

Time to say goodbye: Our employment team advise on the best ways to terminate employment

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The termination of an employment contract is often described as being like a divorce if things don't go well; particularly so when post termination restrictions are involved. Although the contract of employment is a key document, at the very centre is the human element, which may be raw and emotional as any trust may be deteriorating with considerable speed.

For the employer when an employee is breaching confidentially or taking information (including address books and LinkedIn connections), clients or staff there is concern for the welfare of the business and the use by others of its trade secrets which have been acquired over years of hard work. Now, the employer faces losing skills, knowledge, and is having to take time away from the day to day business and face costs of taking action. If they do not act there is a serious risk valuable clients, staff or information will be lost to the business.

For the employee, when the employer has dismissed them or they are about to claim for constructive unfair dismissal they feel let down, abandoned even, and are determined to move on possibly with compensation but certainly without restriction as to their future activities. They feel they have done nothing wrong other than provide long and dedicated service to their employer.

Both must act quickly. At that point the parties may look to the contract they agreed at the start of the relationship, when it was new and strong and everything was positive. By the time of any dispute, the employment contract may be old. The usual restrictions will have been inserted to prevent an employee soliciting clients, staff or removing confidential information, trade secrets all for a limited period of time.

Whilst these situations are not uncommon it is surprising that few of these disputes appear before the Courts. This may have to do with costs, adverse publicity and the seriousness of the breach, including

what evidence there is and the strength of being able to enforce the contractual terms.

In the last 12 months Ogier has addressed termination restrictions before both the Jersey and Guernsey Royal Courts; once for the employer and once for the employee. The case in Jersey was the first for over 15 years and in Guernsey arguably the first. What are the lessons?

For the employer, before taking any steps to dismiss an employee, including a redundancy or restructuring program, think through the impact this may have on your staff and their covenants. Review and regularly update or reissue contracts of employment particularly for senior staff, certainly when promotions or material changes occur to ensure relevancy. Why? Because the non competition restriction is the most invasive, it will not only be scrutinised by the Court but reviewed in respect of the interest being protected at the time it was entered into and whether that interest should still be protected today.

For an employee, ensure the extent of restriction is properly considered when entered into and whether they apply today. If a director, remember your fiduciary duties (acting in good faith, acting in the best interests of the company etc) which are considered separately and create potential personal liabilities.

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Meet the Author



Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: [+44 1481 752253](tel:+441481752253)

Key Contacts



Helen Ruelle

Director of Local Legal Services

Jersey

E: helen.ruelle@ogier.com

T: [+44 1534 514417](tel:+441534514417)