

“ Plain speaking legal advice ”

## Restrictive Covenants

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Over the last year or so the courts seem to have taken a much tougher stance over employees who have restrictive covenants preventing them from approaching customers and suppliers within 12 months of the employment ending.

Previously the advice was that employers would find it difficult to persuade a court that 12 months was a reasonable period if the employee had a very much shorter notice period. Experience showed that unless the employee had a 12 month notice period, the best you were likely to be able to enforce as an employee was a six month non compete or non dealing clause.

There has now been one case in 2006 and two in 2007, which has seen the trend move more in favour of the employer.

The High Court in the case of Allan [2006] involved a firm of solicitors. The court upheld a 12 month covenant that prevented an assistant solicitor from acting for clients of the firm after she had left. Interestingly, this included clients that she had never personally acted for during her employment.

In Beckett Investment Management Group Ltd –v- Hall [2007] a 12 month restrictive covenant preventing dealings with customers and suppliers was upheld by the Court of Appeal. In this instance, the employees who were bound by the covenant were very senior and the Company was able to satisfy the Court that it would take about 12 months to recruit and train suitably experienced replacement staff. Indeed that was seen as a crucial element in the court’s decision to enforce the covenant.

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In *Thomas –v- Farr plc and Hanover Park Commercial Ltd* [2007] the Court of Appeal again upheld a 12 month non compete clause against the Managing Director who had resigned claiming constructive dismissal and gone to work for a competing company. Here the Court decided that 12 months was a reasonable estimate of the period for which the confidential information would remain valuable. It is also important to note that Farr plc were insurance brokers specialising in arranging insurance for social housing projects. The non compete clause just stopped Mr Thomas from acting in the social housing insurance broker market for the 12 months. It did not stop him working in other insurance broker markets during that period.

A word of caution. These were very specific decisions based on very specific facts. In the main, the issues that tipped it in the employers favour were the seniority of the people involved and the confidential nature of the information they had, which could have caused serious harm to the employer. They should certainly not be taken as *carte blanche* to increase all your non compete clauses to show 12 months.

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### **Statutory Grievance Process**

Under the Statutory Grievance process, both employee and employer are expected to use the process before any tribunal claim is lodged. The procedure itself talks about step 1 being where the employee has put his/her grievance in writing and sent it to the employer.

However, it was quickly established by the tribunal that they were not going to take an overly legalistic view on this. A letter by solicitors marked without prejudice was held to be the step 1 grievance notification. A letter in which the employee resigned and made complaints but never once used the term “a grievance” or made reference to the statutory procedure was also held to meet the requirements.

The onus seemed to be placed firmly on the employer to recognise when “a grievance” was being brought and to respond to it accordingly. This approach has been further emphasised in the case of Kennedy Scott –v- Francis [2007].

In this case the employee put nothing in writing at all. It started with an informal meeting between employee and employer during the course of which the employee made a number of complaints about sex and race discrimination and a full note was taken by the employer.

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Subsequently, an employment tribunal claim was made and the employer argued that the employee had failed to utilise the grievance procedure because there had been no step 1 notification. The Employment Appeals Tribunal took the view that the employer had taken a detailed note of the complaints and consequently were put on notice that a grievance was being raised. It was then the employer's responsibility to call a step 2 meeting.

Logically on the facts of this case you can understand why that decision was reached. However it does create some very real problems for employers.

Is any informal meeting between employer and employee in which a complaint is raised, however trivial and where the employer has routinely made a note of the meeting, going to amount to a step 1 grievance notification? It would seem that there is a real risk that it will. In which case the employer is going to have to offer the employee a step 2 grievance meeting (and make a note of that for the file) or run the risk of a claim that they have failed to comply with the procedure and potentially an automatic unfair dismissal.

Interestingly there is some "hint" from the Government that the Statutory Grievance and Disciplinary Procedure may not be with us in its current format for very much longer. Introduced in October 2004 it was trumpeted as a means of reducing the number of cases coming before tribunals. It seems to have had the opposite effect and Gordon Brown has indicated that in the next session of Parliament there will be an "Employment Simplification Bill" which may well repeal the Statutory Grievance and Disciplinary Procedure. What will replace it however is still under wraps.

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