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ARE YOU CONNECTED? SOCIAL MEDIA AND EMPLOYEE COMPETITION

Paul Goulding QC

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Introduction

1. The purpose of this paper is three-fold:

   (1) to consider the potential uses of social media in connection with employee competition following termination of employment;

   (2) to examine the remedies for misuse of social media in the absence of post-termination restrictive covenants; and

   (3) to discuss the efficacy of post-termination restrictive covenants in limiting the use of social media to compete with a former employer.[2]

The potential uses of social media on termination of employment

2. It is sometimes suggested that social media do not pose any really new challenges to employment lawyers. Rather, they simply require the application of well-established legal principles to efforts by employees to compete with their former employer albeit using new techniques.

3. An employee using LinkedIn to announce that he has moved jobs to a competitor, for example, is said to be no different in substance from picking up the phone to tell business contacts of this fact. Similarly, uploading an employer's database of client contact details to LinkedIn so that they are available to the employee in his new job is, it is sometimes argued, no different from removing the rolodex, or copying the client list, or downloading the client database to a memory stick. The principles are the same, the methods are different.

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[1] Barrister, Blackstone Chambers, London and Editor of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (OUP, 2nd ed, 2011).

[2] This paper was originally presented to an Employment Lawyers Association Session in London, together with a paper *Are You Connected? Social Media and Employment Law* by Daniel Isaac of Withers LLP, which examines the employment law issues arising from the use of social media *during* employment.

4. Whilst undoubtedly many of the legal principles which are well-established in this field continue to apply in relation to the use of social media to compete, new challenges are posed by this development. In the first place, it is important to be aware of the uses to which social media can be put to further competition by employees and ex-employees. Unless an employer is alive to the potential of social media to assist a competitor, it will be difficult to detect let alone prevent its deployment for that purpose. In the second place, the application of familiar techniques of restrictive covenants and duties of confidence to the use of social media to compete is far from straightforward. Thought needs to be given to whether these techniques need to be adapted or modified to meet the new challenges.

5. There is a range of ways in which LinkedIn, for example, can be used to help an employee who leaves his job to set up his own competing business or to join an existing competitor.

6. The employee might access his former employer's client details via the contacts on his own LinkedIn account. The basic purpose of a social network such as LinkedIn is to make professional connections with others who have a LinkedIn account. During employment, this can be done in a number of ways. For example:

   (1) It is possible to search for a business contact, and invite that person to become a LinkedIn connection.

   (2) LinkedIn will suggest "people you may know" based on existing connections.

   (3) Joining special interest groups will give you access to other members of that group, perhaps working in the same professional field, whom you can then invite to connect as a fellow group member.

   (4) You can also add connections by importing your email contacts, or uploading a contacts file.

7. In these sorts of ways, an employee can build up a large database of his employer's clients, which may even be encouraged by the employer during the employment, and to which the employee then has access via LinkedIn following the termination of employment.

8. The employee is then is a position to inform his LinkedIn contacts (which is likely to overlap to a considerable extent with his employer's clients) of the fact of his new job at a competitive business. Some employees might do this before they leave the current job; others will do it after they have left.

9. This information can be conveyed via LinkedIn in a number of different ways. For example:

   (1) The employee can edit their profile by updating their current position and giving details of the new job. Each of the employee's contacts will then receive a notification that the employee has updated their current position on their profile.

   (2) The employee can post an update saying that they have moved jobs and giving further details of their new position. This update will be sent to the employee's contacts.

   (3) Perhaps more subtly, the employee might write an article, and post it via an update or simply add it to their publications, with a link to the article. Contacts will automatically receive notification of this update or new publication. The article might be about a professional issue relevant to their new role, and/or the article might state the employee's new position.

   (4) Similarly, the employee might start a discussion about a topic relevant to their new role, and in that context mention their new position, or at least draw attention to it. Contacts will be notified of the discussion being started.

