is confidence in the covenants in question and that there is good evidence, prior to commencing proceedings, that the covenants have actually been breached.

Changes in Spring 2010

New "fit notes" to replace sick notes from April 2010.

On 6 April 2010, "fit notes" will be introduced to replace the current format for assessing sickness by way of a doctor's certificate (or sick note). Fit notes will allow doctors to certify whether an employee **may** be fit for work, for some work or for no work at all and they will also allow doctors to suggest various adaptations which an employer could make to assist the employee's return to work.

Fit notes will include a list of common changes which could be made to an employee's role or work environment in order to assist their return to work. Examples include amending their duties, altering their hours, offering a phased return to work or making other workplace adaptations. Doctors will also be able to suggest any other changes in a comments box.

It is hoped that fit notes will provide employers with greater information as to an employee's condition and ability to do their role. They should also assist the employer in deciding whether an employee is disabled for the purposes of the Disability Discrimination Act. However, there is no option for a doctor to certify that a patient **is** fit for work (only that he/she **may** be fit for work). This is because it was thought that doctors would not have enough information about an employee's individual role to be able to assess their ability and make that decision. The onus is therefore on the employer to carry out a risk assessment and determine what "may be fit for work" actually means in terms of an employee's ability to undertake their usual duties. This is likely to be problematic for employers and could cause contention with employees over exactly what work they are deemed fit to do.

Ultimately, it is for the employer to decide whether any adjustments are appropriate in assisting an employee's return to work. However, if the changes recommended in fit notes are not adhered to and an employee is later found to have a disability, they could be used as strong evidence that an employer has failed to make reasonable adjustments, giving rise to more claims of disability discrimination.

GPs can specify any period of time for which an employee will not be fit for work and this could even be an indefinite period. However, the maximum duration of a fit note which is issued during the first 6 months of a patient's health condition will be 3 months (a reduction from the previous 6 month maximum duration of sick notes).

The advice for employers in light of these changes is to be prepared for the new forms and consider how to respond if adaptations are recommended for an employee. The onus will be on the employer to rehabilitate the employee and decide whether the changes are acceptable or whether the employee should not yet be returning to work at all. It may be sensible for employers to review their risk assessment process and to be particularly aware of the risk for potential disability claims.

Further guidance for employers has been produced by the Government on fit notes, including useful case studies. This can be accessed at http://www.dwp.gov.uk/docs/fitnote-gp-guide.pdf.

New right to request unpaid time off for training

There will be a new right to request unpaid time off work to undertake training or study from 6 April 2010. This right will only apply to employees in businesses who employ 250 or more people and who have worked for the business for at least 26 weeks. It is expected that the right to request time off for training will be extended to all employers, regardless of size, from April 2011.

In order to be entitled to request time off for training, the training must be for the purpose of both improving the employee's effectiveness at work and the performance of the employer's business. However, there is no need for this to culminate in a formal qualification.

An employee may only make one application every 12 months and this must be made in writing and state specific information about the training.

Within 28 days of receiving an application, an employer must hold a meeting with an employee to discuss it, unless the employer agrees to the application and informs the employee accordingly within that period. Where a meeting is held, the employer must notify the employee of its decision within 14 days after the date of the meeting.

Employers will be expected to consider seriously any requests and only turn them down where there is a sound business reason for doing so (similar to the existing process for considering requests for flexible working). A number of specified business reasons can be relied upon including the cost burden, the inability to reallocate work, the effect on the employer's ability to meet customer demand or where an employer does not believe that the training requested will help to improve the performance of the business or the employee's effectiveness.

If an application is refused, the employer must specify at least one of the permitted reasons for the refusal and explain why the reason or reasons apply. There is then a right of appeal.

If an employer does not follow the correct procedures, an employee can bring a claim in the employment tribunal for up to eight weeks' pay and/or for an order requiring the employer to reconsider the application.

Employers should therefore ensure they follow the correct process in dealing with any request received, particularly as regards the time limits for holding meetings and giving decisions. Whilst there is no obligation to grant the request, employers should consider the application carefully and respond giving appropriate reasons.

Change to compensation limit and statutory payments

On 1 February 2010, the maximum compensation that Tribunals may award for unfair dismissal was reduced for the first time, in line with the economic downturn and to reflect the reduction in the Retail Price Index. The maximum compensatory award in a successful unfair dismissal claim has now reduced from £66,200 to £65,300.

On 4 April 2010 statutory maternity pay will rise from £123.06 to £124.88 a week but statutory sick pay will remain at £79.15 per week.

Case Updates in Brief

Holiday can be carried forward where an employee is sick during holiday leave.

