Restrictive Covenants Podcast Transcript

Hi, Rhys Jones. Welcome to my latest podcast. I've not done one for a while now, so apologies for that. The reason being my first priority always has to be the existing partners of the startups and small businesses I work with, not this ego trick that I do on the videos. So the, the reason I'm doing one today is talk about restrictive covenants for recruitment consultants.

This is something I've come across a lot as I'm sure you can appreciate. I work with recruiters who are setting up their own recruitment businesses and restrictive covenants are obviously a big influence in your sales forecast and potential revenue generation. So it's something that I am involved with in the consultation with the currently employed recruitment consultant who want to set up to see what the restrictions are and how we can work with it.

What is the current situation?

The first question I ask is, how would your current employer react? What is the history of the current employer reacting? Because that is the best indicator because the vast majority of large organizations or commercially switched larger organizations don't waste a large amount of cash in trying to pursue a previous employee. The reason being, it is a bit of a thankless task because if they're looking to pursue you, that what they've really got to do is, is have proof that not only have you broke your covenants, but also there's a material loss. And by material loss I’m meaning placements, they've got to find a placement and they've got to prove you've made a placement.

And that proving is quite hard. So what they need is to see that you have that placement and then they can pursue you and sue you or your employer for that amount so they can actually retrieve that cash. And also that evidence then reinforces the action to then get you to confirm you will keep to your covenants going forward.

So a lot of businesses will see that as very expensive and hope that just sending you a very threatening letter will be sufficient. Now, if you have broken restrictive covenants and there is a loss that they've found and they've identified a placement, then the chances are they're going to pursue it and they're going to want the money.

And that is, I suppose, it's certainly fair, isn't it? However, if they are suspicious, you are breaking your covenants, then pursuing you for that is a lot more difficult. Because ultimately what they'll be looking for is a commitment from you that you will keep to your employment contract. You will keep to your restricted covenant, and that is what they'll pursue.

They'll pursue you to commit, you'll keep to that. Now nine times out of 10, what they'll do is they'll send you a very threatening letter. Something very, very scary about maybe holding your kids ransom until you sign this contract. Something that's going to scare you. Because that's the idea. The big company can go and scare you and you're going to go shit, and you’re going to sign it.

But what you should always do is get legal representation. Now I'm going to run through obviously a lot of information today on restricted covenants. I'm not a lawyer. I'm a recruitment consultant. So you know, I can't give you exact advice, certainly not on a video because it is a case-by-case basis.

But importantly, you need the lawyer, or solicitor to speak to is not just get the advice, but also to write back. Cause what you can't do is ignore these letters. If the letters are saying you've got to keep to your covenants, okay, that's not quite as serious. But if you have broken your covenants, and certainly if you made money, then you do have to answer, otherwise it can escalate.

And another big reason why you need to get a solicitor to work on your behalf is if they send you a shitty letter and trying to scare you, and then you reply personally, they are more likely and their legal advisor will get more confidence that they can pursue you and you’ll eventually going to give in because you're not getting advice or however, if you push back with the solicitor's letter, they'll see it as you are taking it seriously and you've got representations therefore you know more. So nine times out of 10, they're likely to back off fairly quickly if, once they've sent the shock and awe letter to try and scare you, you send one back, which is similarly as maybe as aggressive back saying, we are going to defend this. You haven't got a case, whatever. That tends to back off, that's most sensible employees.

However, if you're working for an independent, a small independent, sometimes you do get very emotional reactions from previous employer, and they can get quite vociferous in the pursuit. However, if you do have a decent lawyer, then there shouldn't be anything to worry about providing that you're not stupid and recklessly break your such covenants and you refuse to interact with them.

Now what I've done for this particular podcast is because legal is my first language, recruitment is my first language, I have made some notes. The reason I made some notes is to make sure that I cover all the points. Now, what I could do is I could put up here and then pin it near my camera, but that would look very, very shady if I keep doing this.

Length of restrictive covenants

So I'm not doing that. So I'm going to use this as a prompter. So if I start at the top, what I'd like to talk about, ah, yes, is the length of restrictive covenants. Cause that is one of the reasons I wanted to do this podcast today is, there was a chap I was in conversation with recently who wanted to set up, and he’d explained that his current employer was particularly aggressive when it comes to protecting their restrictive covenant.