   (5) The employee might start a new group on LinkedIn, which will draw attention to his new role and thereby encourage contacts to get in touch.

Remedies for misuse of social media in the absence of restrictive covenants

10. An employee who maintains and develops his LinkedIn account during employment is likely to build up an extensive network of contacts, which will include his employer's clients. These clients might become LinkedIn connections of the employee in a number of ways. For example, by the employee individually inviting a client to become a connection on LinkedIn. Or, by uploading contacts from the employee's emails or other

database whereupon those contacts, who have a LinkedIn account of their own, are invited to become a connection of the employee on LinkedIn. Details of these contacts will then be available to the employee, via his LinkedIn account, when his employment terminates.

11. In the absence of relevant post-termination restrictions, are there any limits on the use which the employee may make of his LinkedIn connections following termination of his employment? A number of issues arise.

Are LinkedIn contacts confidential?

12. Often, an individual's LinkedIn connections will be accessible to each and every one of those connections. Thus, any one connection of A can view the names of every other connection of A and then access the profile of those connections. However, this depends on the privacy settings adopted by the employee who has the LinkedIn account. It is open to an account-holder to adopt privacy settings whereby his connections are seen only by him, or by those with whom he shares the same connection ("closed"). The alternative privacy setting enables each connection to be seen by every other connection ("open").

13. Where open privacy settings are adopted, client details will be posted on LinkedIn and open to every other connection. In those circumstances, it can be argued that any confidentiality in the client details has been lost as a result of their being posted on LinkedIn. If that is correct, it may be difficult for the employer to maintain that the employee cannot use those client details following termination on grounds of confidentiality. The employee will say that the client details have lost their confidential status as a result of being in the public domain on LinkedIn, and so he is entitled to continue to use them. However, it does not necessarily follow that because an employee has open settings on LinkedIn, the identity and contact details of his employer's clients who are included in the employee's LinkedIn connections have ceased to be confidential. Publication of this information to a limited group (the employee's connections) does not necessarily destroy all confidentiality in the information.

14. An employer whose employee builds his LinkedIn connections in the course of his employment may claim that he owns the LinkedIn contacts built by the employee. Conversely, the employee is likely to maintain that the LinkedIn account is his own personal account, and he owns its contents.

15. Clause 2B of the LinkedIn User Agreement, to which every LinkedIn account-holder is a party, provides as follows:

> "You own the information you provide LinkedIn under this Agreement, and may request its deletion at any time, unless you have shared information or content with others and they have not deleted it, or it was copied or stored by other users...
>
> By providing information to us, you represent and warrant that you are entitled to submit the information and that the information is accurate, not confidential, and not in violation of any contractual restrictions or other third party rights. It is your responsibility to keep your LinkedIn profile information accurate and updated."

16. In *Pennwell Publishing (UK) Ltd v Ornstein*[3], it was held that where an address list is contained on Outlook or some similar programme which is part of the employer's email system and backed-up by the employer, the database or list of information will belong to the employer. In the circumstances, such lists will be the property of the employer and may not be copied or removed in their entirety by employees for use outside their employment or after their employment comes to an end.

17. The decision in *Pennwell* was based both on common law and on the Copyright and Rights in Databases Regulations 1997 ("the Database Regulations"). As to the latter, the following provisions may be relevant:

    (1) A database is a collection of independent works, data or other materials which are arranged in a systematic or methodical way, and individually accessible by electronic or other means: Reg 12(1).

    (2) For a relevant property right in a database to exist, there must be a substantial investment in obtaining, verifying or presenting the contents of the database: Reg 13.

[3] [2007] IRLR 700.

Investment includes an investment, whether of financial, human or technical resources.

(3) Where a database is made by an employee in the course of his employment, his employer is to be regarded as the maker of the database subject to any agreement to the contrary: Reg 14(2).

(4) Otherwise, the maker of the database is defined by Reg 14(1) which provides that "the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and having made, the database."

