

Employment injunctions

This client guide is on employment injunctions including what is an injunction and the issues involved.

What is an injunction?

An interim or temporary injunction is a court order that a claimant can obtain against a third party (an individual or any form of legal entity such as a company or a firm) to obtain urgent court relief. Whilst these orders can take a variety of forms, in general terms, the usual form of injunction sought by a claimant is to stop a third party from taking, or continuing to take, a certain course of action which would damage to the interests of the claimant. These orders last until trial or further order. The rationale for making these orders is that allowing the third party to take or continue the course of action unabated would be so damaging to the interests of the claimant as to be impossible to adequately compensate in damages at a trial.

In an employment dispute, an injunction may be sought by a current or former employer to prevent an ex-employee from:

1. working in a competing business
2. soliciting or dealing with the employer's clients
3. soliciting or engaging the employer's employees
4. retaining the employer's documents, electronic databases and confidential information illicitly taken by the employee or former employee and
5. divulging or making use of the employer's confidential (and valuable) information

The injunction can be sought at the same time against the ex-employee's new or prospective employer, if the details of that new employer are known.

An injunction is effective and enforceable as soon as it has been served on the parties concerned. A failure to comply with the terms of an injunction amounts to a contempt of court, and possible imprisonment.

Are the post termination covenants properly drafted?

The first step is to look at the contractual restrictions contained in the contract of the employee or ex-employee. The recent trend has been for the court to grant interim injunctions to enforce post termination covenants contained in employment contracts, **provided** they are enforceable covenants in any event. Well drafted covenants give an employer an increasingly effective means to restrict certain types of competition from a former employee. Post termination covenants must be incorporated into a written employment contract, and carefully drafted so that they are no wider in their scope than is necessary in order to protect an employer's legitimate business interests. Legitimate business interests requiring protection and which the court will protect on an interim basis typically include (1) trade secrets and confidential information, (2) customer connections and (3) the stability of the employer's work force.

Discretion

The court always has a discretion as to whether it is prepared to make such an order. It is a balancing exercise, balancing the interests of the employer if the order is not made, against the interests of the other parties if it is. The court will only grant an injunction if it is considered to be 'just and convenient' to do so.

The court will require evidence demonstrating that it is 'more likely than not' that a former employee has engaged (or is about to engage) in unlawful conduct. The conduct of both parties, as well as that of the competing business in which the employee becomes involved, is critically examined by the court. Any evidence of dishonest conduct on the part of the employee (or the competing business), such as theft of the claimant employer's database will weigh heavily in the applicant's favour. The whole nature of these orders is that they are urgent. So a claimant must not delay before making an application to court. An application for an injunction could fail for delay alone, unless there is a reasonable explanation for this delay, and that it is fully explained to the court.

Full and frank disclosure

The court requires that an applicant and its legal team **must** give full and frank disclosure to the court in the witness evidence filed in support of an application for an injunction. This also involves a duty to disclose information, at an early stage, that could also be helpful to the employee's case. The court wants to be made as fully aware as possible of all issues arising in the case, as they are relevant to the exercise of its discretion. A considerable amount of time and money will therefore be spent on ensuring that the court has all the requisite information before it and the information will need to be gathered in a very short space of time. Legal advice must be sought very quickly. An injunction granted without full and frank disclosure having been given can be overturned, regardless of the merits of the claimant's case.

Undertakings – writing to the employee first

Once evidence emerges that an employee is breaching his obligations, and before applying to court for an injunction, the claimant employer is first expected (in the vast majority of cases) to write to the employee in order to summarise the evidence that has come to light and to demand an appropriate form of "written undertaking" from the employee, to be provided within a very short time frame.

The undertakings normally require the employee to disclose information concerning the alleged misconduct (for example, details of which clients have they contacted and copies of any correspondence, documents removed from the employer's premises) and to deal with the specific allegations that have been raised by the employer.

The employee will also be asked to undertake to stop their activities by agreeing to abide by their covenants. The employer should threaten to issue proceedings and apply for an injunction if the employee fails to provide the information and the undertakings sought with a stated time frame.

The court process

The application will be heard on the basis of witness statements only ie with no live evidence from any witness. The matter may be dealt with in one of two ways:

- The application may be dismissed, if the court takes the view that the covenant is invalid or there is not serious issue to be tried
- An interim injunction could be granted if the court takes the view that there is a serious issue to be tried, that the covenant appears capable of being upheld at trial and that the balance of convenience favours the grant of an interim injunction to prevent the employee from inflicting more serious damage on the

employer. If an interim injunction is granted, the current trend of the court is to set the matter down for a 'speedy trial'.

An employer seeking an interim injunction is required to provide a 'cross undertaking in damages' to the court. This is an undertaking given to the court whereby the employer agrees that if an interim injunction is granted **but the injunction is dismissed at trial** (due to the court ruling that, after a fuller examination of the evidence, the injunction should not have been granted) it will pay damages to the employee and/or any new employer for the loss suffered as a result of having been restrained under the interim injunction pending the trial. The claimant should produce evidence to the court that it would be 'good for the money'. The damages resulting can be considerable.

Costs and risks on costs

Whether a claimant has tried to resolve matters in correspondence before going off and applying for an injunction is critical when it comes to costs issues. If undertakings are not sought from the employee before an application for an injunction is made, the employer risks being ordered to pay the employee's costs of the application. The rationale for this being that even if the employee is guilty of wrongdoing, he might have been prepared to give the undertakings sought if he had been asked to do so before the court process began. However, if the employee refuses to provide the undertakings sought (or an alternative form of reasonable undertaking) and the court grants an injunction is granted the court is more likely to order costs in favour of a claimant. In practice though, the court will reserve the costs issue to be decided one way or another at trial. It is less likely that a court will grant a claimant a costs order at the actual interim hearing itself.

If the employer fails in its application for an injunction, whether at the first hearing or on the return date (described below) it is quite likely that the court will make an order that it pay the employee's legal costs as well as bearing its own costs. At a trial the usual order is that the losing party pays the winning side's costs. Costs however are always at the court's discretion and can depend on many factors.

Practical issues

The process of seeking or defending an application for an injunction is amongst the most stressful and costly situations that clients have to deal with. It should only be undertaken where the employer is facing a serious threat to its business as a result of the former employee's activities. It is essential that clients are properly advised at the earliest opportunity as to the merits of their particular case, the practical and legal issues that they will face and the commercial considerations to be borne in mind.

Clients also need to appreciate the urgent and time consuming nature of this type of litigation and the importance of being on hand to provide full instructions and to deal with the evidence as it emerges.

Our expertise

At Blake Lapthorn we have a specialist employment litigation team who regularly act on employment injunction disputes. We are able to put together an experienced team at short notice who have genuine experience of dealing with this type of litigation and will quickly assess the merits and provide clear tactical advice as to how best to deal with bringing or defending an injunction. We will also provide realistic estimates at an early stage of the likely costs of taking such action together with an analysis of the potential benefits that may be achieved.

Contact

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