



K&L GATES

Webinar

UK Employment Law Update - June 2015

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# Presenter



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# Agenda

1. In case you missed it...
2. Feature: enforcing restrictive covenants in the UK
3. Q&A

## In case you missed it...

- ***The Basildon Academies v Amadi*** (Employment Appeal Tribunal):
  - The EAT decided that an employee was not under a duty to disclose to his employer allegations of sexual misconduct made against him whilst working elsewhere
  - The employment contract did contain an express term requiring disclosure of any misconduct that occurred during employment or in certain other circumstances, as set out in additional documentation
  - However, the employer could not provide this additional documentation so was unable to establish that the employee was under an express duty to disclose his alleged misconduct in a previous role
  - In the absence of an express term, the EAT decided that the employee was not under an implied duty to make such disclosures to his employer

## In case you missed it... (Cont.)

- ***Mbuyi v Newpark Childcare (Shepherds Bush) Limited*** (Employment Tribunal):
  - The ET decided that an evangelical Christian was directly and indirectly discriminated against on the grounds of her religion and belief following her dismissal for expressing negative views about her colleague's homosexuality
  - Various failings in the disciplinary procedure shifted the burden of proof onto the employer, who failed to provide a reasonable explanation for its treatment of the employee during the disciplinary process
  - Therefore, the ET concluded that the employer's actions were based on stereotypical negative assumptions of the beliefs of evangelical Christians (direct discrimination) and that the measures applied by the employer would have a disparate impact on Christians who hold similar beliefs (indirect discrimination)
  - This case highlights the difficulty for employers in balancing their employee's competing protected characteristics in the workplace

## In case you missed it... (Cont.)

- ***McElroy v Cambridgeshire Community Services NHS Trust*** (Employment Tribunal):
  - The ET decided that the summary dismissal of a healthcare assistant for coming to work smelling of alcohol was unfair, given the absence of any evidence of an adverse effect on the employee's ability to do his job and the lack of any previous warnings
  - The employer also took account of the employee's refusal to attend an occupational health appointment, despite the fact that the employee was never informed that this was a disciplinary issue
  - The employment judge concluded that a reasonable employer would not have treated this incident as gross misconduct/conduct justifying dismissal in such circumstances or have considered a charge that had not been put to the employee when deciding to dismiss

## In case you missed it... (Cont.)

- ***Mr A v HMRC*** (First-tier Tribunal):
  - An employee alleged that he had been underpaid bonuses and not received salary increases due to his race or ethnic origin between 2004-7. He was made redundant in 2008, for which he received redundancy payments
  - The employee also received a payment under a settlement agreement regarding a potential race discrimination claim in connection with his bonus and salary, which HMRC taxed as earnings
  - The tribunal decided that the payment under the settlement agreement did not constitute an emolument of employment (despite being calculated by reference to the employee's earnings) and was not taxable earnings under s. 62 of the *Income Tax (Earnings and Pensions) Act 2003*
  - **Test = whether the payment was a reward for services past, present or future.** The payment under the settlement agreement was recompense for the right not to be discriminated against, not a reward for services

# FEATURE: ENFORCING RESTRICTIVE COVENANTS IN THE UK

## What do we mean?

Contractual clauses which, for a certain period post-termination, prevent employee from:

- joining a competitor (non-compete);
- soliciting clients (or prospective clients);
- dealing with clients (or prospective clients);
- poaching employees; and
- interfering with supply of services.

## General principles

- Enforceable provided that the restriction goes no further than is reasonably necessary to protect a legitimate business interest
- Very fact sensitive
- 12 months is generally the maximum duration for senior executives
- “Blue pencil test”: Courts will delete but not rewrite, so if restriction is too long to be enforceable, company will have zero protection
- Need for careful drafting

## General principles (Cont.)

- Usual method of enforcement is an injunction application, but usually preceded by letters requesting undertakings
- New employer often gets embroiled in dispute
- Evidence often difficult to obtain – can involve clients
- Possession of confidential information will enhance prospects of enforcement

## FAQs

- Aren't non-competes unenforceable?
- Do we have to pay salary for the duration of the restriction?
- When do they start to run?
- Can I give details to a headhunter?
- Are global non-competes enforceable?
- Can I go after my new director's old team if I exclude him from the process?
- Can employees get round the non-solicitation restriction using LinkedIn?

## Recent decisions

- Non-compete restricting employee from being involved with the sale of products with which he was involved whilst employed was invalid –
  - no other company sold those products
  - High Court judge took common sense approach: “or similar thereto”
  - overturned by Court of Appeal
- 12 month non-compete invalid where restriction extended to all roles within competing business
  - limit non-compete to similar roles

## Recent decisions (Cont.)

- Non solicitation clauses needs to be limited to individuals with whom employee dealt
- “Reasonableness” judged when contract entered into
  - 12 month restriction given to junior employee unenforceable years later when employee promoted
  - update contracts
- Six month restriction upheld where business of company with which employee not materially involved in final 18 months of employment was excluded

## Recent decisions (Cont.)

- Non-solicitation clause invalid as not restricted to customers with whom employee dealt
- Opposite approach where business had 94 customers and employee was senior
- Restriction preventing solicitation of any company employees too wide – should be limited to those employees with whom they had contact in employment
- 12 month restrictions standard in insurance industry due to annual renewal of policies

## Recent decisions (Cont.)

- Potential customers only protected where company can show building relationship was long and difficult process involving significant investment of time and money

## Variations during employment: *Re-Use Collections v Sendall [(2014)]*

- S asked to sign new contract after business was bought – no existing contract
- High Court: no “consideration” for covenants therefore not binding
- Consideration must be “real monetary or other benefit” conferred on employee to cause him to agree to restriction
- Benefits increased but no specific link to new restrictions

## Variations during employment: *Re-Use Collections v Sendall [(2014)] (Cont.)*

- Pay rise implemented before he signed new contract
- Continued employment insufficient
  - no evidence of possible termination if refused to sign
  - agreeing to do what obliged to do
- Deed? Suggestion that consideration must be substantial
- Action point: provide consideration (bonus, new benefit, etc) and specifically link it to new restrictions



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