18. Whilst the employer's Outlook record of clients was held in *Pennwell* to be a database within the meaning of the Database Regulations, it does not necessarily follow that an employee's network of contacts on LinkedIn is a database.[4] It may be a matter for future litigation to resolve whether (i) the collection of contacts on LinkedIn is arranged in a systematic or methodical way so as to amount to a database; (i) there has been a substantial investment in obtaining, verifying or presenting the contents of the database for a relevant property right to exist; and (iii) whether the employee has made the database in the course of his employment.

19. Thus, where an employee builds his LinkedIn account and contacts in the course of employment – *a fortiori* where he is encouraged by his employer to do so – he may find his employer laying claim to ownership of those contacts as a database under the Database Regulations.

20. Similarly, where the employee has uploaded his employer's client database, such as from Outlook, to LinkedIn, again he may find that the LinkedIn database, or part of it, belongs to the employer, and that the employee has no right to retain it on termination of employment.

[4] See *William Hill v British Horseracing Board* [2004] ECR I-10415.

21. What steps can an employer take to obtain evidence where he suspects that an employee has used, or misused, his LinkedIn account to benefit his new employer who is a competitor? The issue arose directly in *Hays Specialist Recruitment (Holdings) Ltd v Ions*.[5]

22. Ions was a managing consultant for Hays which ran specialist recruitment employment agencies. Ions left to set up his own company (EHR), which carried on business in competition with Hays. Hays alleged that Ions had uploaded client and candidate contact details from Hays' confidential database to his own LinkedIn account, and that these details were being used by EHR.

23. Hays obtained an order for pre-action disclosure under CPR 31.16 of:

    (1) emails or other communications sent to or received by Ions' LinkedIn account from Hays' computer network (on the basis that they might evidence the uploading of business contacts while Ions was employed by Hays); and

    (2) all documents evidencing the use made and business obtained by Ions and EHR from business contacts uploaded by Ions to LinkedIn while he was employed by Hays.

24. In fact, by the time Hays requested a copy of Ions' LinkedIn contacts, Ions had arranged for the whole of his old LinkedIn network to be deleted. However, the US operators of LinkedIn retained the data and had agreed to preserve it.

25. The judge held that Hays had reasonable grounds for considering that it may have a claim against Ions as regards the transfer of information concerning clients and applicants by uploading it to his LinkedIn network while still employed by Hays and with a view to its subsequent use by him in his own business.

26. Ions argued, amongst other things, that it was not his action in uploading email addresses to LinkedIn, but the invitees' acceptance to become connections, which resulted in the information becoming available on his network and it was not then

[5] [2008] IRLR 904.

confidential but publicly available, at least to his other connections. The Judge thought this argument broke down at the first stage. He said:[6]

> "If the information was confidential, it was Mr Ions' action in uploading the email addresses which involved a transfer of information to a site where at least the details of those addressees who accepted his invitation would be accessible by him after his employment had ceased. The evidence suggests that he may have done so, not for the benefit of Hays but for the benefit of his post-termination business. If so, even if confidentiality in the information was thereafter lost, Hays may well have a claim against Mr Ions."

27. Such a disclosure order, made before or after the commencement of proceedings, could prove very effective in obtaining evidence of potential misuse of LinkedIn for the benefit of a competing business.

Restrictive covenants and the use of social media

Forms of restrictive covenants and tests of enforceability

28. Traditionally, there are four principal forms of post-termination restrictive covenants:

    (1) covenants against competing with a former employer (non-compete covenants);

    (2) covenants against soliciting clients of a former employer (non-solicitation covenants);

    (3) covenants against dealing with clients of a former employer (non-dealing covenants); and

    (4) covenants against poaching employees of a former employer (non-poaching covenants).

