

NEWSLETTER

Legal Up-Date

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CAN EMPLOYMENT CONTRACTS KEEP POACHERS AWAY?

Key employees often develop close relationships with their employer's customers. When the employees leave, the customers may well follow them. Departing employees may also be familiar with their former employer's trade secrets or other confidential information which would be valuable to a competitor. What can employers do to prevent their key staff from being poached by the competition?

If an employer wishes to prevent an employee from working for a competitor, they will usually have to look to the wording of the original employment contract; specifically the restrictive covenants or restraint of trade clauses, if any, in the employment contract.

Generally the Courts will allow an employer to enforce a reasonable restraint of trade clause in an employment contract if it does no more than protect the employer's legitimate commercial interests such as confidential information or customer connections. The common law position for over a century has been that a restraint of trade clause is prima facie invalid but will be upheld if it is reasonable and not against public policy. It is therefore advisable for employers to include a well-tailored restraint of trade clause in their employment contracts with key personnel.

In *BearingPoint Australia Pty Ltd -v- Robert Hillard* [2008] VSC 115 (18 April 2008), the Supreme Court of Victoria examined some of the issues that arise when an employee wishes to be employed by a competitor, and the effectiveness of a restraint clause in preventing them from doing so. The Court found that in drafting a restraint clause, it is fundamental that employers be reasonable in the restraint they seek. When the restraint is drafted too broadly, it becomes ineffective.

Robert Hillard commenced employment with BearingPoint Australia Pty Limited, a subsidiary of US company BearingPoint Inc., which deals with management technology consulting. He was eventually appointed managing director/information management for the company. Mr Hillard became dissatisfied with his treatment by the parent company and sought employment elsewhere. In the course of seeking alternate employment, Mr Hillard came into contact with a Deloitte Touche Tohmatsu, a competitor of BearingPoint. Shortly thereafter he signed a letter of intent to become a non-equity partner of Deloitte.

BearingPoint interpreted Mr Hillard's actions as notice of voluntary resignation of employment and put Mr Hillard on 'garden leave' where he would not attend the office but be paid for the next 180 days. At the end of that period, his employment would automatically terminate. In response, Mr Hillard informed BearingPoint that he intended to commence work with Deloitte.

BearingPoint then commenced proceedings against Mr Hillard. Among other things they sought to place Mr Hillard on 'garden leave' for the duration of the notice period, to restrain him from breaching his employment contract and to enforce the restraint of trade clauses in his contract.

The Court found that BearingPoint was entitled to place Mr Hillard on 'garden leave'. This was because Mr Hillard's position was not considered to be a 'special and unique post', unlike an actor or a television presenter, and his future employment prospect would not be undermined by an enforced break from participation in the marketplace.

The Court, however, refused to restrain Mr Hillard from working for the competition for the 6 month notice period sought by BearingPoint or from contacting clients or prospective clients of BearingPoint. The Court considered that granting the restraints would be the same as ordering specific performance of the contract of employment and, generally, Courts do not order that contracts of employment be specifically performed. Further, because BearingPoint had hired a new person for Mr Hillard's position, an injunction would effectively prevent Mr Hillard from operating in competition with BearingPoint which was not considered a legitimate purpose.

In this case the restraint clause in Mr Hillard's contract prevented him from performing information management services for any client of BearingPoint for 12 months from the date of termination of the contract. However, BearingPoint only sought to enforce the restraint for 6 months. Nevertheless, BearingPoint was unsuccessful. In order to enforce the restraints, BearingPoint would have needed to show that the restraints were necessary for the protection of its legitimate interests. However, the Court found that the restraint clauses were unreasonable. This was even though the employer had made the employee sign a separate contract that the employment contract was "reasonable in all the circumstances". The Court considered that the second contract was irrelevant because the issue of the reasonableness of the employment contract was a matter for the Court to decide.

Please note that in NSW, a restraint clause must also comply with, and be enforceable under the Restraint of Trade Act 1976 (NSW). That Act deals with the extent to which a restraint of trade clause is valid and grants the court power in certain limited circumstances to read down a restraint of trade clause. Generally in NSW a restraint of trade will be valid to the extent it is not against public policy. If the restraint is otherwise reasonable and not unreasonable in the public interest, it will not be contrary to public policy.

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If you would like any further information on restraints of trade provisions or employment contracts generally, please do not hesitate to contact either Michael Kobras (mkobras@schweizer.com.au) or Norbert Schweizer (nschweizer@schweizer.com.au).

YOUR FEEDBACK

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