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Albion Chambers EMPLOYMENT NEWSLETTER

Restrictive contracts

Although it may seem a little pessimistic to discuss termination provisions in an employee's contract at the start of what you may hope to be a long and fruitful working relationship, failure to do so may be a disaster for the company and lead to a negligence action against the solicitor drafting the contract.

What is the best way of protecting the company whilst minimising the risk of litigation and cost?

It may help to go back to basics before looking at several recent decisions in this area. The basic rule is that covenants restricting the freedom of the ex-employee are void for illegality unless:

- the covenant protects a legitimate interest of the ex-employer
- it extends no further than reasonably necessary to protect that interest

Legitimate interests that employers can protect include connections with existing and prospective clients, connections with suppliers, stability of the workforce and trade secrets and confidential information.

The most common restrictive covenants are:

Non-competition/area covenants – preventing the ex-employee from being involved in a competitor business within a defined area or working for named competitors. This is the most draconian form of restriction.

Non-solicitation covenants – preventing the ex-employee from soliciting business from clients/prospective clients, suppliers or staff (non-poaching). This is involves an element of persuasion and is more than simply informing an individual that they have left the employer and, possibly, that they operate from a different address.

Non-dealing covenants – preventing the ex-employee from dealing with clients/ prospective clients or suppliers. This deals with the canny ex-employee who claims that it was the *client* who approached *him*.

Confidentiality covenants – prohibiting the ex-employee's use or disclosure of trade secrets or identified confidential information.

Although this area is one in which each case genuinely turns on its own merits, courts will generally apply the following principles when interpreting covenants:

- reasonableness is judged at the time the contract is entered into, but taking into account the reasonable expectation of the parties
- covenants must be clear and certain
- covenants are interpreted in the context of the agreement as a whole and to give effect to the intentions of the parties
- words used are given their ordinary and natural meaning
- the court has no power to re-write a covenant but can sever parts of it.

Another commonly encountered clause is the garden leave provision which can be used as an alternative to the restrictive covenant, or as an additional means of protection. This enables an employer to require the employee to spend all or part of the notice period at home or, at least away, from the workplace. The benefit of this is that the employee is still subject to the duty of good faith to his employer while he remains employed. Courts appear to have settled on the view that the decision to send an employee on garden leave is a commercial one which has no direct bearing on the reasonableness of a restrictive covenant unless the aggregate period of them taken together is unreasonable.

Several authorities on restrictive covenants have been decided recently. In *Kynixia Ltd v Hynes*, *Preston and Smith [2008] EWHC 1495* (QB) the defendants all left their employment and went to work for a separate organisation with which Kynixia had dealings. Two of the defendants were the subject of restrictive covenants in a shareholder's agreement which purported to bind them for 12 months after they ceased connections with Kynixia. Notwithstanding that the restrictive covenants were very wide, in the circumstances,12 months was reasonable and enforceable. This authority is worth noting because, in paragraphs 130-141 of the judgment, Williams J gave a detailed and helpful analysis of the law on covenants which included a review of previous cases.

Norbrook Laboratories (GB) Ltd v (1) Rebecca Adair (2) Pfizer Ltd [2008] EWHC 978 (QB) also deserves mention because, unusually, the employee was not a highly paid director or executive. R was employed by a pharmaceutical company as their sales manager earning £25,000 per annum plus bonus. She was responsible for selling all of the company's animal health products in the north west of England. Her contract of employment contained a non-competition clause that prevented her working for any pharmaceutical business engaged in the manufacture of medical or veterinary products for one year following termination. It also contained a non solicitation provision that prevented her soliciting or transacting business in competition with N at the date of termination of employment from those who within the period of two years immediately preceding the date of such termination had been customers or prospective customers of the company, and where during that two years the employee had direct access to and dealings with the customer or prospective customer. N applied for an injunction against R. R submitted that:

(i) the reasonableness of the covenant depended on the salary, length of service and seniority of the employee;

(ii) the non-competition clause was wider than necessary because it prevented her from working for any competitor in the U.K and in any capacity, and one year was longer than necessary to protect N's legitimate interests; and

(iii) the non-solicitation clause was wider than necessary and unreasonably long.