In our December Write we mentioned the European Court of Justice's decision in the Spanish case of *Pereda -v- Madrid Movilidad* which stated that, where an employee is ill during annual leave, they could reclaim their holiday entitlement by carrying it forward into the next leave year. As we explained, this is in contravention of the UK's Working Time Regulations 1998 (WTR). However, the case has since been followed in the UK in the case of *Shah v First West Yorkshire Ltd.*

Mr Shah booked four weeks' holiday between February and March. However, he broke his ankle in January and was then on sick leave until 18 April. When Mr Shah tried to reclaim his four weeks' holiday entitlement, he was told that this had been lost since he had returned to work in the next holiday year. Mr Shah then brought a claim for his accrued but untaken annual leave.

The Tribunal found that the requirement under the WTR that annual leave be taken in the year of accrual should be construed in line with the decision in the *Pereda case*. It was therefore held that, by refusing to allow Mr Shah to take his holiday in the next holiday year, there had been a breach of the WTR.

It is surprising that the Tribunal has followed the European decision in Pereda and it is still in contravention of the WTR. However, the decision is not binding on other Tribunals and it may be appealed in the near future. In the meantime, employers need to decide whether to follow the wording of the WTR (and risk this being challenged) or the decision in *Shah*.

No discrimination for preventing a cross necklace being worn

In the long running case of *Eweida v British Airways Plc*, Ms Eweida brought several claims including a claim that she suffered indirect discrimination on the ground of her religion and belief due to the fact that BA asked her to conceal a cross she wore on her necklace. Ms Eweida refused to do so and was sent home without pay. BA's uniform policy stated that employees could wear any jewellery as long as it was not visible and jewellery for mandatory religious requirements could be permitted with management consent.

Most of Ms Eweida's claims were dismissed in the employment tribunal and her claim for indirect discrimination was dismissed by the Court of Appeal on the basis that it is necessary to show disadvantage to a group, not just the employee bringing the claim and that it was only Ms Eweida who felt disadvantaged by BA's policy. For a claim of indirect discrimination to succeed, there must be a provision, criterion or practice applied to all employees, which puts 'or would put' persons who share the employee's religion or belief at a disadvantage when compared to other persons.

The court also added that, even if Ms Eweida's argument had been successful, any disadvantage she suffered could be justified as being a proportionate means of achieving a legitimate aim, namely a consistent uniform policy, so she would have failed with her claim in any event.

Whilst the Claimant was ultimately unsuccessful in this case, it has involved very expensive litigation and employers should be careful when implementing new policies or taking a 'blanket ban' approach and should consider whether any of its employees might be affected by the policy, before introducing it.

Associative discrimination

In *EBR Attridge Law LLP and Anor -v- Coleman*, the Employment Appeal Tribunal (EAT) upheld the decision of an employment tribunal that the Disability Discrimination Act 1995 (DDA) is capable of being interpreted so as to cover "associative discrimination" which means that it can cover people who suffer discrimination or harassment by reason of the disability of another.

In this case, Ms Coleman was not disabled herself but was the carer for her disabled son. She brought claims under the DDA that she had suffered discrimination by association with her son's disability. Whilst the wording of the DDA does not cover such discrimination, the European Court of Justice held that the Equal Treatment Framework Directive should be interpreted to protect those who suffer discrimination because of their association with a disabled person. The Tribunal therefore added wording into the DDA so as to include a person associated with a disabled person.

The employer appealed this decision on the basis that the Tribunal had distorted the DDA and that the Directive could not affect the interpretation of the DDA until after its implementation. However, the EAT upheld the Tribunal's decision to amend the interpretation of the DDA and interpreted the DDA to state the following:

"A person directly discriminates against a person if he treats him less favourably than he treats or would treat *another person by reason of the disability of another person"*.

Employers therefore need to be aware of the further risk of discrimination claims by reason of the disability of another person and will need to be aware of and take into account an employee's individual circumstances at home.

The Employment Department - Key Contacts

Joanne Evans
Partner and Head of Department

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at Addleshaw Goddard LLP before joining Neil Myerson in 2007 to head up the firm's team of employment specialists.

joanne.evans@neilmyerson.co.uk

Joanne Henderson
Senior Solicitor

Jo has worked as an employment law specialist for many years at leading commercial law firms. She joined us in March 2009 from Eversheds LLP in order to strengthen further our employment service to our clients.

joanne.henderson@neilmyerson.co.uk

John Morris
Solicitor

John is a solicitor in the employment department. He read law at Cardiff University before working at national law firms DLA Piper UK LLP and Beachcroft LLP. He then joined Neil Myerson in 2008.

john.morris@neilmyerson.co.uk

Charlotte Gilbert
Solicitor

Charlotte trained at Neil Myerson having studied law previously at Durham University. Charlotte qualified as a solicitor in 2008 and advises on all aspects of employment law and resolving employment related disputes.

charlotte.gilbert@neilmyerson.co.uk

NEIL
MYERSON
LLP

SOLICITORS

Neil Myerson LLP
The Cottages Regent Road
Altrincham Cheshire WA14 1RX

T (0161) 941 4000
F (0161) 941 4411
DX 19865 Altrincham
E lawyers@neilmyerson.co.uk
W www.neilmyerson.co.uk