



Successful Court Case Restraining ex-Employee from Soliciting Clients

In the past few weeks, there has been a lot of discussion and publicity in the industry around the recent decision by the NSW Supreme Court regarding a former OAMPS employee and the validity of Restrictive Covenants in his employment contract.

The Gold Seal HR Helpline takes a number of calls on this matter, particularly when employers are employing new staff and preparing their employment agreements.

We have discussed the matter in previous articles; however this month's article will focus on an example of how the restraint clauses stood up in a court of law.

The matter of restraints is a very complex one. The Common Law (employment) Agreement Templates available to Gold Seal HR subscribers include cascading restraints carefully drafted by lawyers and based on court rulings on what is fair and reasonable at the time. If employers wish to alter the restraints as drafted in the agreement, it is strongly recommended that legal sign off be obtained to ensure their legality.

Background

OAMPS employed a broker in Sydney in October 1990 and in May 2010 the employee resigned after nearly 20 years of service, to join a competitor.

The employee was in a senior role at the time of termination as a Client Director responsible for:

- Servicing clients directly
- Overseeing the servicing of clients by a team of brokers
- Developing new client relationships

The broker's employment contract included post-employment restraints which "prohibited him from canvassing, soliciting or dealing with any OAMPS client with which he had dealings during the previous two years of his employment. The restraint periods were 15, 13 and 12 months. The restraint areas were Australia, NSW and Sydney".

Similar to the template employment agreements available to employers, the restraint period and restraint area were drafted as cascading and cumulative clauses, meaning that each of the restraint areas and time periods were intended to work together. That meant the widest intended restraint was Australia-wide for 15 months, and the narrowest restraint was in Sydney for 12 months. There were nine combinations of restraint areas and time periods in total.

After commencing employment with his new employer, the broker continued to interact with OAMPS clients who he had previously dealt with. As a result of this, OAMPS took action to enforce the restraints.

The Court's Decision

The court needed to decide if the restraints were void because they were uncertain (i.e. as they were cascading there were many variations of enforcement), and if they exceeded what was reasonably required to protect the employer's business.

The court found in favour of OAMPS and decided that the cascading and cumulative nature of the restraints in themselves did not make the restraint clauses void for uncertainty.



The court noted that the most reasonable period of time for the restraint was 12 months. This allowed OAMPS an opportunity to fortify the client relationship, without interference from the broker upon renewal. The client renewals were spread throughout the year.

With respect to the geographical area, the court decided that because the restraint related to specifically defined clients, the geographical area aspect of the restraint was irrelevant.

The court also noted that cascading restraints must be carefully drafted so that each subclause can be simultaneously compliant; that each subclause be clean and severable so that if one subclause is void, it does not void the entire restraints clause.

As stated earlier, the Common Law Agreement Templates have been drafted by lawyers using relevant case precedents at the time. If you wish to alter the cascading restraints or the wording of the restraint clauses, legal advice should be sought.

Further Assistance

For assistance or guidance on any HR/IR matter please contact us. Our contact details are 03 9510 5100 or email hrservices@goldseal.com.au .