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Is your restraint of trade clause reasonable?

Restraint of trade provisions are commonly used by employers to protect their commercial or proprietary interests, but are they always enforceable?

Restraint of trade clauses have featured in the media this year in a recent case where the Employment Relations Authority (ERA) ordered political editor, Tova O'Brien, to comply with a non-competition clause included in her employment agreement with her ex-employer, Discovery.

Restraints of trade clauses generally come in two different forms. A non-competition clause can prohibit an employee from setting up their own business, and/or working as an employee for a competitor of the employer. A non-solicitation clause can prohibit employees from approaching customers/clients, contractors, suppliers and/or employees from the previous employer.

Restraint clauses are useful for employers to protect trade secrets, confidential information, and client relationships. However, whether these clauses are enforceable is dependent on a number of factors – simply including them in an employment agreement is not sufficient.

The starting position when interpreting any restraint of trade is that they are contrary to public law and unenforceable. The reason for this is restraints are anti-competitive, and, in the employment context, restrict an employee's ability to work. From that starting point, the onus falls on the party wishing to enforce the restraint (normally the employer) to establish that it is reasonable. The question of reasonableness is at the heart of any restraint of trade enforcement.

Restraints cannot simply protect the employer from competition, they must protect something more. The restraint also must not unreasonably prevent the employee from earning a living in their field of work.

Each situation is specific to its facts and, in order for a restraint to be reasonable, there must be a genuine proprietary interest requiring protection. If there is no genuine interest being protected or the clause is unreasonably wide, it will likely be unenforceable.

When considering the enforceability of a restraint of trade the following factors ought to be considered:

- Whether the employer has a genuine business interest that should be protected (for example, confidential information or trade secrets or connections).
- Whether the time period of the restraint is reasonable - this requires an assessment on what is reasonable to protect the interests. In some circumstances no more than three months will be appropriate, whilst in some situations, 12 months can be justified.
- Whether the geographical or population limits of the restraint are reasonable (restraints may be limited to a particular area or a group of people).
- The employee's position (the employee must have held a relevant position to have access to the information necessary to make up the business interest).
- The wording of the clause agreed to in the employment agreement. Specific reference should be made to the proprietary interest being protected.

In some cases, where a restraint is considered unreasonable, the ERA may apply section 83 of the Contract and Commercial Law Act 2017 and vary the restraint to what it considers reasonable, for example changing a six month restraint to a three month restraint.

Practically, it is costly to enforce restraint of trade provisions, and the employer will have the onus of

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commencing proceedings and establishing that the restraint is reasonable. The employee would also likely incur significant legal costs defending such an application to enforce the provision. That being said, a restraint can be of significant commercial value to an employer, and employees should not write them off as unenforceable if they are reasonable.

Want to know more?

If this article raises any questions or concerns, please get in touch with one of our Employment Team.