

JUST DESSERTS

Here is the scenario. You have a long-serving employee who is about to leave your employ. He lets you know that he is going into a similar line of work but assures you that it is no way in competition to yourself. During the two-month's notice period he continues to work for you having open access to all inquiries, business plans and client details as well as carte blanche to all confidential company information. The relationship to all intents and purposes seems a good one. You are parting as friends and there is even a farewell function and a gift to thank the employee for his years of loyalty and commitment to the company.

Within a few months however this same employee has been round to your clients offering similar services at a much-reduced rate and sometimes the exact same products as yourself. He has used his insider knowledge to undercut you and poach your client base. When you question the employee he quotes the principles of free enterprise and flaunts his new-found freedom. Yet you are the one who has trained this employee – he arrived with none of the skills he now has, and whilst you don't want to deny him the right to make a living there is something disturbing about taking the very products that you have introduced him to along with your inside knowledge of how to work them and for him to then proceed to sell those wares for the benefit of himself or his new employer in the market. This employee has not paid to learn the products, understand how best to introduce them to the market nor taken the risk of introducing them initially – you did, at considerable cost and yet here he is grabbing all the gain without the pain. To use a culinary analogy, you took all the time and trouble to whip up the elaborate sundae and all they did was put the cherry on top but they're the one who's getting the credit for that stunning confectionary end creation.

How would you feel? Unfairly treated and betrayed, no doubt. Many employers, specifically smaller, informal organisations such as consulting companies, often rely solely on the integrity of the individual and trust in the relationship to ensure that trade secrets and institutional knowledge is not divulged when an employee leaves. But all too often when an employee leaves and the former relationship is severed, all that confidential information leaves with him, along with any former loyalty. So along with poaching your staff, your ex is visiting your clients, using the same supplier and generally piggy-backing off your company's wealth of knowledge instead of developing his own. And this is exactly why increasingly we are seeing restraint-of-trade clauses employment in a specific geographical area for a limited period of time. The idea behind this is to prevent the employee from later using the employer's trade secrets or confidential information to aid himself or one of the employer's competitors.

If you believe that an ex-employee is breaching a restraint-of-trade-clause, you can bring proceedings for breach of contract. If the clause is in an employment contract, the Industrial Court has exclusive jurisdiction to deal with your claim. Formerly the courts were reluctant to enforce restraint-of-trade clauses, on the grounds that an individual's right to work should not be limited and he has a right to ply his trade and use his skills. But elsewhere in the world this attitude has been relaxed and now the courts will look at the restrictions imposed by the clause and the general history of the ex-employee's period of employment. However, the starting point is that the clause is assumed to be invalid, and you, the ex-employer, have the burden of showing that the clause is reasonable and should be upheld. In deciding whether the restraint should be enforced, the courts will consider whether it is:

- unfairly restrictive
- essential to protect your business interests
- against the public interest

In general the greater the restraint – whether in terms of geographical area, time or the type of business – the more likely the court will be to hold that the restraint clause is invalid. Now I know from experience that an employee looking for work will sign almost anything if they want the job but the parties' respective bargaining strengths when the contract was entered into will also be a factor in determining whether the restraint is reasonable. The court will be more likely to hold that the clause is invalid if there was an imbalance of bargaining power in your favour, which is very often taken to be the case when an applicant was job-seeking, rather than head-hunted.

If you are a small business with local interests, you are unlikely to be able to enforce a restraint-of-trade clause preventing somebody from working in the same industry in another part of Botswana – it's just too small and the Court will likely take the view that your former employee's entire livelihood may be affected if he is unable to make a living from an alternative field of work due to limited skills.

In the end it comes down to fostering customer loyalty and meeting or beating any improved offers the rogue ex-employee may offer. You should also secure exclusive local distribution or operational rights to any products or services you offer, which will restrict his ability to harm your own business without restricting his right to seek alternative employment in the same field.

Seeking legal redress is time-consuming and likely futile and can be spent more profitably cementing supplier and client relationships. Apprentices listen, learn and move on but it is a rare one who ever manages to eclipse the master. Sure, he's watched you make the dessert many times but when he tries it himself it may not taste nearly as nice. All he's good for is putting the cherry on top because he doesn't have the secret ingredients – originality and experience.

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