

Mishcon de Reya Solicitors

Employment briefing from Mishcon de Reya published in the
May 2010 issue of The In-House Lawyer:

Team moves and poaching raids

THE 
IN-HOUSE
LAWYER

Team moves and poaching raids



BY
ASA WARING
legal director,
Mishcon De Reya



BY
WILL WINCH
solicitor,
Mishcon De Reya

TULLETT PREBON PLC & ORS v BGC BROKERS LP & ORS [2010], where BGC were held to have unlawfully poached several teams of Tullett brokers, is a recent example of the fine line between team moves that are legally permissible and those that are unlawful. *Tullett* also illustrates the significant disruption and costs caused by poaching raids on staff.

The volatile business of inter-dealer broking may not be representative of most employers, but with an increased fluidity in the employment market as the economy emerges from recession, more employers are becoming wise to the increased risk, or opportunity, of team moves, particularly in sectors where teams rather than individuals are responsible for securing business.

How, then, should a business go about acquiring a team without incurring liability? Conversely, what should a business do to protect itself against losing its most valuable assets?

WHAT IS PERMISSIBLE?

As a matter of public policy, employees are free to move from one employer to another, providing they do not breach any enforceable term of their employment contract in doing so or otherwise commit an unlawful act. These *provisos* are discussed in this article and anyone planning on poaching staff or defending a raid should carefully consider whether the conduct of the poacher falls within the parameters of what is acceptable.

CONTRACTUAL OBLIGATIONS

Implied terms

The main implied term in employment contracts that is commonly referred to in cases involving team moves is that relating to the duty of fidelity. This is also fairly interchangeably termed 'the duty of loyalty' or 'the duty of good faith'. This duty will:

- prevent the employee from competing with their employer while still employed;
- impose a limited duty of confidentiality (see, in particular, *Faccenda Chicken Ltd v Fowler* [1986]); and
- require the employee to disclose the misconduct of others (even if this results in the discovery of the

employee's own wrongdoing (*Kynixa Ltd v Hynes & ors* [2008])).

The concept of what constitutes 'competing' has been tested in several cases. The courts have recognised a distinction between competing and preparing to compete. For example, these actions have all been held to be lawful:

- 1) buying an 'off the shelf' company;
- 2) purchasing premises from which to run a business;
- 3) ordering materials (points 1) to 3) from *Balston & anor v Headline Filters* [1990]); and
- 4) making enquiries to suppliers (*Laughton & Hawley v Bapp Industrial Supplies Ltd* [1986]).

Other examples where actions have not amounted to competition include an employee who asked a colleague (without offering an enticement) if they would be interested in joining them if they were to set up in business against their employer (*Tithebarn Ltd v Hubbard* [1991]) and a junior employee who, on request from their future employer, provided a list of names of colleagues who may be interested in leaving with them (*GD Searle & Co Ltd v Celltech Ltd* [1982]).

However, *Shepherds Investments Ltd & anor v Walters & ors* [2006] casts doubt on the extent to which preparing to compete may be lawful. *Shepherds* indicated that any action taken after the employee has formed an irrevocable intention to compete will be unlawful unless the employee resigns and leaves their employment.

Therefore, if a senior employee approaches their colleagues with a view to encouraging them to leave (thereby acting as an internal recruiting officer for a competitor) this will be unlawful (*UBS Wealth Management (UK) Ltd & anor v Vestra Wealth LLP & ors* [2008]). Even taking legal advice to prepare to compete may be unlawful, unless the advice is taken to determine the extent to which such conduct is lawful (*Shepherds*).

As well as the duty of fidelity, there may also be an implied term in the contract allowing

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the employer to put the employee on garden leave. However, the employee may seek to demonstrate that they have a right to be provided with work if their skills will otherwise be weakened as a result of being taken out of the market (*William Hill Organisation Ltd v Tucker* [1998]).

However, most employers will not rely solely on implied terms, but will seek to set out employees' duties and restrictions expressly in employment contracts.

CONTRACTUAL OBLIGATIONS

Express terms

Well-drafted contracts will have several provisions that will protect against team poaching (see box on p21).

The main issue in relation to all express terms will be whether or not they will be enforceable. In determining enforceability, the court will balance the public interest in avoiding restraint of trade with the right of a business to protect its legitimate interests (such as customer connections and the stability of its workforce). Accordingly, the court will only enforce a post-termination restrictive covenant if it goes no further than reasonably necessary (in duration, scope and, in some cases, geographical area) to protect the employer's legitimate business interests.