29. There are, of course, variations on these covenants (for example, as to (4), covenants against "employing" colleagues of a former employer absent any act of solicitation, although the preponderance of authority is currently against their enforceability), and other, though perhaps less important, forms of covenant (for example, covenants against interference with suppliers).

[6] Ibid, [20].

30. As to the suite of four principal covenants identified above, non-solicitation covenants are of particular interest when considering the use of social media when an employee joins a competitor, although non-dealing and non-poaching covenants are also important.

31. There are generally four stages to the test for enforceability of restrictive covenants by injunction in English law[7]:

    (1) Construction**:** it is necessary at the outset to ascertain the proper meaning of the restrictive covenant, and to discover whether the impugned activity is prohibited by the covenant.

    (2) Legitimate interest**:** the covenant must protect a legitimate business interest. Whilst the categories of interest are not closed, they classically take the form of the protection of trade secrets and confidential information, the protection of client connections, and the stability of the workforce.

    (3) Reasonableness**:** the covenant must be reasonable in the sense of being no wider than reasonably necessary to protect the identified legitimate business interest.

    (4) Discretion**:** whilst the enforceability of any covenant (legitimate business interest and reasonableness) is to be judged at the time the contract is entered into, the court retains a discretion whether or not to grant an injunction to enforce a restrictive covenant in light of all relevant circumstances obtaining at the date the injunction is sought.

32. It should be remembered that the courts may look more favourably on the enforcement of restrictive covenants in settlement agreements, given the public policy in favour of the settlement of disputes and finality of litigation[8].

33. It may be helpful to consider, first, the circumstances in which the use of social media might fall foul of standard restrictive covenants, that is to say covenants which are in standard form and not tailored in any way to prevent the use of social media; and,

[7] *Employee Competition*, above, §§5.04-5.10; *Office Angels Ltd v Rainer-Thomas* [1991] IRLR 214, CA; *TFS Derivatives Ltd v Morgan* [2005] IRLR 246.
[8] *Employee Competition*, above, §§5.11-5.15.

secondly, the ways in which covenants might be drafted with a view to preventing the use of social media to compete, and whether such covenants are enforceable.

Conventional restrictive covenants and social media

34. Consider the position of an employee who informs his LinkedIn contacts (which are wholly or mainly his former employer's clients) of the fact of his new job (which is with a competitor of his former employer). Does this amount to solicitation of his former employer's clients in breach of a non-solicitation covenant in his contract?

The meaning of solicitation

35. A typical non-solicitation covenant will restrain an employee, for a period of time following termination of employment, from soliciting the custom of any client of his former employer with whom he has dealt during a period prior to termination in relation to goods or services which are the same as or similar to those that the employee had been providing during a period of time prior to termination. What does solicitation mean in this context?

36. In answering this question, it is necessary to have regard to the well-known principles to be applied in construing a written contract. The classic approach was laid down by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society*:[9]

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

37. The authorities on the meaning of solicitation are not entirely helpful, clear or consistent.

38. The vendor of a business may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser: *Trego v Hunt*.[10] In this context, Lord Herschell suggested that if the vendor "sets up in business on his own account and appeals generally for custom", this would not amount to soliciting customers of the firm. But "when he

[9] [1998] 1 WLR 896. The extract is principle (1) of Lord Hoffmann's 5 principles, but is a sufficient statement of the proper approach for present purposes.
[10] [1896] AC 7, HL, 20-21.

specifically and directly appeals to those who were customers of the previous firm" he engages in impermissible soliciting of those customers.

39. The context and circumstances surrounding the acts said to amount to solicitation are important. A New Zealand case suggests it is helpful to ask whether the conduct of the employee evidences a specific purpose and intention to obtain orders from customers: *Sweeney v Astle*.[11] In that case Hosking J said that solicitation:

> "involves a selection of the persons appealed to...In the cases put it is plain that the trader, by singling out the objects of his solicitation, evidences a specific purpose and intention to obtain orders from them."

