

Non-competition clauses in labour contracts

**National reporter: Judge Kevin Duffy
Chairperson, The Labour Court
Dublin**

- 1) What clauses, if any, are in your country's constitution relating to covenants not to compete in labour contracts? Are there clauses relating to the freedom of occupation; protection of property (if so, does this include intellectual property and trade secrets); freedom of contract, etc. If there are such clauses, how are they applied relating to covenants not to compete? Which, if any, of the EU Directives relating to this subject are applied in your country?

There is no provision in the Irish Constitution which specifically addresses this subject. There is a right to work but it has been held that the right does not extend to a right to work at a particular occupation. The Constitution also protects property rights and this includes intellectual property including trade secrets. The effect of this constitutional provision is to prevent the legislature from enacting laws which could have the effect of abolishing the rights of intellectual property. As with all constitutional rights, a balance must be maintained between conflicting parties. Such a conflict could arise between the right of an employer to protect his intellectual property and the right of a former employee to work and earn a living. The law achieves that balance by ensuring that restrictions on employees or former employees are reasonable and go no further than is necessary to protect the rights which are deserving of protection.

Restrictive covenants are also subject to EU competition law which is incorporated in the Competition Act 1991. All EU directives are binding on the State as to the result to be achieved.

- 2) Is there a statute in your country that governs the enforceability of covenants not to compete? Or, is the law governed solely by case law?

The law is derived from common law and is governed by case law. There is no specific statute dealing with the enforcement of restrictive covenants.

If there is a statute, does the statute relate to specific professions or industries?

See above.

- 3) In general, are covenants not to compete in labour contracts enforceable in your country? Following are some possible answers:

- (a) In my country covenants not to compete are not enforceable under any circumstances.

They are enforceable.

If they are not enforceable, explain the legal and economic basis for this rule.

See above.

- (b) In my country covenants not to compete are enforceable under certain conditions and to a certain extent.

At common law, an employer is entitled, by terms and conditions implied in the contract of employment, to have the law protect his trade secrets and confidential information. This may include in certain circumstances a limitation on the right of a former employee to compete after the employment has terminated. Traditionally common law categorized such restrictions as restraints on trade and took the view that they were prima facie unlawful unless they could be shown to be reasonable in protecting the interests that are entitled to be protected. That has been taken to mean that they must be reasonable in terms of their duration and in respect of their geographic scope or product scope.

(If the answer is yes, there are further questions about the condition required for the covenant to be enforceable.)

- 4) What are the employer's protected interests and how are they defined?

An employer may protect trade secrets and confidential information. Trade secrets are information which is known only to a particular company, such as a production process for a particular commodity. There is no need for a confidentiality clause to protect such information. Common law provides that trade secrets can never be divulged.

Confidential information is that which, while not a trade secret, is sensitive and valuable and is not generally available outside the company. The dissemination of such information subsequent to the termination of employment must be prohibited by an express provision and such prohibition must be reasonable in terms of both time and space.

What is the public's interest in enforcing covenants not to compete? Is this a reason for statutes and case law?

The law in this area is based largely on the right of an employer to protect property rights.

5. If covenants not to compete are enforceable in your country: what must the plaintiff show to prove the existence of an enforceable covenant not to compete?

- (a) Is a written contract required?

Yes. This could only arise where there is an express term in a contract.

- (b) Is a trade secret required to prove the employer's case? If so, how is a trade secret defined? Does it include customer lists, price lists, systems of work?

No. There is no need to provide that a trade secret may be disclosed. Customer lists and price lists would not constitute trade secrets but would constitute confidential information which can be protected. Systems of work may be a trade secret or they may be confidential information. See the definition of both terms above.

- (c) Does the employer need to give the employee consideration (in addition to a regular salary) as a condition for the covenant not to compete to be enforceable?

No.

- (d) Will geographical factors, time factors and the special characteristics of an industry be considered when deciding whether to enforce a covenant not to compete?

