Another non-compete bites the dust

By Sophie Vanhegan - 28 January 2021

In the recent case of *Quilter Private Client Advisers v Falconer* the High Court found that a nine month non-compete restrictive covenant was an unlawful restraint of trade and void. It provides a useful reminder of when such restrictions may fail.

By way of reminder, post-termination restrictive covenants will be void as an unlawful restraint of trade unless they protect a legitimate proprietary business interest of the employer (such as trade connections with clients or maintaining the stability of the workforce) and go no further than is reasonably necessary to protect the legitimate interest. The reasonableness of the covenant must also be assessed at the time it is entered into.

Ms Falconer (EF) joined Quilter (Q) as a financial adviser to take over the clients of a retiring adviser, but she left after less than six months to join a competitor as a self-employed independent financial adviser. As she was still in her probationary period, she only had to give two weeks' notice. However, her contract contained a 9-month non-compete and 12-month non-solicitation and non-dealing covenants.

Q sought to enforce EF's restrictive covenants, but the High Court held that the non-compete, non-solicitation and non-dealing covenants were invalid because they constituted a restraint of trade.

The court did not uphold the non-compete for three key reasons:

1. **Period**: the 9 month non-compete applied regardless of how long EF had worked for Q, even if she left during her probationary period on the two weeks' notice which applied during that time. The court found that this made the length of the restriction unreasonable, as a departing employee requires less protection if they have had less time to build client relationships.
2. **Scope**: the non-compete sought to prevent EF from working in competition with Q for clients who had never been clients of Q. This went further than was necessary to protect Q's legitimate interest in its client connections, which could be adequately protected by an appropriate non-dealing restriction.
3. **Geographical limitation**: a geographical carve-out, which allowed EF to work in any part of the country in which Q did not operate was of no practical effect, because Q was a nationwide business.

It also did not uphold the non-solicitation and non-dealing covenants, largely because they sought to capture clients who could have last been actual clients of Q just short of 18 months previously – i.e. the lookback period was too long.

This case is a useful reminder of the issues the courts will look at when asked to consider enforcing restrictive covenants, particularly non-competes, and why businesses should always consider the reasonableness of their covenants for the particular hire they are making, rather than applying a one-size fits all approach. Employers should also consider whether to have shorter restriction periods to apply during an initial period, such as a probationary period, where an employee is unlikely to have built up relationships with clients and fellow employees. It is also timely given that the government is currently consulting on reforming non-compete clauses in employment contracts.

If you have any questions about this restrictive covenant case please contact Sophie Vanhegan or your usual GQ|Littler contact.