40. It has been said that a communication which does no more than inform a client that an employee has left his employer is not a solicitation, even if it contains the address of the former employee, and even if it is sent in the hope that the client will transfer his custom: *Taylor Stuart & Co v Croft*.[12]

41. In *Taylor Stuart*, an employed salaried partner of a firm of chartered accountants sent the following letter, on headed notepaper he had designed, to clients of the firm for whom he had been responsible:

> "Dear
>
> This is to inform you that I left the Partnership of Taylor Stuart & Company on 18 November 1994. With effect from 1 December 1994 I shall be establishing my own professional Practice and can be contacted as above.
>
> Yours sincerely"

42. In concluding that this did amount to solicitation, the judge said:

> "There may be a very narrow and difficult line indeed between a communication which is and one which is not a solicitation or canvassing. Indeed, it is because of the narrowness of this line, and the practical difficulties of proving solicitation (which is often suspected to have taken place in an unrecorded conversation between a departed employee and a former client) that a well-considered and well-drafted contract should include a reasonable restraint on a former employee from dealing with or working for clients of his former employer.

[11] [1923] NZLR 1198.
[12] Unreported, 1997 (Stanley Burnton QC sitting as a High Court Judge).

> It is of the essence of solicitation and of canvassing (and it was common ground that there is no practical difference between them) that the client should be requested to transfer his custom. A communication which does no more than inform a client that an employee has left his employer is not a solicitation, even if it contains the address of the former employee, and even if it is sent in the hope that the client will transfer his custom. It follows that a letter in the form of that sent by the Defendant...would have been unobjectionable if it had been limited to its first sentence...
>
> I have found the question whether the letter as sent did cross the line into solicitation and canvassing difficult. The letter did not unequivocally invite clients to transfer their work to the Defendant. Furthermore, apart from giving the date of 1 December 1994, the second sentence gave no information which was not in the first sentence combined with the heading of the letter. Nonetheless, I do regard the words "I...can be contacted as above" as an invitation to the addressees to contact him. In my judgment, in the form as sent, it constituted a solicitation..."

43. In *Austin Knight (UK) Ltd v Hinds*[13] it was held that an employee of recruitment consultants who had been made redundant, and had no prospects of new employment, did not solicit her main customers whom she telephoned to tell them that she had been made redundant. She did not want them to hear of her dismissal from others and possibly infer mistakenly that she had been dismissed for misconduct or incompetence. When, two months later, she found another job, and was approached by customers who asked whether she could continue to handle her accounts, her positive response did not amount to solicitation. A contrary finding would convert a non-solicitation covenant into a non-dealing covenant.

44. In *Hydra Plc v Anastasi*[14] the employees agreed "not to solicit or entice away any employee of the Company for a period of 12 months following the termination date". Royce J concluded that entice meant "tempt, lure, persuade, inveigle".

45. In light of these authorities it can be argued that solicitation requires:

    (1) a targeted approach to clients; and

    (2) an explicit or implicit request to do business.

[13] [1994] FSR 52, per Vinelott J at 58-59.
[14] [2005] EWHC 1559 (QB) at [45].

46. In asking whether the pre-conditions for solicitation identified above are met in any particular case, it is necessary to consider the precise context and circumstances in which the employee uses social media, such as LinkedIn, when joining a competitor.

47. First, is there a targeted approach to clients?

48. Any change to the employee's LinkedIn profile will be conveyed directly to his LinkedIn contacts. These contacts may comprise a number of different groups: professional and personal; of the professional, these may consist of his former employer's clients, and also the employee's professional contacts that he already had as professional contacts when he joined his last employer. The make-up of the employee's contacts on his current LinkedIn account may depend on the former employer's policy (if any) as to the use of LinkedIn during the currency of the employment. It will be assumed for present purposes that the majority of an employee's LinkedIn contacts comprise his former employer's clients.