Similar considerations apply to the enforceability of garden leave. However, unlike restrictive covenants, which are judged at the time the parties entered into the agreement, the reasonableness of a garden leave provision will be judged at the point when it commences.

Contractual provisions requiring the employee to notify the employer of their own wrongdoing, the wrongdoing of others or the fact of an approach from a competitor (whether directly or indirectly,

through recruitment consultants or other members of staff) may be helpful in alerting the employer to a potential raid.

The way in which notice periods operate can be another useful way of protecting a team's integrity. If employees are hired on a succession of minimum term contracts and those minimum terms are staggered, this will make it much harder for a poacher lawfully to lift a fully functioning team. They will have to wait for a period of months, even years, before the notice periods all expire and the whole team can be extracted, which may deter the potential poacher.

FIDUCIARY DUTIES

In some circumstances, employees will have a duty to act in the utmost good faith. This is a step beyond the more common duty of fidelity. A fiduciary duty will arise in relation to directors, but can also arise where very senior managers are involved or even where more junior employees are given particular positions of trust. Fiduciary duties are

harder to establish, but will entitle the employer to expect the employee:

- not to make secret profits from their conduct;
- to disclose circumstances in which their own personal interests conflict with the interests of their employer; and
- to disclose their own misconduct.

OTHER LIABILITIES

In addition to the above provisions, poachers may also be held liable if they can be shown to have induced a breach of contract.

Inducement to breach (also known as tortious interference and interference with contract) occurs when a person (A) intends to cause another person (B) to breach their contractual obligations to another person (C). If, however, A has an honest belief that no breach of contract will flow from their approach, they will not be held liable, even if the honest belief is muddleheaded (*British Industrial Plastics Ltd v Ferguson* [1940]). However, the defendant will need to work hard to persuade the court that they honestly did not know of the employee's obligations if they are a reasonably sophisticated employer. They may even need to take specific legal advice on the issue (*Tullett; Cantor Fitzgerald International v Bird & ors* [2002]). In any event, it would be sensible for any poacher to make enquiries of the employee so that they might properly

TIPS: HOW TO POACH

- Use recruitment consultants rather than approaching employees directly.
- Ask about restrictions and notice periods, and indicate that you acknowledge the obligations of the employee to their previous employer in the contract.
- Use 'forward contracts' where appropriate (binding contracts that are entered into while staff are still employed at their employer, but which do not require them to perform any duties until it is lawful for them to do so).
- Remember your disclosure obligations: all e-mails, text messages and other documents will be relevant, and therefore will be disclosable. As such, they should contain information that helps, rather than hinders, your defence. Document the steps that show you are acting within the law.
- Obtain separate legal advice for the poaching employer and for the poached employees, as interests may diverge later in the case.
- Consider your settlement strategy. What will you be prepared to offer in return for an amicable resolution?

understand the employee's obligations to their former employer and ensure that those obligations are not breached. If A turns a blind eye to the consequences of an approach to B, or is indifferent to whether the approach will result in a breach, A may still be held to have induced the breach.

Employees and prospective employers may also be liable if they conspire to injure a third party. The agreement that results in injury may be lawful or unlawful. If lawful, the parties to the agreement will be held liable if the predominant purpose of the agreement was to injure a third party. If the agreement is unlawful (because, for instance, it involves an inducement to breach), the parties will be held liable if the effect of the agreement injures the third party, whether or not this was merely a means to an end.

TACTICS TO DEFEND AGAINST RAIDS

If an employer suspects that its employees are being poached by a rival, what steps should it take to minimise the risk?

'Rarely is it sensible to dismiss employees who are likely to go, as the employer will lose much of its control over the departing employee, as well as jeopardising its restrictive covenants and inviting an unfair dismissal claim.'

First, it would be sensible to investigate the situation as quickly as possible. Those leaving should be invited to attend exit interviews to discuss why they are leaving. An employer may choose to approach its key or trusted staff and sound them out as to whether they too have been approached (and by whom), to determine the extent of the problem. It may also choose to monitor e-mails and phone recordings (to the extent permitted by law), and to review the use of pass keys at weekends and at odd hours.

If, having investigated the matter, the employer has grounds to suspect that a raid

is imminent or in progress, it should consider offering retention bonuses to key staff members. These retention bonuses can be expressed to be repayable if the employee leaves within a certain period and this will not constitute a restraint of trade (*Tullett*).

