EMA EMPLOYMENT RELATIONS CONFERENCE
31 MAY 2012

Thank you for your welcome. No doubt the recently heralded prospective changes to the Employment Relations Act 2000 will achieve some attention at the Conference and much discussion between you.

The proposed changes announced relate mostly to collective bargaining and, as always, the devil will be in the detail which we don't yet know. From whatever point of view you come, I think it is inevitable that such change will generate work for employment lawyers and for the courts. This is, of course, the law of unintended (although not unknown) consequences in operation.

Rather than ruminate about what might be changed, I want to talk to you this morning briefly about what is not proposed to be changed but which I hope you will agree with me should be. If the following scenario is not that of your business, then let me assure you that it is typical of many cases that I see.

Your business is marketing and sales-based and operates in a very competitive market.

Your key employees have up to date and legally compliant employment agreements. These include covenants in restraint of competition, non-solicitation of other staff, confidentiality of trade secrets and other vital information, and the like. You have spent good money getting the best legal advice about these agreements and you are confident that you are well protected should things go awry.

Your sales manager is a great rain-maker, almost charismatic in his field. Your customers (although he often describes them as *his* customers) love him and they think that they really deal with him as a friend and not with your company.

That's been okay and indeed a win-win situation. You have got good repeat business and, despite very tough times, new business is gradually coming in, attributable to your sales manager's skills. He earns good commissions on these sales.

You begin to hear rumours that the sales manager may have been looking around at other opportunities. You confront him and ask him straight. He says that he's in a rut, that family life is suffering and that he's thinking of taking a 'sabbatical' at an ashram in India. You delicately mention his notice period and the covenants in his employment agreement. He waves his hands and says that although he's been told that the restraints are not worth the paper they're written on, you have nothing to worry about.

In the next week, however, the sales manager resigns (giving notice) but asks to be released from the notice and doesn't turn up at work. You hear that he's been in discussions with your main competitor. Several of the sales staff have now also resigned in unison.

You call in the lawyers. They write to him asking him to give undertakings that he will comply with his restraints. There's no reply. You come in to work to find that the sales manager has returned his laptop to the office overnight and your suspicions are starting to grow.

You get a computer forensic expert to see what may have happened to the laptop and he reports that thousands of pieces of data have been copied to a memory stick in the last few days. You're now not really surprised to find out that orders from your best customers are drying up.

You want to hold the sales manager to his restraint, you want to get your confidential sales information back from him, and you want to keep your customers, or at least have an opportunity to show them that you can still deliver for them. And you don't want your main competitor to benefit from this disaster.

What do your lawyers need to do? They advise that you should seek a without notice search order will enable the computer records to be searched for, seized, and analysed. They also advise that you should issue proceedings against the sales manager and against your competitor for whom it appears that he is now working, and that it will be necessary to get interlocutory injunctions immediately to prevent that from

happening. You tell the lawyers to go ahead and do what they need to do to preserve your business from going down the gurgler.

It is at this point that their next piece of advice is the object of this story. The lawyers will have to issue three separate legal proceedings in three different jurisdictions. First, they will have to issue in the Employment Relations Authority in respect of the breaches of the sales manager's employment agreement. Next, they will have to issue proceedings in the High Court to prevent your competitor from using your confidential information and otherwise benefiting from the sales manager's breaches. And finally, to get a search order, they will have to issue proceedings in the Employment Court to recover your IP and computer data. Those proceedings in the Employment Court will have to come first because they will have to be without notice. The Employment Relations Authority will require service of your proceedings against the sales manager and may send you to mediation before investigating your application for interlocutory injunction.

Although your lawyers are from a boutique employment law firm that is very competent in that field, they say that a barrister with High Court litigation experience will have to be instructed for the proceedings in that Court and in the Employment Court because its ability to deal with search order applications relies on the High Court Rules.

Even if you get your search order from the Employment Court, the proceedings will still remain in parallel in two jurisdictions, the High Court and the Employment Relations Authority.

The need for three separate filing fees and the necessity to engage a barrister with High Court litigation experience are relatively minor issues when put alongside all of the other complications of running parallel litigation in two jurisdictions including forum shopping tactics, applications for stay of one or other of the proceedings, the differences between the investigative methodology of the Employment Relations Authority, and the adversarial litigation in the High Court and the like.

Is this a new problem? No, Judges have identified it for years, literally, and have said so in judgment after judgment.

How much of a problem is this? Well, I suppose as against the numbers of personal grievances that are dealt with in the employment institutions each year, it is not significant numerically but is certainly a very significant problem if it's your company that is involved. I have never known a business to have gone under as a result of a personal grievance, but this scenario has just such a potential.

Why is nothing being done about it? I do know the answer. I know that it is not regarded as a labour market issue which is the principal concern of policy people in the Department of Labour. Its existence and consequences are certainly not for want of advice and comment in judgments.

Is legislative reform needed to deal with these issues? I leave that to you decide and, if you think so, to do something about.

It is an issue affecting principally employers or former employers and so perhaps one for the EMA to take up.

Graeme Colgan

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