49. The employee's contacts will receive notification of the employee's updated profile both on the client's home page (where contacts' updates are listed), and by email (which also refers to recent updates). Whether the contact learns the detail of the employee's new job is likely to depend on whether the contact happens to see the reference to the employee's update in the list of contacts' updates, and goes to the employee's profile to find out more about the update.

50. Nevertheless, the updating of a LinkedIn profile by referring, in one way or another, to the employee's new job is likely to involve a targeted approach to clients.

51. Secondly, does the communication entail an explicit or implicit request to do business?

52. When the employee in *Austin Knight* first contacted clients, it was to inform them that she had been made redundant (as opposed to dismissed for misconduct) and at a time when she had no prospect of a new job. No question of an intention to obtain new business arose.

53. In *Taylor Stuart*, the judge appeared to consider that a letter on letterhead of the new business, and stating that the employee had left the old firm, would not amount to solicitation. What took the employee across the line was that statement "I can be contacted as above", involving, as the judge saw it, an implicit invitation to clients to get in touch. It might forcibly be suggested that this invitation would have been implicit in a letter announcing the departure from the old firm, and providing contact details of the new business.

54. The answer depends, to some degree, on what the employee says in updating his profile. If he actively encourages contacts to get in touch, or to direct business to him, it will be difficult to deny that there is solicitation.

55. If, however, he merely updates his current job, without more, it can be argued that this does not involve any request to do business with the contact. In an age of social media, professionals habitually stay in touch with a wide range of business contacts, and keep their profiles up-to-date. Against that, it can be said: what is the point of having a profile on LinkedIn, and keeping it updated, if it is not to foster relationships, and thereby conduct more business, with professional contacts?

56. There is, at least, a real risk that updating a LinkedIn profile with the fact of the employee's new job with a competitor, especially where the employee knows that that information will be communicated to all his contacts (knowledge that is likely to be inferred in the absence of compelling evidence to the contrary), will amount to solicitation in breach of a standard non-solicitation covenant.

57. The uncertainties as to whether conduct of the kind discussed above does, in fact, amount to solicitation of clients serves to emphasise the importance of including a non-dealing covenant in the contract of employment. Although it might be more difficult to obtain evidence of dealing (as opposed to evidence of updating the LinkedIn profile), at least the inclusion of a non-dealing covenant will render the employer less vulnerable to the uncertainties of whether or not particular activity on LinkedIn amounts to solicitation. Whether or not it does, he can rely on the non-dealing covenant.

58. As to whether updating a LinkedIn profile amounts to solicitation or poaching of employees of the former employer, this is more straightforward. It might, of course, be

the case that a number of an employee's contacts on LinkedIn are former colleagues. They are likely to know that the employee has left, and may even know about the new job he has taken up with a competitor. To announce the fact of this new job via LinkedIn is unlikely to amount to solicitation of former colleagues to leave, and hence unlikely to breach a non-poaching covenant.

Adapting restrictive covenants to cover the use of social media

59. There are several ways in which restrictive covenants might be tailored to cover the use of social media. In each case, they will be subject to the conventional test for enforceability of restrictive covenants. It would clearly be sensible for en employer to ensure consistency in the underlying approach adopted both to social media policies during employment, and reference to social media in post-termination restrictions.

60. First, it is open to an employer to state specifically in its restrictive covenant that certain activities on LinkedIn, such as updating a profile by stating that the employee will be leaving, or has left, or by providing any information about a new job with a competitive employer, will amount to solicitation.

61. Secondly, an employer might seek to go further and require an employee to close down a LinkedIn account. A draft compromise agreement recently contained the following clause:[15]

> "You agree to delete any existing or prospective clients of the Company from Facebook, LinkedIn, Twitter or on any other social or professional networking site ("Networking Site") on or before the Termination Date.
>
> You agree that you are aware that updating your profile on a Networking Site may equate to solicitation of a customer/client that remains connected to you. You further agree that, following deletion of connections with the Company's customers, clients and suppliers on or before the Termination Date in accordance with your obligations under this Agreement, you shall not reconnect with any such person, firm or company or, directly or indirectly, contact any such person, firm or company through a Networking Site for the period of the restrictions preventing solicitation of customers and/or clients as provided for in your Contract and/or this Agreement."

