



THIS MONTH MAXINE ORR EXPLAINS HOW TO INTRODUCE NON-COMPETITION AND RESTRAINT OF TRADE CLAUSES INTO EMPLOYMENT CONTRACTS.

HOW TO INTRODUCE RESTRICTIVE CLAUSES

Many employment contracts contain non-competition and restraint of trade clauses which attempt to prevent employees from setting up in competition or contacting or dealing with customers of the employer after the termination of their employment contract. These types of clauses are only enforceable if they protect legitimate business interests of an employer and are reasonable in all the circumstances. When offering an employee a contract that contains such terms it is entirely a matter for the individual as to whether or not he or she wishes to accept the employment on this basis. However, the situation is very different when an employer seeks to introduce such clauses to existing employees. A recent decision of the Court of Appeal in England considered this very issue giving employers some very clear guidance on how to approach the matter.

Windsor Recruitment, a recruitment company specialising in the supply of workers for health and associated services, was experiencing a loss of staff and confidential information to its competitors. In an attempt to address this, it requested that its employees sign new contracts of employment that contained restrictive clauses. The clauses purported to prohibit employees from poaching its

employees or ex-employees for a period of 12 months after the termination of the employment and from working for a wholly or partly competing business for six months after termination of the employment contract. The employees had little opportunity to consider the import of the terms or indeed seek advice, nor were they advised that they would be dismissed if they did not sign the new terms. The employees who did not sign the new contract were dismissed and issued employment tribunal claims for unfair dismissal.

The employer defended the claims arguing that the dismissals were on the grounds of one of the potentially fair reasons for dismissal namely "some other substantial reason" (as provided for in the Employment Rights (NI) Order 1996). The tribunal held that the dismissals were unfair because the clauses were unenforceable as they were too wide and therefore unreasonable. The employer appealed and the Employment Appeal Tribunal overturned the decision stating that "when determining whether an employer has made out this potentially fair reason for dismissal, a tribunal need only assess whether the reason could be a substantial other reason". However, the Employment Appeal Tribunal found the

dismissal to be unfair in any event owing to the procedure followed by the employer in seeking to impose the new terms. The employer appealed to the Court of Appeal.

The Court said "In the instant case, the refusal to accept covenants designed to protect the employer's legitimate interest fell into a category that could in law form the grounds for dismissal". Accordingly it was necessary to proceed to the second stage of considering whether the employer had acted reasonably in dismissing the employees. The procedure was held to be unfair.

Perhaps the result might have been different if the employer had consulted with the employees and given them adequate time to fully consider the new terms and seek advice if necessary. It is clear that the hasty actions of the employer in dismissing the employees contributed to the finding of unfair dismissal despite the reason being acceptable by the court.

Employers should always seek advice on how to implement new terms and conditions of employment. Following correct procedure and good industrial relations practice is a must if an employer is to defend its actions before a tribunal.

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