And he was a little bit concerned about that. I said, well, let's look at the employment contract and let’s see what you can and can't do. And it said it has a 12-month restrictive covenant, which as an employee is not enforceable. There’s virtually no judge at all will reinforce a 12-month restrictive covenant.

And I was a bit pissed off about that to be honest, because this is a large organization, a very large organization, that using their weight and by being a bit of a bully to reinforce an employment contract that isn't enforceable and is unfair. Cuz six months is seen as fair and reasonable. 12 months is not.

So I was prepared to say, look, stand back. I've got this. I'll defend it for you. So that that is another reason why I wanted to do this podcast is to talk about some of the myths that you have in employment contracts. Now, the interesting thing with a 12-month restrictive covenant is, if it were to go to court, which you wouldn't do because their lawyers at some points are going, let's not go to court because they're not going to win.

If they were to go to court and the judge said, right, I'm sorry, but 12 months isn't enforceable. It doesn't go back to the six months, which is, it goes back to nothing. It just wipes out. And with this particular organization that then I'm sure would become, not necessarily public knowledge, but you know, everybody would gossip about it and that would then mean that all the employment contracts they have with these 12 months restrict of covenants don't work because the restrict covenants are gone.

So that would be a big risk on their part, and that's where a lot of the interaction with your solicitor and their solicitor sometimes is a game of poker to front up as to who he's prepared to go as far as they need to go. But with any legal situation, I've never lost a legal situation.

It doesn't mean I've won every one. Because you don't necessarily win legal arguments. You can defend yourself and not lose, but you know, they are time consuming. They are stressful, they are expensive, but, you know, I've been fortunate enough, but the best way to deal with a legal situation, either avoid it in the first place or just come to a Compromise Agreement.

So I'm going to run through with my list here of some of the myths so you can make sure that you are aware of what you can and can't do, and you've got more knowledge if you do get pursued. So anyway, we've talked about the length of restrict to covenant. That is six months going forward, and it's six months going back for clients and 12 months going back for candidates.

Myth: You can’t work for a competitor

So going back to some of the myths is you can't work for a competitor - that's bollocks. You can work for a competitor. And the reason why you can work for a competitor is it would be a restriction of trade to stop you doing that. Because if you are an experience recruiter in, say FMCD or print or whatever it might be, and the company wants to stop you working for another company in that sector, that is your trade.

So that is not fair and reasonable. And also, it's got to illustrate that it's a serious protection to the business. Okay? The protection, there's a slight argument in there, but the fact it's your trade, they just can't do that.

Myth: You can’t work within a 25-mile radius

What they also can't do is, is the radius clause. So if they say you can't work within a 25-mile radius - the only time that is ever applicable is if it's a business that's based on a proximity. So if it's like pickers and packers or laborers within a 25-mile radius, then that's fair enough. You can't work in that 25-mile radius. But if the business that you've done is outside that 25-mile radius, what the employment contract's got to do is protect the business interest of the company that's pursuing you.

So if your business is outside that 25-mile radius, what's the logic of saying you can't work inside 25 miles? Because the business is outside 25 miles. So what it's basically saying is you can't set up or move to an employer that's within travel the distance of your house. So that's unreasonable. So, so that, that isn't applicable.

Myth: They own your LinkedIn account

The other thing that isn't applicable is that they own your LinkedIn account. Now the only way they can own your LinkedIn account is if they gave you a completely blank LinkedIn account when you started work with them and they've paid for it. So that in effect is kind of like their database.

However, if when you join them, which is most of the circumstances that you come across where you've got a LinkedIn account, then you already have data on it, so they don't own it. They might pay for LinkedIn license but doesn't necessarily mean they own the data. The very most they can go for is they can expect you to delete the data that you have collected whilst being employed by them, not previously. Now, that's incredibly difficult to enforce. It's very complicated, possession is nine tenths of the law. I'm sure you've got your password changed and your login, et cetera. So that is one that's incredibly difficult.

I'm not saying that any employer won't pursue you for it because with all these things I'm speaking about, if I say they're not applicable doesn't mean that your employee won't necessarily pursue you. They can pursue you. They can do whatever they want. But more often not, that just runs up legal bills for them in lots of letters.