It was held that:

(i) there was no basis for according R's level of pay particular significance in determining reasonableness. The age, seniority and length of service of R did not detract from the fact that she was to have access to confidential information and was in a position where she would establish customer connections;

(ii) R was given confidential information during her employment, including customer lists and sales lists that N was entitled to protect. In the circumstances it was reasonable that the non-competition clause restrained R from working for a competitor anywhere in the U.K. and in any capacity, not just sales. There was a real risk that confidential information might be revealed irrespective of the capacity in which the employee was employed by a competitor. (N had, in fact, admitted revealing sales information to P during a job interview). The period of one year was also not an unreasonably long restraint;

(iii) The reference to customers or potential customers of N whom R had 'direct access to' was too uncertain to be enforceable. Furthermore, including 'prospective' customers made the clause too wide. However, the two offending phrases could be deleted, leaving the remainder of the clause valid and enforceable.

Lastly, in *Chipsaway International Ltd v Kerr [2008] EWHC 1887 (Ch)* a former franchisee, who operated his own car care business following the termination of a franchise agreement with the claimant company, was not acting in breach of a restrictive covenant where the company had no businesses in the area which the franchisee could have been in competition with. The position would have been different had C granted a car centre franchise to a new operator in the same area, and would change if C granted such a franchise to a new operator while the 12 months' term of the restrictive covenant was still running. However, the crucial words were "which competes", and referred to competing on the facts as they were, not to the possibility that competing might begin to happen in the future if the facts changed. Accordingly, there was no breach of the covenant unless and until that occurred and C was not entitled to an injunction.

Notwithstanding the current economic conditions, one suspects that when normal service is resumed in the corporate market, this area will continue to be one in which companies and employees alike will seek to challenge the restrictions on the right to work. Courts will continue to judge each case on its' merits but some points can still be made.

First, a solicitor drafting the contract must fully understand the factual background and have a clear and accurate knowledge of the employee's role in the context of the operation of the business. Secondly, an employer may consider it worthwhile to afford the prospective employee the opportunity of seeking legal advice, possibly even recommending it. Obviously, the courts will be less inclined to interfere where there has been equality of arms. Thirdly, the courts have shown that they are increasingly willing to enforce restrictive covenants which would otherwise be too onerous, by severing the offending parts. That being so, lawyers drafting provisions which they consider borderline ought to bear in mind that, if it is worded in such a way that;

(i) the unenforceable provision can be removed without the necessity of adding to or modifying the remaining words; and,

(ii) removing those words does not fundamentally change the character of the contract, then there is a stronger chance that at least some form of restriction on the employee will be effective.

Jason Taylor

Stress relief

Here is a stress management technique recommended in the latest psychological texts:

Picture yourself near a stream. Birds are softly chirping in the crisp, cool, mountain air.

No one knows your secret place.

You are in total seclusion from the world.

The soothing sound of a gentle waterfall fills the air with a cascade of serenity.

The water is deep blue and crystal clear.

You can easily make out the face of your line manager…

There now… feeling better?

Prior to the current economic downturn the Health and Safety Executive was already warning employers as to the very real problems 'stress' and associated conditions were having upon the nation's workforce. The HSE estimated that 13.5 million work days were lost due to stress in 2008.

The above statistics were compiled before the true bite of the downturn had been felt and before redundancies began to be made and the pressure on an ever increasingly stretched workforce was as keenly felt. Hence, it is anticipated that the corresponding statistic for 2009 will show another increase.