Yes, the question as to what is reasonable will be answered by reference to the economic interest which the employer is seeking to protect. Thus if the economic interest is confined to a particular area (as in the case of a shop or a professional practice), a non-compete clause will not be enforced if it seeks to impose restrictions outside that area. Moreover, generally a non-compete clause will not be upheld if it is to last for more than 6 months.

- (e) Must the covenant not to compete meet a “reasonable test”? If so, who has the burden of proof? How, if at all, does your case law balance between such rights as freedom of contract, property rights and freedom of occupation?

Yes. Reasonableness is measured in terms of time and space. The onus is on the person seeking to rely on the covenant.

- (e) May the new employer be sued for employing an employee who is violating the covenant not to compete in his labour contract with the former employer? If so, in which court? Is this hearing held jointly with the suit against the employee? Note: the new employer has no contract with the former employer and there is no employee-employer relation between them.

These cases are dealt with under the law of contract. Where an employee breaches a non-compete clause he is in breach of contract and may be sued. A new employer is not party to the contract and would not be liable for any breach unless it could be established that he procured or encouraged the breach. Thus if the new employer had known or ought to have known of the breach and engaged the employee nonetheless, he would be liable. If a new employer obtained trade secrets he would be fixed with knowledge of wrongdoing by the employees. The employer relying on the breach of covenant may also seek to recover any records containing trade secrets or confidential information wrongly obtained by the new employer.

Such actions would be tried in the High Court. Where the employee and the new employer are being jointly sued, the actions maybe conjoined.

- (g) If the employer terminates the labour contract, is the covenant not to compete enforceable? Does it matter what the reason for the dismissal is?

Normally yes. However where the employer repudiates a contract of employment by committing a breach of a fundamental term, there is authority for the proposition that he cannot later rely on a restrictive covenant in the contract.

7. If a covenant not to compete is held by a court in your country to be overly broad, will the court modify the covenant? What other flexibility do courts have relating to relief they can grant?

If the covenant is unreasonable, it is void and will be struck down in its entirety unless the contract makes express provision for severability. Many contracts of this type contain a clause (which is referred to in the UK as a “blue pencil clause”) which

provides that where a provision is regarded as unenforceable it is to be severed from the contract and the Court can substitute a reasonable provision in lieu. These clauses are accepted as valid and will be applied.

8. Do the courts issue preliminary (temporary) injunctions for violation of covenants not to compete in labour contracts?

Yes, subject to the usual rules applicable to the grant of injunction, that is there must be a fair question to be tried, damages will not be an adequate remedy and the balance of convenience lies with granting the injunction.

9. What are the remedies which courts can and do grant when an employee has violated his/her covenant not to compete?

Damages and injunctions

10. Which court(s) in your country have jurisdiction over legal matters relating to covenants not to compete in labour contracts? (Labour Courts; Civil or Commercial Courts; Administrative Law Courts; Constitutional Court, etc.).

The Circuit of the High Court

10. Are there any leading or illustrative judgments that you would like to describe relating to covenants not to compete in labour contracts?

The case which is regarded as seminal in this jurisdiction is in fact a decision of the Court of Appeal for England and Wales on the *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69.

The head note of the report of this case is reproduced below:

Mr. Fowler was employed as sales manager of the plaintiffs, a company which breeds, rears, slaughters, prepares and sells chickens. Mr. Fowler established a van sales operation, whereby refrigerated vehicles offered fresh chickens to butchers, supermarkets and catering establishments. There were 10 vehicles, each driven by a salesman covering a particular route in the Midlands.

In December 1980, Mr. Fowler was arrested and subsequently charged with the theft of 45 cases of chickens. On the day of his arrest, he offered his resignation, which was accepted. He was subsequently acquitted in the Crown Court.

In 1981, Mr. Fowler set up his own business of selling fresh chickens from refrigerated vehicles. He advertised for employees and five of the 10 van salesmen of Faccenda, their supervisor and two office staff left the company and joined Mr. Fowler's firm. The Fowler company directly competed with Faccenda and the majority of its customers were former customers of Faccenda. Neither Mr. Fowler nor any of the former employees of Faccenda was subject to any express agreement restricting his or her activities after leaving Faccenda's employ.