And certainly like for example, things like the 12 months and the radius, they're going to be wasting their time. However they can try and frighten you by pursuing you. Now, if you are moving to an employee position, you'd like your current employer to defend you, and you tend to find that your previous employer is less likely to pursue if you work as an employee because they feel less threatened.

They know that there's a company behind it that's going to protect them, and also, there's less they can do. Because if you're an employee that you can write to and say you have to keep your restrictive covenants, we need you to sign documentation to confirm you are going to keep those restrictive covenants.

Now you can then get in a two and fro between your solicitors, whether you'll confirm you'll keep to it or not, especially if they haven't got proof that you've broken it. Now, if they've got hard proof you've broken restrictive covenants and you've made money from it, they'll want that money back.

So they will pursue you for that money, your employer, for that money. And you just hardly given the money because, you know, ultimately you would lose that. But that's if they've got proof because they have to prove that you've made money from it. And if you've been incredibly reckless by doing death mail shots to all the clients you used to deal with, that's proof as well.

But ultimately, really what they're going to ask for is you are going to keep to these restrictive covenants in your employment contract. The situation is, is if you sign those and you say, yes, I am going to keep to these, and it's from one solicitor to another solicitor, and you then break them, you're a bit fucked because it's like perjury.

If you are committing in that legal circumstance, it means you're fully aware and fully understand the situation, if you then commit to it, that's a bit serious. So if you do commit to such covenants after they've pursued you and said, look we need from you, you have to keep to them.

Myth: You can work with the same clients

Now, some of the myths that you have about how you can get around your restricted covenants are if your current employer or your new employer rather deals with the same client that you have in your six months restricted covenants, you can work with them. You can't.

Now that I think, if I'm honest, I think it's a little bit unfair because it's unfair on the client who wants to carry working with you and if they're already trading with that company, you think that that would be okay. But unfortunately, it's not, there's nothing you can do about it and especially, well, not especially, but if you then say, okay, I'm going to get somebody else to deal with that client for me, then you do have, in your contract you have direct or indirect business transactions or direct or indirect solicitation, so that can be covered. It's a bit harder to prove, obviously, but that doesn't necessarily get around from it. But there's one thing I definitely don't suggest you do is by using a pseudonym.

So if you are going to pretend to be Joe Blogs and set up a new email address or something like that, that is a bad idea because it's a lot easier to get caught out. It's very difficult to do. Honestly, I don't like it morally because it's dishonest. But more importantly is if you are caught doing that and it does go to court, the judge will look very badly on this because you've tried to be dishonest and you've tried to be deceitful.

Now if you've broken your restrictive covenants, there's an argument you weren't aware or whatever, it's a bit softer. But if you've tried to be dishonest, then that isn't going to work in your favour. And like I say, it sounded like a good idea, but in practice it can be very, very difficult. So that's something I certainly wouldn't suggest.

Myth: It’s okay to break your restrictive covenants

So I'm just referring to my list now. Yes. If your current employee or your new employer tells you that it's okay to break you restrict covenants, then don't take it as gospel that it is because I have had circumstances or heard of circumstances where a candidate or a recruiter rather, has broken the restrictive covenants and the employer said, yeah, go ahead, break them. And then the previous employers pursued them and then it stopped them from being able to trade their clients that the new employers actually got rid of them because they don't seem as profitable, which is, you know, quite frankly they're twat’s trick, but so don't necessarily assume that's okay because your employer said it's okay.

But on the other side of the coin if your current employer before you've left did encourage you to break your restrictive covenants and certainly if you have something in writing that's great, or an email or something. If they then pursue you, then you can throw that back and say, well, no, you encouraged me to break my restrictive covenants whilst employed by you, you can't expect that to carry on. And a judge would look at that and say, well, it's cake and eat it. You can't expect that. So it's something to go back with now.

What I get asked is, is what are the consequences of breaking your restrictive covenants? Now, the vast majority of situations are short-lived. Because if you write back and say you're going to defend yourself, then the other solicitor will probably advise their current employer, it's not financially worth it to carry and pursuing, and they tend to go away providing you’re fair and reasonable. You're not taking the piss by, you know, really flagrantly breaking restrictive covenants.

And the worst they tend to ask for is for you to commit that you won't do it again. If you've made a profit from it, then, you know, you made a placement, they got proof, then they'll want that money back. But it's not necessarily a thing to be overly feared about. It's not something to get too afraid about providing you don't put your head in the sand, and you address the solicitors.