62. This unusual provision has a number of notable features.

[15] The clause is posted and discussed on the blog of Hampshire Lawyer. See http://gtk399.wordpress.com/2010/11/24/social-networking-and-compromise-agreements/

63. It contains an agreement that "updating your profile on a Networking Site may equate to solicitation of a customer/client that remains connected to you." In stating that such updating "may" equate to solicitation, the clause fails in removing the uncertainty discussed above as to whether such updating does amount to solicitation. If the covenant states that updating a profile "will" amount to solicitation, the meaning is clear. However, the question then to be asked is whether it is enforceable. Assuming the existence of a legitimate business interest (in the form of client connection), the central issue is whether the covenant is reasonable. If the covenant in these terms was included in the employment contract from the outset, and if it was reasonably anticipated that the employee would use LinkedIn to connect and foster relationships with the employer's client, such a provision may well be reasonable. If it is contained in a compromise agreement, its enforceability will benefit from the added weight given to covenants in settlement agreements.

64. The clause also contains an agreement to delete existing or prospective clients of the company from all social networking sites including Facebook, LinkedIn and Twitter. On its face, this seems wide-ranging. However, note that it is limited to "existing or prospective clients of the company". The inclusion of Facebook and Twitter might be thought to go beyond what is reasonably necessary to protect the legitimate interests of the business, unless the use of these sites has been encouraged by the employer, or is known to have been used by the employee for business purposes during employment. If their inclusion is unreasonable on the facts, they could be severed from the clause, leaving LinkedIn as the sole surviving network referred to. It might be argued that the requirement to delete clients of the company from LinkedIn is no different from a requirement that the employee shall, on termination of employment, return to the company all documents relating the business of the company, including details of clients, or delete electronic records relating to the company's clients.

65. Finally, the clause prohibits the employee, during the period of the restrictive covenants, from reconnecting with those clients or contacting them through any social networking site. This could be said to follow logically from any provision deeming updating a LinkedIn profile to amount to solicitation.

66. However, it can be argued that this is a step too far. An employee who, on termination, returns documents containing details of an employer's clients could not ordinarily be restrained from having any contact with those clients during the period of any restrictive covenant, providing the nature of the contact did not breach the covenant. So, for example, social contact with a client who had become a friend would be permissible (provided that it was genuinely social contact). If the client took the initiative and contacted the employee, this would not be prohibited by a non-solicitation clause; neither would such contact necessarily be prevented by a non-dealing clause, provided that business was not pursued during the restricted period.

Conclusion

67. A number of conclusions may be drawn:

(1) The increased use of social media gives scope for novel forms of competition by employees who join a competing business in terms of the use of a former employer's client details, and solicitation of a former employer's clients and employees.

(2) The use of social media by employees to compete with a former employer also poses challenges in the application of conventional legal analysis to restrain such competition. The courts have not yet grappled to any great extent with these challenges, but are likely to be called upon to do so in the near future.

(3) One likely area of enquiry will concern whether confidentiality in client details has been lost by the posting of those client details in the form of an employee's connections on LinkedIn; another is whether an employer owns a database right in the connections on his employee's LinkedIn account.

(4) It is arguable that the updating of a LinkedIn profile with details of an employee's new job with a competitor would amount to solicitation for the purposes of a non-solicitation covenant. Employers would be well-advised to avoid the uncertainty as to whether or not this is so by making appropriate express provision in restrictive covenants concerning the use of social media, which could even extend to a requirement that an employee deletes contacts from LinkedIn for the period of the restrictive covenants.

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