

Protecting Business Interests

When an employee leaves to go to work for another organisation, their employer may wish to have in place safeguards to protect sensitive information relating to the business, to prevent it from falling into the hands of a competitor.

One possible way of doing this is through a post-termination restrictive covenant, but this will only be enforceable if the ex-employer can show that it is reasonably necessary to protect his legitimate business interests, which include trade secrets or confidential information and customer information. A restrictive covenant that goes beyond what is reasonably necessary to protect these interests will not be enforceable. However, a restrictive covenant that is widely drafted may be reasonable in the case of senior employees, depending on the individual circumstances involved.

In addition, all employees have a duty to serve their employer with honesty and fidelity. Company directors owe a fiduciary duty to act in the best interests of the company, as do employees who hold a senior position within the organisation. Employees who become shareholders may also be bound by the terms of any shareholder agreement entered into.

In *Kynixa Ltd. v Hynes and others*, Mr Hynes, Ms Preston and Ms Smith had held key roles working for Kynixa, a specialist provider of rehabilitation and case management services for people who have suffered an injury. Over a period of time, all three resigned and went to work for a competitor company, without informing Kynixa of their intentions or the identity of their new employer.

The High Court found that all three ex-employees had breached their duty of fidelity by positively misleading Kynixa as to their true intentions. In addition, Mr Hynes and Ms Preston were found to be in breach of their fiduciary duties because they had not informed Kynixa of their negotiations with a competitor. The two also held shares in the company and were found to be in breach of restrictive covenants, contained in the shareholders' agreement, which ran for one year from the date when they ceased to be connected with Kynixa. Mr Hynes and Ms Preston argued that this was too long a period to be enforceable but the Court judged that although the post-termination covenants were very wide, in the circumstances they were reasonable to protect the legitimate interests of the business and were therefore enforceable. Kynixa operated within a small, fiercely competitive market and the disclosure of trade secrets to a competitor could be particularly damaging to its business. Furthermore, Mr Hynes and Ms Preston had a choice as to whether or not to enter into the shareholder agreement and they had both chosen to do so for (potentially) substantial gain.

As a result of this ruling, substantial damages were payable to Kynixa by the three ex-employees.

We can advise you when drafting post-termination restrictive covenant clauses to ensure that they are tailored to cover the particular circumstances relating to the individual employee concerned.