Now, if you set up your own business, that's a bit different. And you know, your current employer will take it maybe a little bit more seriously. However, the situation is not too dissimilar in that they will expect you to keep to your restrictive covenants. They'll write to you to ask you to keep your restrictive covenants. If you do make money from it, they're going to pursue you for that.

However, where there is an ultimately bigger price to pay for it, and this is if you're not sensible and you know, you break your restrictive covenants and you’re currently breaking it and they're writing to you and they've got proof, then ultimately, with the candidate, they can go for something called injunctive relief or put an injunction on the business to stop it trading.

And that is incredibly rare. It's very expensive to do for your previous employer. Maybe reach 20 grand. And they've got to do it incredibly fast because they have got to prove to the judge that they need to stop your business trading because it's a big threat to their current business. So they've got to say, look, there's obviously breaking the covenants, you know, and this is threatening the livelihood of this business.

We need to stop it trading whilst we go to court and then sue for damages. And that has to be done incredibly quickly because if it's not done within say weeks, 10 days, then if it goes longer than that, then the judge could look and say, well, it can't be that big a threat. Because you've not done something about it.

So, you know, if you go past that period, that threat kind of goes away. And it doesn't mean that you can ignore the letters. You still have to engage with them, which can be a little bit unfair if they are just being persistent just for the sake of it, because it's going to cost you when you run up the bills.

But what you can't do is necessarily ignore them. However there is one sort of cute trick that I have used in the past, and I think it's sensible anyway. Is to say to your previous employer, okay, with the clients that you want me to keep to, I need a list, I need to see who I can and can't contact.

Now, you can, through your solicitor say, I'm not prepared to sign to say I'll keep that employment contract because it's not necessarily fair and reasonable. And then it's a case that they've got to decide whether they pursue that to take it, so you have to sign that. But that tends to be a letter between the lawyers and that can often go away.

But if you do ask them and if they are persistent, you can ask them for a list, a definitive list of the, of the clients, so then you know what you can and what you can't do. And that's a reasonable thing to ask for. A lot of the time, they're not going to give you that list because then they know if they give you that list, you can go whenever you want and also, it's like a canvas list, isn't it?

And they've got to show their hand that they've got the data to prove it. And there was one particular circumstance, again, where this is something that we did because the previous employer was being an arse, being unreasonable and being overly aggressive.

So, you know, we wrote to them, and we defended it vigorously because, you know, I can't stand bullies. And we got this list. Right, fine, no problem. We've got the list. It was the wrong list. So we got, it was like, hang on a minute, this has got an awful lot of clients that are missing. So, you know. Anyway, three or four weeks later, they write, oh shit, wrong list.

Here's the right list. And we said, oh, I'm sorry, but you know, we've already contacted all the other companies not on list. We can't uncontact them. So that makes that void. I'm sorry, but that's how it works. So, you know, there are ways of dealing with these things. What I'm not going to do on this video blog is start giving hints and tips of how to bypass restrictive covenants because morally, I think they're fair. You know, I've been both sides of the table, you know, because I had my own recruitment before I sold it for 10 years. And, you know, I wanted to protect my business through people, you know, breaking covenants.

But also, I've been on the other side of it. Cause I represent people who set up their own recruitment businesses and I will defend them, you know, providing that everything's fair and reasonable and not taking the piss. So, you know, I've got experience in this, but you know, you need to be fair and reasonable about the situation.

If you're fair and reasonable about the situation, your employers will be fair and reasonable about the situation. Nine times out of 10, you know, it's not something you necessarily need to be concerned about, but what you do need to do is you do need to take the advice of a lawyer and get representation. So anyhow, I hope this has been a good help for you.

I can't stress enough that you do need to get legal advice because each circumstance can be different. Quite often there can be loopholes, the candidate situations. I found a number of loopholes and situations when I've been representing the people that I've set up in startups. I'm not, like I said, I'm not going to go through those now because that'll be unfair and probably a little bit immoral.

But I hope it's helped. If you're listening to this, you can listen to it on Spotify and all the various podcast channels. You can also get it on my Davidson Gray website. You can obviously watch on YouTube. I hope you've enjoyed this and what I'll do, I'll try and do one a little bit longer than six months ago.

I did for the last one. Anyway, I'll see you soon.