

## Employment Related Injunctions

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Typically, a contract of employment or service agreement will contain a number of different types of restrictive covenants, such as:

- A A non-competition covenant – where the employee agrees not to take employment with a competitor (or to trade) within a defined geographical area for a defined period of time.
- B A non-solicitation covenant – where the employee agrees, for a defined period, not to solicit business from customers he has had contact with (e.g. in the last year) whilst working for his current employer.

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- C A non-poaching covenant – where the employee agrees, for a defined period of time, not to poach other employees with whom he has had a defined level of contact (e.g. colleagues) during a specific period of time prior to his leaving.
- D A non-dealing covenant – similar to a non-solicitation covenant but wider in that it prohibits dealing even if it is the customer rather than the ex-employee who initiates contact.
- E A non-employment covenant – similar to a non-poaching covenant but wider in that it prohibits employment of the affected employees even if those employees seek employment of their own volition and are not approached.
- F Confidentiality covenants – where the employee agrees not to disclose or use, after employment has ended, information which is regarded as commercially confidential. This is distinct from the employee’s skills and know-how.

In addition to protection by express covenant, if information amounts to a “trade secret” – such as a secret manufacturing process – there is an implied duty of confidentiality after employment has ended even if there is no express covenant.

### **Is the covenant enforceable?**

The starting point is that it is not in the public interest for anyone to be prevented from, or restricted in, offering his services in competition with existing providers, including his former employer. Free competition and the utilisation of the skills of all who wish to enter the market is viewed as being for the common good.

From that starting point the law allows restrictive covenants if:

- They are designed to protect a legitimate interest of the employer (such as trade connection and goodwill, business secrets or stability of the workforce), and
- They extend no further than is reasonably necessary to protect that interest

Protection from competition is not considered to be a legitimate interest. However, a restriction of competition, limited by area and time, can be considered reasonably necessary to protect a trade connection and goodwill if, for example, a non-dealing covenant would be difficult to police.

The reasonableness of the covenant is assessed by the court on the basis of whether it meets the two tests above at the time that the contract containing the covenant was made. If it is held to be unreasonable then, subject to the possibility of severance, it will be completely void.

If there is a non-competition covenant lasting for 2 years after the end of employment and the court holds that to be unreasonably long, the entire covenant will be void – i.e. the court cannot substitute and uphold a shorter period.

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## Enforcing restrictive covenants

Because of the great difficulty in establishing how much profit may have been lost due to breach by a former employee of a restrictive covenant, the remedy of choice is an injunction to prevent breach rather than simply a claim for damages. An injunction is an equitable remedy which the court may grant at its discretion and in deciding whether to grant the injunction the court will consider whether it is reasonable to enforce the restrictive covenant by injunction. This is an additional hurdle to the requirement that the covenant was reasonable at the time it was entered into (for example if there are changes in the company's business, operations, and customer base, not only must the covenant be reasonable when entered into, but its enforcement many years later under changed circumstances must also be reasonable in those changed circumstances).

## Interim injunctions

These are usually by far the most significant available remedies, because in most circumstances the delay (perhaps only of a few weeks) before a final remedy might be available is likely largely to defeat the purpose of the covenants: by the time of final trial, the former employee may already have misused confidential information, and the damage to the former employer's business would already have been done. Interim injunctions are the principal solution to this problem.

When faced with litigation, an employee may initially consider offering undertakings that he will not engage in certain activities for a limited period. This may resolve the dispute and avoid litigation, but even if the employer pursues the matter to court, the employee may be able to rely on that offer of undertakings to resist any injunction application.

Interim injunctions may:

- prevent breach of a specific restrictive covenant
- prevent unfair competitive advantage following unlawful activity during employment
- order delivery up of documents or other items — see below
- freeze a defendant's assets — see below
- permit search of a defendant's premises — see below
- enforce garden leave

The grant of such injunctions is subject to various principles:

- it is a discretionary remedy, not granted as of right
- a good arguable case and a serious issue to be tried must be established: this does not usually require detailed determination of the merits
- live evidence is not called on interim injunction applications: evidence will be in affidavits or witness statements

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- if there is a good arguable case, the court will consider the 'balance of convenience':
  - where damages would be an adequate remedy an injunction should not normally be granted
  - if the granting of an injunction would do more harm than good, it will not be ordered
  - the applicant must be able to give a cross-undertaking in damages which it is able to satisfy
  - where the balance is unclear, the courts will usually order maintenance of the status quo

The courts may examine the merits where granting an interim injunction would effectively dispose of the entire case: but evidence will still be restricted to affidavits and/or witness statements.

## **Injunctions in the Republic of Ireland**

Employers in the Republic of Ireland can pursue the same injunctive relief as outlined above.

However, unlike the position in Northern Ireland, employees also regularly seek injunctive relief restraining purported termination of contracts of employment and disciplinary proceedings. The basis for pursuing such injunctive relief is that constitutional and natural justice is not being observed by the employer. Very few cases will proceed to full hearing and most cases will settle.

The most recent high profile case in this area was Mary Mullen –v- Brown Thomas in which the High Court in Dublin granted an interim injunction preventing Brown Thomas restraining it from implementing its decision to dismiss the Applicant. There was no allegation of misconduct against the Applicant however she argued that she had not been afforded a right of appeal and that the dismissal would do irreparable damage to her professional reputation in a niche market. The case settled before judgment was given however the case does seem to herald a change in the recent approach of the High Court only to grant injunctive relief in misconduct cases.

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