Employment Legal Update: tactics for team moves

Now that the dust has settled on the keenly awaited judgment in *Tullett Prebon Plc v BGC Brokers LP* this update focuses on key points from the decision and lessons to be learned. In the wake of this case, prospective employers may take a more cautious approach when carrying out a 'raiding' exercise on a competitor. At the end of the alert, we have included recommendations for 'poachers and gamekeepers' involved in team moves.

Poachers and Gamekeepers – tactics for team moves

The case may be well-known to readers as it has attracted fairly extensive media coverage. The case is a complex one, involving a number of issues, so we have focussed in this update on the issues most likely to be of interest to readers.

The facts

The main parties, BGC Brokers LP (BGC) and Tullett Prebon Plc (Tullet), were rival inter-dealer brokers. BGC recruited Tony Verrier, former COO of Tullett. Shortly after joining, Mr Verrier embarked upon a campaign to recruit brokers from Tullett. He persuaded 13 brokers to sign "forward contracts" providing that they would join BGC as soon as they were free to do so. Three subsequently changed their minds. Significant signing payments were offered to all 13 and indemnities provided in respect of losses caused by them leaving Tullett.

When Tullett learned of the plans afoot, it arranged whiteboard presentations for various brokers some of whom had been approached by BGC, promoting Tullett's business and outlining the risks of joining BGC. Tullett also noted that it would take legal action against the individuals. Tullett later suspended Mr Hall, a desk manager, who they believed was acting as a recruiting sergeant for BGC. Within short succession, the remaining 9 brokers (the Defendant Brokers) resigned, on instructions from Mr Verrier, claiming they had been constructively dismissed in light of the whiteboard presentations and Mr Hall's treatment when he was suspended.

Tullett commenced proceedings against BGC, Mr Verrier, Mr Lynn, Mr Hall and the Defendant Brokers claiming, amongst other things, conspiracy and inducing breach of contract and seeking injunctive relief. The Court granted a "no poaching" injunction preventing BGC from approaching any UK-based Tullett employee (whether lawfully or unlawfully) pending trial. Undertakings were also given including that Tullet would treat the brokers as being on garden leave until trial. By the time judgment was given, those undertakings had been in place for almost 12 months. At trial, Tullett sought an injunction to prevent the Defendant Brokers working for BGC until October 2010, which would have amounted to an injunction of 18 months, and damages. BGC counterclaimed against Tullett for inducing three brokers to change their minds and breach the contracts entered into with BGC.

Key points from the decision

1. **Constructive dismissal**

Wise to the fact that all too often arguments of repudiatory breach are constructed by employees seeking to avoid "notice periods and irksome covenants", the Court held that the Defendant Brokers had not been constructively dismissed and that Mr Hall had relied on manufactured grounds.

Despite the fact that the whiteboard presentations had been attended by "a formidable team" of Tullett's senior management and members of its legal department, the Court held that, rather than being designed to destroy the relationship of trust and confidence between it and the Defendant Brokers, they were intended to strengthen it.

2. **Conspiracy and inducing breach of contract**

The Court accepted that it was BGC's intention to injure Tullett by recruiting its employees to advance its own business, even if that was not its dominant intention or purpose. It was sufficient that BGC intended (by unlawful means) to injure its rival's business as a means to an end.

3. **Injunctions**

Encouragingly for employers in Tullett's position, the Court found that it was not unreasonable to have a non-compete restrictive covenant with no garden leave off-set. However, lack of an off-set was a factor to consider in determining whether to uphold a covenant, and if so, for how long.

It also held that non-compete covenants are not unreasonable where non-solicitation and non-dealing covenants may be difficult to enforce. A six month non-compete period was reasonable given the importance of broker/trader relationships.

Weighing up all of this, the Court deemed that 9 of the 10 brokers should not be kept out of the market for any longer than 12 months (a period that was shortly due to expire). For the remaining broker, a period of 8 months was justified.

In terms of the no poaching injunction granted pending trial, that would continue for another 14 days only. Although Tullet argued this injunction should be extended, the Court held that the potential destabilisation of its workforce was no longer a significant factor as the Defendant Brokers had been on garden leave for almost 12 months.

4. **Breach of 'forward contracts'**

The Court found that Tullett had not induced the three brokers who changed their mind to breach their contracts with BGC. BGC had itself breached the relationship of trust and confidence with those brokers before the employment relationship had even started due to its "cynical disregard for the law and for employees' duties throughout the recruitment exercise." They were therefore induced to breach contracts they were entitled to end in any event due to BGC's conduct, so BGC suffered no loss.

5. **Repayment of retention payments and loyalty bonuses**

Tullett sought repayment of retention payments paid to the Defendant Brokers, which were stated to be repayable if notice was given during the fixed-term of the contract, and bonuses, 25% of which were attributable to past performance and 75% to loyalty. Under the relevant provision, they were entitled to retain one-sixth of the bonus for each complete month worked after payment date.

