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Enforceability: Post termination restrictions

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[Quilter Private Client Advisers v Falconer](#) is a rare case on PTRs and acts as a stark warning to employers not to use 'template' clauses without due consideration.

In Quilter v Falconer, the High Court found that the post termination restrictions clauses contained in Falconer's employment contract were an unreasonable restraint on trade and therefore void and unenforceable.

What are post termination restrictions clauses?

Post termination restrictions clauses (PTRs) are often referred to as restrictive covenants and are the non-solicitation, non-compete and non-dealing clauses contained in an employment contract.

Background

In 2019, Falconer joined Quilter as a financial adviser and was unhappy in her employment, citing her dissatisfaction with the administrative support she was receiving and the restriction on the products she could recommend to clients. She resigned during her 6-month probationary period, serving her two-week notice period on garden leave.

Falconer then began working for one of Quilter's competitors as a self-employed financial adviser, in breach of the PTRs contained in her employment contract with Quilter.

Quilter brought a breach of contract claim against Falconer and sought an interim injunction to enforce the restrictive covenants in her employment contract. Quilter also alleged that Falconer had not devoted her whole time and attention to her work and that she had taken confidential information, contacted clients during her garden leave and breached her duty of fidelity.

Whilst the interim injunction was granted, by the time the case came to trial the covenants in question had already expired leaving only the issue of assessing damages and costs.

The High Court's decision

The Court held that the non-compete, non-solicitation and non-dealing clauses in Falconer's employment contract were invalid under the restraint of trade doctrine. The Court held that had the clauses been valid then Falconer would have breached her employment contract by, amongst other things:

1. contacting Quilter's clients during her garden leave without permission
2. attending an induction course for her new employer whilst still being employed by Quilter
3. failing to show her new employer the restrictive covenants contained in her contract, despite an express clause requiring her to do so; and
4. scanning confidential client documents for the purpose of diverting business away from Quilter.

Quilter had legitimate business interests which it sought to protect by virtue of the post termination restrictions.

The Court, however, held that Quilter was obliged to assess the reasonableness of any clause at the time it was entered into and that the burden of proving whether a clause is indeed reasonable lies with the employer. Quilter could not evidence the reasonableness of such clauses.

The non-compete clause

In Falconer's contract, the nine month non-compete clause applied regardless of how long she had worked for Quilter. During Falconer's probationary period she could be dismissed with two weeks' notice and therefore it was reasonably foreseeable that Falconer could be employed for a very short period, whilst still being restricted by the nine month non-compete clause.

The Court held that the length of the period of notice can be an indication of the unreasonableness of the duration of the restraint. Such a short notice period indicates the employee's services are less valuable to the employer and therefore in need of less protection. As such, it was an unreasonable clause.

Further, Falconer was restricted from working with clients who had ever been a client of Quilter. The Court rejected this clause on the basis that it went further than protecting confidential information by seeking to prevent competition.

The Court noted that the Head of Quilter, who had access to much more confidential information, was only subject to a six-month restriction. Quilter offered no evidence to justify imposing the same or, as is the case here, longer restraints on a junior employee thus indicating that Quilter had adopted a 'one size fits all' approach and was failing to consider the suitability of restrictions for each level of employee.

The Court's preference would be for Quilter to have protected its interests by using an appropriately worded non-dealing clause. The Court doubted the necessity of the non-compete clause, given the evidence at trial also suggested that non-compete clauses are not common practice for financial advisers. Once Quilter was aware of Falconer's new employment it decided to wait five months before seeking to enforce the non-compete clause which suggests it was content with the protections afforded by virtue of the non-dealing and non-solicitation clauses.

The non-dealing and non-solicitation clauses

Both clauses were similar in scope in that they were to last for 12 months from termination and sought to prevent Falconer from supplying financial services to any customer of Quilter who had been a client during the 18 months prior to the termination date. This 18-month "backstop" was the central issue for the Court. The wording of the clause was such that Falconer would be prevented from soliciting or dealing with anyone within the book of clients she had taken over, even if she had not met or spoken to them, as the wording would capture all such clients. It would prevent Falconer from even dealing with her family and friends.

In the absence of evidence from Quilter as to why such clauses were reasonable, the Court held that these PTRs went further than necessary and the 18-month backstop, together with a 12-month restriction, was excessive for a junior employee.

Noteworthy is that Quilter's monetary claim amounted to £39,000, yet by trial its costs had reached £500,000, with Falconer having to act as a litigant in person due to a lack of funds. Those representing Quilter candidly admitted that the case had proceeded to trial based largely on a dispute as to who would pay the costs. Whilst the trial dealt with liability and injunctive relief only, Mr Justice Calver did remark that, "*…it is highly regrettable, and to nobody's credit, that the parties failed to settle this case at a mediation in January 2020 and instead chose to occupy the court's time fighting a full-blown trial*'. Certainly words of warning for would-be litigants.

Takeaway lesson for employers

Employers should avoid using PTRs in a "one size fits all" manner and should instead consider the reasonableness against the employee's role and level within the business.

To consider the reasonableness, and importantly, the enforceability of any PTR, employers should consider a range of different scenarios including, as was the case here, an employee leaving after a very short period of employment. It is arguably reasonable to enforce a 9-month restriction on an employee who has worked somewhere for a long period of time and developed longstanding relationships with clients, whereas it is clearly less likely when compared to a new starter, employed for a short period of time, who has not yet developed those client relationships.

Employers should consider limited PTRs which apply during an initial period, such as a probationary period, having regard to the employee's exposure to clients, and provide for more stringent PTRs thereafter.

If you use template employment contracts which include PTRs, this judgment makes it abundantly clear that a "one size fits all" approach is not reasonable and could lead to clauses being unenforceable. Call Karen Cole today to review your existing and future employment contracts. Karen can

also advise you on the reasonableness and enforceability of any PTRs.

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