



Team recruitment or unlawful poaching exercise?

On its face, there is nothing unlawful about a company seeking to recruit the employees of its competitor. If a company is planning to take on a team of employees, the position can be more complicated. It is vital for the new employer to know the risks associated with team recruitment and for the old employer to know how best to protect itself.

On its face, there is nothing unlawful about a company seeking to recruit the employees of its competitor. When, however, that company is planning to take on a number of employees, maybe a whole team, the position can be more complicated. There is a significant risk that, if not properly handled, a team recruitment drive will be found to be an unlawful poaching exercise. Litigation against the employees and the new employer is also far more likely than in a case of individual recruitment. The loss of a team will usually have a serious detrimental impact on a business and make the costs of litigation seem justified.

For these reasons, it is essential for employers to know the risks associated with recruiting a team of employees. Conversely, employers should be aware of the risk of losing a team to a competitor and consider whether to take steps to protect themselves.

Key risks of team recruitment for the new employer

There are a number of potential claims which the old employer might bring against the new employer. We set out below the key claims and associated risks. Claims against the new employer are commonly brought in conjunction with a direct claim against the senior employees involved in the team move.

- **A claim of inducement of breach of contract**
This is probably the most common claim brought against the new employer by the old employer, and is likely to arise if the old employer can show that:

- the employees have breached their contracts of employment in assisting the new employer with the recruitment;
- the new employer has induced the employees to act in this way or has encouraged them to do so, in the knowledge that it is inducing a breach of contract and with the intention to cause that breach; and
- the old employer has suffered damage.

The breach in question will usually be one of the following:

- breach of an express term of the employment contract, eg one restricting the solicitation of employees both during and after employment or the transfer of confidential information to third parties; or
 - breach of the implied duty of fidelity or the implied term of trust and confidence – this is particularly likely to apply where senior employees influence more junior employees to come with them to the new employer or negotiate on the new employer's behalf so as to facilitate the team move.
- **A claim of dishonest assistance in breach of fiduciary duty**
There is a risk of this additional claim if any of the employees is a director or has quasi-fiduciary duties arising from a senior position, and the old employer can show that the new employer both assisted those employees in breaching that duty and that the new employer was conscious that in doing so it was

not abiding by the ordinary standards of honest behaviour.

□ **Causing loss by unlawful means**

This claim is often tagged onto a claim of inducement of breach of contract. It requires the old employer to show that the new employer has committed an unlawful act (such as, for example, committing the tort of inducement of breach of contract) and that the new employer intended to cause the old employer damage (as opposed to him intending to induce a breach of contract, which is all that is required in a case of inducement of breach of contract).

□ **A claim of unlawful means conspiracy**

If the old employer can prove that the new employer agreed with senior employees to use unlawful means to cause damage to the old employer (and damage was in fact caused), it should be able to bring this claim. The old employer will not need to show that the intention to cause damage was the new employer's dominant intention, but just that the intention to cause damage was, for the new employer, a means to the achievement of its dominant intention of enriching itself. The unlawful means in question can either be a civil wrong which is actionable by the old employer or a criminal offence.

□ **Springboard injunction**

The old employer may go to court to seek a 'springboard' injunction against the new employer and the senior employees. This type of injunction is traditionally used when confidential information has been taken from the old employer but has recently been used when employees have committed other serious breaches of their contracts of employment. It is intended to protect the old employer from the head start gained by the new employer and the senior employees in committing the unlawful act. The injunction applies for the period during which the new employer has an unfair advantage. As is the case for a standard interim injunction, the old employer must show that it has a real prospect of success at trial and that the balance of convenience is in favour of granting the injunction (ie that it would be more damaging to the old employer not to grant the injunction than it would be to the new employer to grant it).

□ **Adverse publicity**

Not a legal claim but nevertheless damaging to the new employer.

□ **Additional claims against senior employees**

The old employer may make additional claims against the senior employees involved in the team move. These claims might include a claim for breach of the obligation to disclose to the old employer matters which are adverse to its interests, eg that there was going to be a team move or that colleagues were breaching their contractual obligations. This obligation can apply to fiduciaries and quasi-fiduciaries. It is not uncommon for the new employer to indemnify the senior employees against the risk of claims being brought against them by the old employer.

Key steps to protect your business when you realise a team move is afoot

- Act swiftly to speak to employees who have not yet resigned. A team poaching exercise will usually only be really successful if the resignations take place simultaneously. If this does not happen, use this time to improve your position.
- Speak to employees individually. Consider whether to offer incentives to employees to stay; employees who choose to stay may provide valuable evidence of the breaches of the other employees.
- Write to the employees to remind them of applicable restrictive covenants (whether in contracts of employment or relevant incentive plans).
- Search telephone records and email systems without delay. A forensic IT specialist is the best person to conduct the search. He will know how to preserve evidence in case it is needed later in a court action. The new employer may well have told the senior employees to avoid putting anything in writing. But even a small piece of evidence showing that the new employer has encouraged senior employees to persuade staff to come with them may allow you to bring or threaten a claim against the new employer.
- Ascertain how the junior employees have been recruited. The new employer may have used a recruitment agent to try to overcome any allegation that the senior employees have breached their duty

of fidelity by encouraging the junior team members to come with them. The recruitment agent may have valuable evidence in relation to what was planned and who was involved. Consider a pre-action application for disclosure against the recruitment agent.

- Write to the new employer threatening legal action for inducement of breach of contract and any other potential claims that are relevant.
- Seek legal advice immediately and consider whether to seek injunctive relief.

What steps can you take in advance to protect against a team move?

- Review your standard contractual documentation to ensure that it operates as effectively as it can to protect your business.
- Consider amending restrictive covenants to be sure (i) that they apply both during and after the employment and (ii) that they go no further than is reasonably necessary to protect your legitimate business interests. If they go further than is reasonably necessary, you will not be able to enforce them.
- Review confidentiality restrictions to ensure that they specifically protect the types of confidential information which are key to your business.
- Consider whether to include within the contracts of employment of your senior employees an express duty of disclosure of matters that are adverse to your interests. An express duty tends to be easier to enforce and will act as more of a deterrent to employees.
- Check that your standard contracts of employment include a garden leave provision. A garden leave clause can give the employer the right to put an employee who is on notice of termination on garden leave and to prevent him from attending premises, contacting clients or undertaking any business activity. When the notice period is longer than six months, the contract should state that the employee will not be put on garden leave for more than six months (six months is generally the maximum garden leave period that the UK courts would enforce). Ensure that the contract makes clear that the length of any post-termination restrictive covenants will be reduced by any time spent on garden leave.

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