

The Boardroom Practice Limited

◆ Building Governance Best Practice ◆

“Practice Note: Restraints of Trade

We are often asked whether or not one can, should and if so how does one, put a restraint of trade in place to deal with employees who leave, are made redundant or otherwise end up in a position where they might cause detriment to a company. While not claiming to be lawyers – and as always advising that specific advice should be taken for specific situations – a recent trawl of case law and thinking on this matter by TBPL reveals that:

In general restraints of trade are frowned upon by the relevant Courts. They are, in a great majority of cases illegal. The reason for this is the overwhelming power of the idea that one cannot interfere with the rights of people to work and to undertake business. So in general (a) steer clear and (b) if you attempt to use them, be careful and well advised.

There are cases where some restraints of trade have been upheld and the following principles appear to apply:

1. There should be something worth protecting – some identifiable IP for example – knowledge, a brand, something that is not protected some other way and which is of material value.
2. The restraint itself should be reasonable, not unlimited and relatively specific – and example might be a geographic area and a limited time period. The idea is simply that unspecified, blanket prohibitions will probably not withstand scrutiny,
3. The arrangement setting out the restraint must see both parties acting in good faith when it is initiated. That might involve both parties to an employment contract for example signing up knowingly and willingly at the outset.

None of this guarantees anything. The area is complex and blurry. These principles though, at least provide a guide.”

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