Warner Goodman

ISSUE 800 / MAY 2022

Employment Newsletter

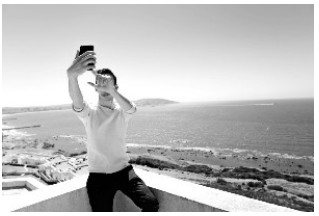
YOUR WEEKLY BULLETIN OF WIT AND WONDER

WRITE ON

The last 799 have just *flown* by!

STRICTLY NO COMPETING

A tribunal decides on the strength of a non-compete covenant



MY LITTLE EYE IN THE SKY

The future of the selfie is here… well, in France, anyway.

AND I WOULD WRITE 800 FILES…

Caaaaaaake for me!

For this, I am reliably informed by the team here at WG Towers, is my 800th newsletter!

800?!

It's a number of some magnitude. I looked it up and discovered the following facts about 800:

- It is an even number
- It is a positive number
- It can be written as = $2^5 \times 5^2$
- It is the number of staff illegally sacked by P&O Ferries in March
- It is a curvy number with no straight lines

I like all of the above facts, apart from the P&O one, obviously. As a responsible employment lawyer, that one makes me shudder. But, in truth, there wasn't much more to be found around 800, so I turned my attention (and let's be honest… it's been a pretty *long* attention span) to the year it all started. 2007. Fifteen years ago! What else was happening in the world when this weekly epistle was launched?

OTHER IMPORTANT OCCURRENCES IN 2007

- The first ever iPhone was released by Apple, selling for $599.
- The New Horizons spacecraft flew past Jupiter, getting a gravitational boost for its onward journey to Pluto (it got there in 2015)
- Gordon Brown became PM
- The London Olympics logo was showcased. Everyone hated it.
- Netflix was launched
- NASA's spacecraft, The Phoenix, touched down on Mars - the first successful landing on the red planet
- Crossrail was commissioned and is due to open this May 24th - So… only 15 years and £18billion spent on that since the newsletter began.

Actually, considering the intervening years, 2007 was pretty tame. Unlike the newsletters which, I'm sure you'll agree, are always ON THE EDGE. Of something…

If you've read all 800 do let me know. There's probably a badge in it for you.

Ms Ali joined the law firm in May 2013 as an Associate Director, specialising in employment law for NHS clients. In 2016 Ms Ali entered a Shareholder Agreement with the firm which included a non-compete covenant whereby she agreed not to be engaged or concerned with a company that competed with, and operated in the same territory as her employer for 12 months after termination of employment.

In 2018 Ms Ali was promoted to Director. Her work with NHS clients increased and she developed strong relationships with important NHS clients. In January 2021, she agreed to enter into a Service Agreement which contained non-solicitation and non-dealing covenants, as well as a non-compete covenant. The non-compete covenant stated that, for 12 months following termination of her employment, Ms Ali would not be involved in any capacity with a business which competed or intended to compete with those parts of the business Ms Ali was materially involved with in the 12 months before her termination.

In May 2021 Ms Ali resigned in order to work for a larger law firm which was a direct competitor of her former employer. Her former employer asked for written undertakings from Ms Ali that she would not breach her restrictive covenants. Ms Ali responded that she would comply with the non-solicitation and non-dealing covenants but not the non-compete restrictions as she did not believe these were enforceable. The firm subsequently sought an injunction to enforce the non-compete covenants in both agreements.

The court decided that the non-compete covenant in her Service Agreement was enforceable, but the broader non-compete covenant in the Shareholder Agreement was not.

The test that courts apply when determining the enforceability of restrictive covenants is whether the restriction is reasonable, and whether the party seeking to rely on the restriction can show that the restriction goes "no further than is reasonably necessary to protect that party's legitimate business interests." The Court found that the firm had legitimate interests to protect, including client contacts, charge out rates, the status on ongoing matters, and content of training material. In deciding whether a non-compete covenant was necessary to protect the interests, the Court considered all the circumstances including:

- Ms Ali was a senior employee with access to a lot of confidential information, and had built strong relationships with valuable clients.
- The non-solicitation and confidentiality covenants in her agreements did not adequately protect the firm's business interests because those covenants are more difficult to police and enforce.
- Before handing in her notice, Ms Ali had prepared a business plan in which she indicated a clear intention to "transition" clients to her new employer.

The judge concluded that the non-compete covenant in the Service Agreement "extended no wider than was reasonably necessary" to protect the firm's business interests." Critical to this finding was that the operation of the covenant was limited to those parts of the business "in which Ms Ali was involved to a material extent proximately to her departure from the firm" The Court considered that a 12 month duration was also a reasonable reflection of the "shelf life" of the confidential information Ms Ali would take with her to her new employer.

However, the Court found that the non-compete covenant in the Shareholder Agreement was not enforceable because it prevented Ms Ali from being involved in a business which competed with *any* part of her former employer's business, including areas where her involvement was minimal. This was held to be too broad a restriction, and so was not enforceable.

This case shows that in some circumstances, non-competition clauses may be appropriate and will be enforced by the courts. However, employers should still exercise caution when seeking to rely on non-competition restrictions, as this case was very fact specific, and each case will be decided on its own unique circumstances. Employers should ensure that their restrictive covenants are carefully drafted, with as narrow a scope as possible to protect the legitimate business interests.

2021

JUL 19
Practice Makes Perfect Masterclass

OCT 6
Settlement Agreement Masterclass

NOV 23
Litigation Lessons Masterclass

COME FLY WITH ME

The news we've all been waiting for has arrived! After years of moaning that our arms just aren't long enough and selfie sticks are just awkward, the selfie drone is here!

According to the BBC website, the Pixy operates on its own, taking video as it flies, which is then wirelessly transferred and saved in the app on your smartphone. At the end of the flight, the selfie drone lands in the palm of your hand, like a sycophantic yellow plastic pet.

So, after 800 newsletters, I am feeling VERY important and think that I should, frankly, have a film crew documenting my life, hour by hour. But, budget dictates that a Pixy may have to do.

Except - DARN - you can't use them in the UK. Believe it or not, our privacy laws are more stringent than in France and the US, where the entire populace (well, the pretty ones, anyway) will soon be creating a literal buzz wherever they go.

I predict the next best-seller will be an extendable Pixy swat…

Like a wasp at a picnic, Snapchat's Pixy never leaves your jammy face.

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