Prior to addressing the legal recourse available to a claimant/employee who claims that their employer's actions or omissions have caused a psychiatric reaction, it may be helpful for those representing both claimants and defendants/respondents to note the HSE website, giving valuable guidance to all parties in stress related matters. As a rule of thumb, if an employer complies with, or an employee notes 'breaches' of these guidelines, such matters may well prove persuasive if not determinative. The web address is http://www.hse.gov.uk/stress/index.htm.

A claimant may wish to pursue a claim in either the county court or the employment tribunals, depending upon the precise nature of the allegations. However, it should be noted that, if a discrimination claim is brought in the ET and the discriminatory acts or omissions are the same as those relied upon as the foundation for a personal injury claim, the claimant is obliged to bring the action in the ET. Depending upon the facts, however, if a discrimination claim has not yet been brought, those advising an employee may wish to examine the county court route instead. In any event, practitioners will no doubt be keenly aware of the cost implications, both pro and against, on either track.

Although this newsletter is targeted towards employment practitioners, this area in particular has many crossovers with which our personal injury colleagues may be able to assist. Therefore, below, I will deal with stress related actions both in the county court and the ET.

Personal Injury actions

It is notoriously difficult for a claimant to

successfully bring a claim for personal injuries arising out of stress, allegedly caused by the employer's acts or omissions. It is similarly difficult to convince case insurers to act under conditional fee agreements.

The main hurdle in these cases is one of foreseeability. Each and every employer has a duty of care to its employees, enshrined both in statute and common law. However, this duty is not absolute, it is modified by test of reasonableness, i.e. a reasonable duty of care. Therefore, an employer owes its employees a reasonable duty to avoid causing injury by its negligent acts or omissions. But it must also be reasonably foreseeable that such acts or omissions *would* cause injury, whether physical or psychiatric. As stated in *Stokes v GKN (Bolts and Nuts) Ltd [1968]* "The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know... where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it...."

This is the crux of the problem in stress at work cases. In many work environments employees may report being under pressure, feeling 'stressed' and/or anxious about particular duties or the quantity of work to be undertaken. However, for liability to be established the court will require clear evidence that the employer was 'on notice' of the real risk that, should duties continue, it will or is likely to cause the employee to suffer from injury. As Jack Ryan would say (although I accept that it may be over stating the position somewhat), there must be "a clear and present danger". Successful cases will, in the main, rely upon a medical report from either occupation health or an independent medical practitioner stating that if the employer continues in the same way, the employee will suffer psychiatric injury.

For those representing claimants in such circumstances the case of *Walker v Northumberland [1995]* seemed to open the floodgates somewhat, although in reality the courts continued in much the same, restrictive, way. However, the parameters of Walker were curtailed in any event by the leading cases of *Sutherland v Hatton [2002]*, and subsequently *Barber v Somerset County Council [2004]*. The thread that is apparent from all of the above precedent is that the issue of foreseeability is not a mere formality.

To counter this generally restrictive approach, in April 2004, the House of Lords said of *Sandwell MBC v Jones* that it was a borderline case but did not interfere with the factual findings of the County Court. In that case, the claimant had worked excessive hours, effectively doing the work of three people. She had asked for help but when it was given, it was immediately diverted by her manager who subsequently dismissed her complaints. She became depressed. During certified sickness leave, she was made redundant. The Court of Appeal upheld the finding of liability on the basis that the employer could have done something to reduce the workload, which would have prevented the psychiatric injury. Ms Jones may have considered herself somewhat fortunate in light of the established body of case law.

This area has been revisited in the recent Court of Appeal authority of *Dickins v O2 Plc [2008]*. The facts of this case were quite complicated and convoluted and a summary would cause their true reflection to be lost. Nevertheless, in short, the claimant reported to at least two line managers that she was having difficulty coping and even requested a six-month sabbatical as she was 'stressed out'. The employer was also aware of previous stress related episodes and the fact that the claimant was suffering from IBS, potentially stress related. Her line manager began enquiring as to the procedure for taking a sabbatical and offered the claimant the services of in-house counselling. She refused as she was already receiving counselling. The key date in the case was 23 April 2002, where the claimant made it crystal clear that she was 'at risk'. The representatives of the employer relied heavily upon the offer of the counselling service and the case of Hatton.

