

Restrictive Covenants in Employment Contracts - Employer Liability

by Joseph Lewin

A recent Court of Appeal case, *Allen t/a David Allen Chartered Accountants v Pollock and Anr* [2020] EWCA Civ 258, has considered the liability that can arise where one business poaches an employee from a rival business, in circumstances where that employee is subject to restrictive covenants that prevent him or her from competing.

This case applies existing authority and provides helpful clarification on what could make a new employer liable for inducing breach of a new employee's restrictive covenant with their former employer.

Restrictive covenants against competing with an ex-employer

In a global, competitive business landscape, companies continuously seek to employ and invest in the most talented employees to help their business excel and/or expand.

Because of this, many employment contracts contain restrictive covenants within them to protect current employers on an employee's departure, against losing clients and carrying away inside knowledge or strategies.

A restrictive covenant is a clause in an employment contract or services agreement that works to prohibit an individual from (among other things) competing with his or her ex-employer for a certain period after he or she has left the business.

It is well established that such clauses can only be enforced against the ex-employee where they (a) are designed to protect the ex-employer's legitimate business interests, and (b) extend no further than is reasonably necessary to protect those interests.

Liability for inducing breach of contract

What often receives less attention is the question of whether, in circumstances where the employee joins a competing business, the new employer can become liable if his new employee breaches his or her restrictive covenants in their prior employment contract.

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It has now been established that the new employer can be liable for inducing a breach of his new employee's prior contract but only if the ex-employer can show that the new employer did so:

(a) knowing about the contract, and

(b) with intention to induce the ex-employee to breach it, without reasonable justification.

The case

In *Allen v. Pollock*, Mr. Pollock, a business service specialist, had been employed by David Allen, a firm of accountants. During his employment, as part of an arrangement which entitled him to an increase in his salary, Mr. Pollock entered into certain restrictive covenants aimed at preventing him from working for a competitor for twelve months in the event that his employment terminated.

Despite these covenants, Mr. Pollock agreed to join a rival of David Allen's, Dodd & Co Ltd ("Dodd").

Dodd was aware of the restrictive covenants, although it did not know about the circumstances in which Mr. Pollock had entered into them. Before Mr. Pollock began his new position, Dodd therefore sought legal advice regarding the enforceability of the restrictive covenants and whether it would be put at risk in hiring him.

This advice that Dodd received described the covenants as being more likely than not unenforceable because: (a) no consideration had been given, and (b) the length of time for which they purported to restrict Mr. Pollock from working was excessive. Dodd & Co was therefore told that the restrictive covenants were "*probably*" unenforceable.

In fact, this advice was incorrect.

David Allen raised two claims: (a) one against Mr. Pollock for breach of the covenants, and (b) another against Dodd for inducing the breach.

At the first instance trial, the Court found that consideration had been given, and that David Allen did have a legitimate interest in protecting its goodwill. Whilst many of the covenants went beyond what was necessary to protect that interest, the Court found that it was possible to sever the excessive elements whilst retaining the rest.

As such, Mr. Pollock's covenants were in fact enforceable, at least in part. This meant that Mr. Pollock had breached them when he went to work for Dodd.

Despite this, the trial judge dismissed the claim against Dodd for inducing the breach. The reason that he did so was that, because of the legal advice it had received, Dodd did believe that it was more likely than not that the covenants were unenforceable; the Court found that the firm was entitled to rely on the responsibly sought legal advice and did so

honestly.

David Allen appealed, on the basis that the legal advice obtained by Dodd was equivocal and did not clearly state that Mr. Pollock would not be in breach, only that he would “*probably*” not. As such, it alleged, Dodd knew that there was a risk. David Allen hence argued that Dodd’s actions thereby did still amount to inducing a breach of contract.

Leading the unanimous judgment, and emphasising that “*it cannot realistically be said that [Dodd] turned a blind eye to [Mr. Pollock’s] contractual obligations*”, Lewison LJ dismissed the appeal.

The Court found in Dodd’s favour on the following grounds:

1. The fact that the advice received was unequivocal and was not clear that no breach would occur did not mean that Dodds knew it would be inducing a breach of contract.
2. To induce a breach of contract a person must:
 - a. have knowledge of the breach; and
 - b. know that the act performed would subsequently breach the contract.
3. Employers are entitled to act on the legal advice received without having to be exposed to liability in tort.

Learning points

The case is an important reminder to all sides to consider the drafting and application of restrictive covenants closely.

As always, tightly drafted covenants that are not for an excessive period are more likely to be enforceable than extended obligations.

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