Faccenda issued a writ asking for damages on the grounds that the defendants, Mr. Fowler, the former Faccenda employees and Mr. Fowler's company, had broken their contracts of employment by using confidential sales information relating to the requirements of customers and the prices they paid to the disadvantage or detriment of the company. They also alleged a conspiracy by the defendants to injure the company's goodwill and connected by such abuse of confidential information and by inducing breaches of contract by the company's customers.

The High Court, Chancery Division (Goulding J) 1984 [1984] IRLR 61 dismissed the claims.

The Court of Appeal (Lord Justice Kerr, Lord Justice Neill, Lord Justice Nourse) on 5.12.85 dismissed the appeal. Leave to appeal to the House of Lords was refused.

The Court of Appeal held:

The High Court judge had correctly dismissed the plaintiffs' claims that the defendants, in breach of implied terms of their contracts of employment, had wrongfully made use of confidential information acquired during their employment by the plaintiffs to the plaintiffs' detriment and had unlawfully conspired together to injure the plaintiffs. The High Court judge had correctly concluded that although use had been made by the defendants after their employment had come to an end of sales information obtained during their employment, such use did not involve any breaches of contract by them or provide evidence of an actionable conspiracy.

The relevant principles of law to be applied to the use by an employee of information acquired during his employment can be stated as follows:

- (1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer.
- (2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.
- (3) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. The obligation not to use or disclose information may cover secret processes or manufacture such as chemical formulae, or designs or special methods of construction, and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only "confidential" in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith.
- (5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. The following matters are among those to which attention must be paid:
 - (a) The nature of the employment. Thus employment in a capacity where "confidential" material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.
 - (b) The nature of the information itself. Information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*. Therefore, the court could not accept the suggestion by the judge below that an employer can protect, by means of a restrictive covenant, the use of confidential information which has become part of the employee's own skill and knowledge, even though it does not include either a trade secret or its equivalent. Restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restricted, unless it can be regarded as a trade secret or the equivalent of a trade secret. It is impossible to provide a list of matters which will qualify as trade secrets

or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets, though the secrecy of some information may be only short-lived. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality.

- (c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret.
- (d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose. The separability of the information in question is not conclusive, but the fact that the alleged “confidential” information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

In the present case, neither the sales information as a whole which the defendants had acquired while in the employ of the plaintiffs – the names and addresses of customers, the most convenient routes to be taken to reach individual customers, the usual requirements of individual customers, the days of the week and times of day when deliveries were made to individual customers, and the prices charged to individual customers – nor their knowledge of the prices charged to individual customers looked at by itself, fell within the class of confidential information which an employee is bound by an implied term of his contract of employment or otherwise not to use or disclose after his employment has come to an end. The argument on behalf of the plaintiffs that any information about the prices charged to individual customers was confidential, and that, as this information formed part of the package of sales information, the package taken as a whole was confidential too could not be accepted. Although in certain circumstances information about prices can be invested with a sufficient degree of confidentiality to render that information a trade secret or its equivalent, in the present case the following factors led to the conclusion that neither the information about prices nor the sales information as a whole had the degree of confidentiality necessary to support the plaintiffs’ case: the sales information contained some material which the plaintiffs conceded was not confidential if looked at in isolation; the information about the prices was not clearly severable from the rest of the sales information; neither the sales information in general, nor the information about prices in particular, though of some value to a competitor, could reasonably be regarded as plainly secret or sensitive; the sales information, including the information about prices, was necessarily acquired by the defendants in order that they could do their work and each salesman could quickly commit the whole of the sales information relating to his own area to memory; the sales information was generally known among the van drivers who were employees, as were the secretaries, at quite a junior level, so that this was not a case where the relevant information was restricted to senior management or to confidential staff; there is no evidence that the plaintiffs had ever given any express instructions that the sales information or the information about prices was to be treated as confidential.

Do you have any additional remarks on this subject?

No.