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The employer should consider applications to the court for pre-action disclosure

TRAPS: HOW TO PREVENT POACHING

- Check your contracts. They should be signed by the employee and include terms relating to:
 - confidentiality;
 - competing during employment;
 - a duty to act in the best interests of the employer;
 - a duty to avoid and report conflicts of interest;
 - a duty to report the wrongdoing of others;
 - a duty to disclose the employee's own wrongdoing to their employer;
 - a duty to report approaches from competitors;
 - garden leave, which includes a provision whereby confidentiality and the duty of fidelity continue during the garden leave period; and
 - post-termination restrictions (which can include restrictions specifically targeted at team moves).
- Investigate suspicions thoroughly.
- Identify what wrongdoing is involved.
- Do not breach the contracts of your employees.
- Comply with your own policies.
- Keep talking to staff to persuade them to stay and to keep the loyal staff on side.
- Use loyalty bonuses to encourage key staff to stay.
- Stagger notice periods.
- Remind staff of their responsibilities.

Balston & anor v Headline Filters [1990] FSR 385

British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479

Cantor Fitzgerald International v Bird & ors [2002] EWHC 2736 (QB)

Faccenda Chicken Ltd v Fowler [1986] 1 CH 117

GD Searle & Co Ltd v Celltech Ltd [1982] FSR 92

Kynixa Ltd v Hynes & ors [2008] EWHC 1495 (QB)

Laughton & Hawley v Bapp Industrial Supplies Ltd [1986] IRLR 245

Shepherds Investments Ltd & anor v Walters & ors [2006] EWHC 836 (Ch)

Tithebarn Ltd v Hubbard [1991] UKEAT 532/89/0711

Tullett Prebon Plc & ors v BGC Brokers LP & ors [2010] EWHC 484 (QB)

UBS Wealth Management (UK) Ltd & anor v Vestra Wealth LLP & ors [2008] EWHC 1974 (QB); [2008] IRLR 965

William Hill Organisation Ltd v Tucker [1998] EWCA Civ 615

'Employers whose employees are approached may wish to agree to trade employees from one business for employees from the other – a so-called "hostage swap".'

from those parties likely to be named in any claim. It may also apply for third party disclosure orders from recruitment consultants and others who may be involved in facilitating the team lift.

The employer should also consider more aggressive injunctive orders, such as:

- orders for the preservation of evidence;
- orders for the immediate delivery of documents;
- search orders; and
- springboard injunctions.

Since *UBS*, the scope of springboard injunctions has widened. Whereas they used to be used for misuse of confidential information, they have now been confirmed to be available in cases where an employee has breached their duty of fidelity or a fiduciary duty. Therefore, an employer should consider applying for an injunction that, for instance

(as in *Tullett*), prevents any solicitation of employees (whether or not such solicitation is lawful or unlawful), pending trial of the substantive issues of the claim.

One important element to be remembered is that employers whose employees are approached may wish to open a dialogue with the poacher. In some cases, there may even be scope to agree to trade employees from one business for employees from the other – a so-called 'hostage swap'.

If the matter cannot be resolved by way of undertakings, compensation or other means, the ultimate sanction will be to proceed to a full hearing of the issues. This can be very expensive and time consuming. It is important for employers to pick their battles. If an employer fails in its attempt to prevent employees from leaving, this could result in further defections. Conversely, a successful defence will deter prospective poachers.

The successful employer will be able to claim damages, request a permanent

injunction or, in cases involving breach of fiduciary duty, an account of profits. They will also usually be able to recover some of their costs from the other party. In *Kynixa*, this meant that a relatively junior employee who failed to report their colleagues' wrongdoing faced joint and several liability (with two others) for a £1m legal bill. This may be sufficient to put off some of the more bullish employees thinking of moving.

CONCLUSION

The loss of a team can cause significant damage to a business and unless that business can show that the tactics used to poach the team were unlawful, there will be no remedy. However, recent case law has expanded the extent of the implied duties owed by employees to their employers and has demonstrated an increased willingness of the courts to uphold post-termination restrictions in favour of employers. It has arguably become easier to obtain injunctive relief and bring other legal claims. However, this has not diminished the importance of trying to prevent team moves in the first place. For employers looking to recruit teams, careful planning and execution will be necessary to avoid the pitfalls.

*By Asa Waring, legal director and Will Winch, solicitor, Mishcon De Reya.
E-mail: asa.waring@mishcon.com;
will.winch@mishcon.com.*