BGC argued that Tullett's claim for repayment amounted to an unlawful restraint of trade. The Court disagreed as the repayment provision did not affect the brokers' ability to work after they left employment; they were substantial sums paid to highly paid employees as a reward for loyalty.

The Court also held that the repayment provision was not a penalty as it was not a sum payable in the event of a breach of contract. The sums claimed by Tullett were repayable on any departure, not just one in breach of contract. The Judge was also plainly influenced by the fact that the brokers were "intelligent, successful men capable of driving a bargain with Tullett and the law should not look for ways for them to avoid the provisions of their contracts."

Impact

It is clear that the High Court disapproved of the conduct of the Defendants in this case. It was keen to strike a balance between the right of employees to move from one employer to another and the strong public interest in ensuring that employees who are handsomely remunerated should be held to covenants into which they entered freely.

On the face of it, BGC got off relatively lightly in that, 14 days after judgment was delivered, the brokers were free to go and work for them. However, one of the reasons the Court did not extend the periods of restriction was that it was conscious that the adverse publicity the case had attracted ought to act as a deterrent to BGC acting in the same way again.

The trial was limited to issues of liability and injunctive relief. There will be a further hearing to resolve the matter of damages (if it cannot be agreed between the parties). Tullett will argue that significant damage was caused to their business and given the apparently dim view the Court took of BGC's conduct, the damages award may be substantial.

Recommendations

This case contains many useful learning points for those involved in team moves as well as some warnings as to the potential pitfalls involved.

Tips for gamekeepers:

- Consider including a provision in contracts for senior/valued employees that they must inform you if they receive an approach from a rival. This would provide a valuable opportunity to consider whether or not there was a wish to retain the services of the employee in question. The Court held that such a provision in the contract of a senior employee would not amount to a restraint of trade as the employee could decide whether or not to move.
- Include a clause in the contract which requires an employee to show his contract to a prospective employer so that that employer is aware of the restrictive covenants. That is likely to make it easier to get a claim for inducing breach of contract off the ground.
- If an employee is required to repay a bonus within a certain period of payment if he leaves/gives notice, consider specifying that a significant proportion of the bonus relates to loyalty. That seemed to be influential in the Court's decision that the bonus clause did not amount to a restraint of trade.
- If seeking to persuade employees to stay, be careful not to stray into behaviour that would constitute constructive dismissal. Tullett's whiteboard presentation did not cross the line. However, the Court was influenced by the "strength of character" of the brokers. In a case of "shrinking violets" (as the Court put it), this might not have been so.
- Consider at an early stage what evidence is available to prove the allegations. In this case, orders for delivery up of blackberries were sought but as the Judge recorded, "it was Mr Verrier's gambit to "lose" blackberries whenever he thought they might contain inconvenient material". Nevertheless, the Court was able to establish a pattern of communication amongst the Defendants by examining telephone records.

Tips for poachers:

- Do not assume that ignorance of the terms of an employee's contract is a defence. Being indifferent can be sufficient to satisfy the test for inducing a breach of contract.
- If offering an employee an indemnity in respect of legal costs and financial losses suffered as a result of leaving the current employer, this will usually be on the condition that the recruiting employer can direct the employee's conduct. Although this is the most practical way of the indemnity working, it could increase the likelihood of a finding that the poacher induced a breach of contract by the employee. The other drawback of offering an indemnity is that it arguably makes the employee more likely to breach his/her contract.
- If using a desk head (or similar level of employee) as a recruiting sergeant, bear in mind the view in this case that a desk head is under a plain legal duty to act in the best interests of his employer and to report a proposed poaching raid by a competitor (even though that may appear to be in conflict with the obligations he feels he owes the members of his team). He would then be under an obligation to follow his employer's instructions to prevent that raid happening.
- Remember that it may be a breach of duty for an employee to provide information to a competitor to further a recruitment exercise, which the employee knows would assist the competitor and harm his/her employer, even if that information is not confidential.
- Do not forget that actions can amount to a breach of trust and confidence even before an individual has started employment – e.g. the way in which the recruitment exercise has been conducted.
- Bear in mind that relevant communications by mobile or blackberry may be disclosable (and even the records for those devices may have to be disclosed).

About Mayer Brown

Mayer Brown is a leading global law firm with offices in major cities across the Americas, Asia and Europe. We have approximately 1000 lawyers in the Americas, 300 in Asia and 450 in Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS

AMERICAS
- Charlotte
- Chicago
- Houston
- Los Angeles
- New York
- Palo Alto
- Rio de Janeiro
- São Paulo
- Washington

ASIA
- Bangkok
- Beijing
- Guangzhou
- Hanoi
- Ho Chi Minh City
- Hong Kong
- Shanghai

EUROPE
- Berlin
- Brussels
- Cologne
- Frankfurt
- London
- Paris

ALLIANCE LAW FIRMS
- Mexico, Jâuregui, Navarrete y Nader
- Spain, Ramón & Cajal
- Italy and Eastern Europe, Tonucci & Partners

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

0285emp
May 2010