Sports in the news - What do the employment lawyers think this January?

Have England dropped the ball? The Eddie Jones saga and the benefits (and limitations) of post-termination restrictions

For England rugby fans, the excitement surrounding the recent announcement of the men's Six Nations Squad was somewhat overshadowed by the news that former England coach Eddie Jones will now be coaching Australia at this year's Rugby World Cup. Jones was one of the most successful England men's rugby coaches of all time, taking the team to the World Cup final in Japan in 2019, but was dismissed by England's RFU in December 2022 following a poor run of results. England now face the prospect of playing an Australia side led by Jones in the quarter-finals or the finals (fingers crossed!), armed with a whole host of knowledge about the team he so recently coached. Knock on by England?

For those of us who enjoy a bit of employment law alongside sports, we couldn't help but think: "Surely his employment contract contains a non-compete restriction to prevent exactly this sort of situation?!" What lessons can employers outside the sports industry learn from this potential fumble by the RFU? In this article, we wanted to use this story as an opportunity to explore some of the steps employers can take to protect themselves in this scenario, and to consider the limitations of such protections.

(For the record, the RFU has publicly stated that it decided not to insist on including a non-compete restriction in the severance package it agreed with Jones when he was dismissed. Nothing in this article is intended as a commentary on the merits of or reasoning behind that decision – we are just having a bit of fun.)

Garden Leave?

If an employee has resigned, or the employer has given them notice of dismissal, one potential option available to employers is to place them on garden leave during their notice period. Whilst on garden leave, they will remain an employee and continue to receive their salary but are typically instructed not to attend the employer's offices, perform any duties, or have any contact with customers or employees.

One advantage of this approach is that, because they remain employed, the employee will still be subject to any express terms of the

employment contract preventing competitive activities and the implied duty of fidelity to the employer. Another advantage is that the employee is effectively "kept out of the market" during their notice period, preventing them from accessing confidential information or maintaining relationships with customers and key employees.

When considering this approach, employers should check that the employee's contract contains a well drafted clause giving them the contractual right to place the employee on garden leave and to restrict the employee's activities during this time.

Garden leave may be of limited value if the employee has a relatively short notice period. On the other hand, employers should not assume that an employee with a very long notice period (for example, 12 months), can be placed on garden leave for all of that period. If a court was ever asked to enforce a period of garden leave, it would consider factors such as whether the period is necessary to protect the employer's legitimate interests.

Post-termination restrictions?

Another potential option available to employers is to include post-termination restrictions, either in the employment contract or as part of any severance package agreed with the employee on termination of their employment (which the RFU apparently decided against doing with Eddie Jones). Typical post-termination restrictions include a non-compete, restrictions on soliciting customers and key employees, restrictions on "dealing" with customers, and restrictions on interference with suppliers.

Post-termination restrictions often have significant deterrent value. However, actually enforcing a covenant can be difficult in practice, and is likely to be a costly exercise. Employers should take care in drafting restrictive covenants and identifying the employees to which they apply, in order to maximise the chances of enforceability.

The starting point is that a court will only enforce a covenant if it considers that it goes no further than is reasonably necessary to protect the employer's legitimate business interests. This approach comes from the "restraint of trade" doctrine that someone should be allowed to carry out their profession without undue influence from anyone (including their ex-employer).

So, what do we mean by legitimate interests? There's no fixed list of legitimate interests that an employer can seek to rely on, but there are three principal types that courts have previously upheld:

- Trade connections;
- Business secrets and confidential information and;
- Workforce stability.

The need to protect trade connections is typically relied on when seeking to enforce a restriction on soliciting customers, the desire to protect business secrets and confidential information is often used when enforcing a non-compete, and workforce stability in the context of a restriction on soliciting key employees. Turning to Eddie Jones, his detailed knowledge of England's playing squad, tactics, sporting strengths and weaknesses and strategy for the World Cup is a classic example of sensitive confidential information that his former employer might have legitimately wanted to prevent him from taking to a competitor on the eve of a major tournament.

Once an employer has established the legitimate interest it is seeking to protect, it will then need to persuade a court that the restriction goes no further than is necessary to protect that interest. For example, in the context of a non-compete, a court might consider whether the restriction only prevents the employee working for a competitor in a restricted geographical area in which the former employer also operates its business. Similarly, a restriction on soliciting customers might only be enforceable if it applies to customers with whom the employee had material dealings during their employment, or in respect of whom they hold confidential information. The duration of a restriction is also key: the longer an employer seeks to restrict an employee's activities post-termination, the less likely it is to be enforceable against the employee.

For an example of the difficulty of enforcing post-termination restrictions in practice, you might want to read our article about the High Court case of Quilter Private Client Advisers v Falconer (in which a 9-month non-compete restriction was decided to be void).

Other options?

Finally, an employer might consider structuring an employee's financial remuneration and incentives in a way that dissuades them from post-termination competition. For example, some organisations may operate deferred remuneration schemes, whereby a proportion of an employee's incentive is held back and paid at a later date. These schemes often provide that the deferred element is no longer payable if the employee is no longer employed or has given or received notice of termination at the payment date. They can also make clear that those who go on to work for a competitor within a certain period of time will be designated as "bad leavers",

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resulting in the employee forfeiting their entitlements under the scheme. Structuring remuneration schemes in this way can have significant deterrent value, much in the same way as post-termination restrictions.

As is hopefully clear, there are various steps employers (inside and outside the sports industry) can take to prevent their own “Eddie Jones” scenario from occurring, but in each case, this requires careful consideration. GQ|Littler has a wealth of experience in drafting, reviewing and enforcing post-termination restrictions – if you would like further advice on this topic for your business, please do get in touch.

In the meantime, we hope all rugby fans enjoy this year’s men’s and women’s Six Nations and the Rugby World Cup!

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