Kim Leighton 1 day ago 4 min read

Sleight of hand in mediations - by Lawrence Anderson

I've settled hundreds of personal grievance claims so far in my career as an employment advocate.

The settlements I negotiate for employee clients could be a combination for wages, hurt and humiliation compensation, other benefits, and my costs for representation and helping resolve the problem. The Record Of Settlement (ROS) will have the usual confidentiality clause and sometimes a mutual non-disparagement clause.

In doing all of this I have become wise to a sneaky trick that employers' counsel are increasingly trying on. That is where the employer sneaks in a restraint of trade clause into the draft ROS.

Where this happens there should really be consideration for it, the act or forebearance of one party, or the promise thereof is the price for which the promise is bought. In simple terms there should be an exchange of something of value for the employer to buy the restraint of trade clause.

Quite often there would have been no discussion about the need to include such a clause prior to this point. Where this happens it is mostly annoying because our client has anchored and accepted to a degree an amount of money to part ways or to end litigation. These restraint of trade clauses are often slipped in at the eleventh hour and without warning.

On most occasions, particularly where the employment relationship is live and there will be a parting of the ways, the employee is going to walk out of the meeting as an unemployed person, whether agreeing to a ROS or if the employer continues a process to attempt to justify dismissal. The employee is understandably worried about how long they're going to be out of work for, even though the payout should cushion the blow. It is for that reason the employee may not put much thought in pushing back on the inclusion of a restraint of trade clause.

A restraint of trade clause in a ROS is a lot more enforceable than the same clause in an Individual Employment Agreement. I will just make some legal points here without the legalese:

1. Clauses that purport to restrict the employment or trading activities of one or more of the parties are prima facie (on the face of it) contrary to public policy and therefore void.
2. The employer must have a proprietary interest that the clause is designed to protect. A bare covenant against competition cannot be enforced.
3. The Courts (or the Authority) will not enforce a provision that is wider than is necessary to protect the employer's business or that would prevent an employee earning a living.
4. The Courts will not enforce a restriction that applies to a wider area than is strictly necessary or which is unreasonably restrictive of the employee.
5. The Courts will not enforce a restriction that is for an unreasonably long period.
6. The Courts will not assist in protecting the employer from competition if the employer has nojustification..
7. A restraint of trade clause does not survive if the employer breaches the contract (e.g. unjustifiable dismissal).

If an employee agrees in a ROS to a restraint of trade provision, there is no arguing the above points. This is simply because public confidence in section 149 settlements under the Employment Relations Act 2000 will be undermined if it is perceived that parties are permitted to breach settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements. Therefore it is my advice to not readily agree to restraint of trade clauses in a ROS without carefully considering your overall position.

Here is an example of a recent restraint of trade clause that was part of a poorly drafted ROS that was sent to me in an effort to resolve a personal grievance. The restraint of trade clause was not discussed with me, but it turned up in this draft ROS that was apparently being drafted by the employer's representative to save me having to spend time writing it up. The employer's representative was from a large company that deals with providing advice and representation for employers, and I am unimpressed with their efforts. The clause reads:

> *The parties agree that any restraint of trade, non-solicitation of client, or non-solicitation of other employee clause that is contained in the Employee's employment agreement will continue to remain in effect for the period specified in that clause and are enforceable in the Employment Relations Authority or Court as if it they were a term of this agreement.*

My response was to write up a ROS using my own template, omitting the restraint of trade clause that they were wanting to put in. I sent that back and the representative raised no issues about the clause not being in there. The settlement was then signed by their client and also my client.

So why was that restraint of trade clause in there in the first place? It seems that this is just a "standard" clause and becomes part of the documentation without any thought or discussion.

That brings me to the most amusing part of this story. My client was fired within three months of being employed for having allegedly been a poor performer. Why, then, would an employer want to restrain an employee who is a burden to their business? Wouldn't it be better for the employer if the employee was allowed to work for the competition and become the competitions problem instead?