

Employment & Employee Benefits Group

Non-Compete Clauses

Case illustrates the difficulty enforcing post termination restrictions

A restatement of the law relating to restrictive covenants

The case of Levinwick Limited -v- Hollingsworth, [2014] IEHC 333, delivered earlier this year, restates and confirms the High Court's views on the enforceability of restrictive covenants contained in employee contracts. This case highlights the difficulty in enforcing restrictive covenants in the Courts and, in particular, non-compete clauses.

As illustrated in this case, the Courts will carefully examine the clauses themselves and the role of the employee in the business before imposing any restriction. Consequently, if an employer believes that restrictive covenants are necessary to protect their business interests, they need to ensure that the relevant clauses are drafted in such a manner that they adequately describe the business interest which requires protection, that the duration of the restriction is not too onerous and that any geographical restriction is reasonable.

The employee in this case had been employed by the Plaintiff, as a pharmacy manager at Blake's Pharmacy in Celbridge, County Kildare. His employment commenced in 2007 and continued until his departure in 2013. Immediately after leaving Blake's, he worked for two other pharmacies before returning to Celbridge to work for a competitor of Blake's Pharmacy in January 2014, approximately ten months after he had originally left their employment. His employment contract with Blake's contained a clause which stated:

"You undertake that during the term of your employment but for a period of 24 months after the termination of your employment for any reason, you will not be employed or engaged by a pharmacy or other retail business which trades in cosmetics or gifts or which provides photography services within a two mile radius of the Pharmacy..."

The Plaintiff applied for injunctive relief in the High Court to prevent the Defendant from working for a competitor in Celbridge.

The Judge restated the principles set out in the case of Murgitroyd & Co Limited -v- Purdy [2005] 31.R.12 which state that such covenants are *prima facie* unenforceable in common law. However, they are enforceable if they:

- (i) protect a legitimate business interest; and
- (ii) are no wider than is reasonably necessary for the protection of that interest.

The Judge in this case analysed the role of the Defendant - when he was working with the Blakes and his current role with the competitor - and the extent to which he interacted with customers.

The Defendant often worked in an office upstairs away from the sales area where he was responsible for purchasing and making payments to suppliers. Blake's Pharmacy employed a number of pharmacists and eight or nine retail assistants. The Defendant argued that his colleague, who was also a pharmacist, would have had a higher degree of personal contact with customers than him. He said it was unusual for customers to follow a pharmacist and believed that other factors - such as the availability of parking, proximity to general practitioners or customers' homes - would be more likely to affect a customer's choice of pharmacy.

The Plaintiff produced evidence which showed that their business had declined since the Defendant had left their employment and claimed that, in his view, the customers were following the Defendant. Their accountant also argued that the 24-month restriction in the Defendant's contract of employment would protect the goodwill built up by the pharmacy.

The Judge felt that the evidence fell a long way short of establishing that the employee represented the face of the pharmacy to its customers. The Judge believed that there were a substantial number of employees employed by the pharmacy and, on balance, that the pharmacy had not established that the nature of the Defendant's position or his work in the pharmacy gave rise to such a personal

connection with the customers of the pharmacy that the restriction imposed by the clause was necessary to protect the goodwill of the Employer.

He therefore refused the Plaintiff's application for injunctive relief and damages.

For further information on this topic please contact: Paul Gough, Associate, Employment & Employee Benefits Group, E: pgough@efc.ie