The appeal was dismissed and the finding against O2 was upheld. Therefore, the case of Dickins does show that a PI claim founded upon 'stress' is not as hopeless a cause as suggested by some commentators. In Dickins the employer had verbal evidence from the claimant, medical evidence from various practitioners and knowledge of a history of stress related ailments. A 'clear and present danger', coupled with a negligent failure to act could be shown and the court thus found against the employer.

Employment actions

There is a plethora of potential actions that may be founded upon a psychological reaction to pressures at work. Most fall within a DDA claim and therefore will require a finding that the stress illness is a 'disability' under the Act. Similarly, if abuse relating to race, sex or other protected characteristic is found, the psychiatric reaction to such abuse may also be claimable. However, it is not unheard of to base such claims upon a breach of contract; a breach of the implied term that the employer will fulfil its duty of care to each individual employee.

Below, I have set out a number of cases to give a broad impression of the types of actions that have been decided in the ET, one way or the other.

First, *Essa v Laing Ltd [2004] IRLR 313, CA*. The claimant was black and of Somali origin. He was also Welsh. The employer did not take seriously the claimant's grievances centring upon offensive racial comments made to him by a superior. The tribunal awarded £5,000 compensation for injury to feelings but only three weeks' loss of income in respect of depression and inability to find work. This limited award was made on the grounds that the reaction was extreme and irrational and the employer could not be liable for something that was not 'reasonably foreseeable'. In essence, the employer sought to graft Hatton principles onto a discrimination claim. The EAT held that, unlike the position in personal injury county court cases, there was no requirement in a race discrimination case for the applicant to show that the type of injury suffered was reasonably foreseeable. The majority held that compensation should cover all harm which arises naturally and directly from the acts alleged.

The next case leads onto a potentially fruitful (for the claimant), or vulnerable (for the respondent) area of stress related disability discrimination. In *Paul v National Probation Service [2004] IRLR 190 EAT* the employer, with the best of intentions, attempted to avoid stress related problems by rejecting a job application from the claimant. The claimant had a history of chronic depression, exacerbated by stress. The employer's OH advised that he was not fit to work with people on probation because it was considered 'stressful'. His application was unsuccessful. The EAT said that an OH assessment should not lead to an automatic refusal of employment unless the particular disability affected capability per se and any reasonable adjustments would not alter the fact. The OH report failed to take into account any psychiatric evaluation, a psychiatrist's report that encouraged him to work; and no suggestion of possible adjustments. The employer was held liable for disability discrimination.

Therefore, imagine a scenario where an employee is certified 'off sick' for stress related ailments, even if such stress was not caused by any negligence of the respondent. If that ailment qualified as a disability under the Act, the employer will have to be very careful about the ▸

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way in which it approaches the 'back to work' process. If the employer's requests for information exacerbates the stress in terms, for example, of the frequency of requests or the content or the like, a claim may be founded upon ss.3(A)(2) and/or 4(A) – a failure to make reasonable adjustments or harassment.

Conclusions

With the expected increase in stress related sickness, employment practitioners can also expect a rise in claims based upon that stress. If the warning bells were ringing loud and clear and the employer failed to act, the appropriate forum may well be the county court by way of a personal injury claim.

However, if the stress related action is less clear cut (i.e. the psychological reaction may not have been reasonably foreseeable), the ET affords numerous avenues to pursue a stress claim. If the psychological reaction is significant so as to qualify as a disability and employer is required to take great care in dealing with their employee. If such care is not taken, action based upon reasonable adjustments, discrimination and/or harassment may be irresistible to the tribunal, even in the absence of any malicious intent.

Richard Shepherd