

Protect your business: Beware...



In a recently reported English case of *MPT v Peel* the Court had to consider whether a business was entitled to certain interim remedies against 2 former senior staff. Those 2 individuals had agreed various restrictions within their employment contracts, including a wide ranging protection against revealing confidential information. There were also certain restrictive covenants.

The employees had decided to set up in competition following their restrictions ending. That business would compete directly with their former employer. Prior to leaving their employment, client and company data was copied and downloaded and then removed. The individuals did not tell the truth when they were asked about their intentions.

The employer discovered individuals had begun a competing business. The former employer sought an injunction (called interdict in Scots law - a Court order preventing the party from doing something).

Duty to tell the truth?

One interesting issue in this case was the extent to which the individuals were under a duty to tell the truth in relation to their intention to compete with the business following the ending of their restrictions. There are certain terms and duties implied into every contract of employment. One such duty is that of fidelity and honesty. It was alleged in this case that one incident of the duty of good faith is to answer questions truthfully. The Judge noted that there are some exceptions to this principle, one being that employees are entitled to refuse to answer questions about their private lives. The Judge considered the position and said he was "far from satisfied that these employees were under a duty to disclose their true intentions". He said that:

"The law will step in to prevent unfair competition or to hold employees to enforceable restrictive covenants or to protect confidential

information. Equally, employees must not induce others to breach their own contracts of employment, conspire to cause their employer injury or, in most cases, solicit their colleagues for their new enterprise. Subject to these matters, employees are otherwise free to make their own way in the world. I should therefore be reluctant to hold that an incident of the duty of fidelity is that, when asked a straight question a departing employee is under a contractual obligation to explain his own confidential and nascent plans to set up in lawful competition."

He did note, however, if the individuals owed the company fiduciary duties the position may have been different. This would apply, for example, in relation to company directors and certain senior staff.

Confidentiality – Focus the restriction

The two former employees admitted to copying and taking away company data which they conceded was wrongful. The Judge found that this was a flagrant breach of the duties of fidelity and could well have been an infringement of the employer's database rights and/or its copyright in its technical drawings. However, it was argued that the confidentiality restriction was far too wide to be enforceable. Not only did it apply indefinitely but the range of material contained within the express provision rendered the clause too wide to be enforceable.

The Judge noted that confidentiality clauses can be enforced even where they are of indeterminate duration but it is important to ensure that wide and generic definitions of confidential information are avoided. One reason to avoid such wide clauses is that where employers seek to protect confidential information by way of an interdict, it is "essential that they should make it absolutely clear what it is that they are seeking to protect". In this case the Judge decided to issue a more restricted order to prevent the 2 individuals (and the new company)



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from retaining, copying, using, manufacturing machines in specific ways and from divulging to any third party a specified list of documents.

Practical issues

It is very clear that the law in this area is complex. There are a large number of different issues arising, both in terms of employment law specifically but also in terms of the duties that arise as a consequence of the parties relationship. While the above case arose under English law, there are similarities in the position under Scots law.

The case underlines the need for employers to ensure proper consideration is given to protecting the business. This includes ensuring the contract of employment contains carefully drafted confidentiality restrictions which are focussed and relevant. It also includes the need to consider whether bespoke post termination restrictions (restrictive covenants) are needed and would be enforceable.

Taking practical action now by seeking expert legal assistance to protecting the organisation is key. Doing nothing is no longer an option.