

HUMAN RESOURCES

人才薈萃

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How to Protect Employers' Customer Connections

By Jezamine Fewins, Partner, Stephenson Harwood

Summary

In this case, the court enforces non-solicitation and non-dealing clauses to stop a senior employee from joining a competitor and using the customer connections of their ex-employer.

GFI (HK) Securities LLC v Gyong Hee-kang and ICAP Equities Asia Limited

Court of First Instance, HCA 1319/2015
Deputy High Court Judge Saunders
Date of hearing: 19 June 2015
Date of Reasons for Decision: 23 June 2015



Facts

Gyong Hee-kang, the first defendant, was employed by the plaintiff, GFI (HK) Securities, as "a senior broker and head of Korea fixed income". The first defendant's employment contract contained post-termination restraints prohibiting her, for six months from the termination of her employment, from competing with the plaintiff or accepting orders, instructions or soliciting business from any person who had been a client of the plaintiff in the previous 12 months. The first defendant resigned from her job on February 17, 2015.

On May 18, 2015, the plaintiff discovered that the first defendant's Bloomberg account had been activated with ICAP, the second defendant. The plaintiff subsequently learned that the first defendant was listed as an employee of the second defendant and licensed to deal in securities

with the SFC. A phone call to the second defendant provided evidence that the first defendant was employed at the company.

On May 19, 2015, the plaintiff's lawyers wrote to the defendants, warning them that they would seek an injunction if required to protect their client's interests. Messages between brokers showed that, in the week commencing May 27, 2015, the first defendant was in South Korea and had contacted four clients of the plaintiff.

On June 16, 2015, the plaintiff applied for an injunction to restrain the first defendant from being employed by the second defendant, and soliciting and dealing with the plaintiff's clients, for the duration of the contract. The plaintiff listed the clients which it sought to restrain the first defendant from dealing with. However, at the hearing, the plaintiff dropped

its application to restrain the first defendant from being employed by the second defendant.

The first defendant argued that the application be dismissed, as the plaintiff had delayed in applying for the relief, the restraints were unreasonable, and that she had been pressured into accepting the contract containing the restraints.

Decision

The judge granted the injunction against the first defendant, prohibiting her from soliciting business from, and having business dealings with, the plaintiff's clients until August 17, 2015. The plaintiff had threatened legal action the day it learned that the first defendant's Bloomberg account had been activated, which was 17 days later that the plaintiff had evidence that the first defendant was in breach of the agreements. The plaintiff

applied for an injunction 13 days later. Under the circumstances, the judge considered that the delays did not justify the dismissal of the application. The plaintiff was justified in waiting to obtain evidence to substantiate its allegations.

The judge then found that the restraints the plaintiff was seeking to enforce were plain and unambiguous. Furthermore, it had legitimate interests to protect through the restrictive covenants. The first defendant's position gave her access to confidential information, such as brokerage rates and spreads offered by the plaintiff, as well as influence over clients.

The judge considered the plaintiff had a reasonable prospect of success in establishing at trial that, partly due to the first defendant's seniority, the restraints were reasonable and no more than necessary. The judge considered past cases involving workers in the finance industry, in which restraint periods of six months or more were allowed. A period of six months would allow a replacement employee to be found, and for their trade connections to be built. The judge found that there had been no undue influence or pressure on the first defendant to sign her employment contract, as she had had the opportunity to take legal advice and had not done so.

If an injunction was not granted, the plaintiff risked losing clients to the first and second defendants. If the first defendant used confidential information, then the plaintiff had no prospect of recovering the information and it was difficult to see how damages might be assessed. Conversely, any wrongly imposed injunction could be compensated by damages to the first defendant.

Take-away points for HR professionals

1. Hong Kong courts are willing to uphold restrictive covenants to stop employees making use of their ex-



employer's customer connections and confidential information. A non-dealing and non-solicitation clause will be upheld provided the court is satisfied that the restrictions are clear and unambiguous and are reasonably necessary to protect the employer's legitimate business interests. In the above case a six-month period for a senior position in the finance industry preventing them from soliciting or dealing with named clients was considered reasonable to protect the legitimate interests of the employer.

2. Employers, when they draft restrictions in their employment contracts, should take into account how long it will take to hire a replacement employee, train them and build a rapport with existing customers to secure their loyalty in the period in which a departed employee is prevented from soliciting clients.
3. Non-dealing and non-solicitation clauses which are longer than six months will only be enforceable

and considered reasonably necessary to protect an employer's legitimate interests where the employer can provide evidence that the recruitment and settling in time of a replacement employee will take longer than six months. If such evidence is not available, the clause is likely to be unenforceable and will be considered beyond what is reasonably necessary to protect an employer's legitimate interests.

4. Employers should not delay in notifying an ex-employee and their new employer of any potential breach. They should investigate immediately to ascertain if agreements have been breached and seek legal advice. 

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僱主如何保護客戶網絡

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PICTURE: THINKSTOCK



GFI (HK) Securities LLC v Gyong Hee-kang and ICAP Equities Asia Limited

原訟法庭
HCA 1319/2015
高等法院暫委法官辛達誠
聆訊日期：2015年6月19日
裁決理由頒布日期：2015年6月23日

摘要

法官於本案中執行不招攬和不接洽條款，禁止一名高級僱員加盟競爭對手和使用前僱主的客戶網絡。

案情

第一被告Gyong Hee-kang曾獲原告GFI (HK) Securities聘用，任職「高級經紀及韓國定息產品部門主管」。第一被告的僱傭合約載有離職後限制條款，禁止她在合約終止後六個月內與原告競爭，或接受任何在過去12個月曾是原告客戶的人士的指令或指示，或向他們招攬生意。第一被告於2015年2月17日辭職。

於2015年5月18日，原告發現第一被告的彭博賬戶獲第二被告ICAP啟動。原告隨後得悉第一被告受僱於第二被告，並持有可與證監會進行證券交易的牌照。與第二被告的電話通訊亦證明第一被告當時受僱於第二被告。

於2015年5月19日，原告的代表律師去信提醒第一被告和第二被告，表示會在有需要時

向法院申請禁制令，以保障其客戶的利益。經紀之間的訊息顯示，於2015年5月27日起的一星期，第一被告身在南韓，並曾經聯絡原告的四名客戶。

於2015年6月16日，原告向法院申請禁制令，禁止第一被告在第二被告的公司任職及在合約期間向原告的客戶招攬生意或與原告的客戶接洽。原告列出擬禁止第一被告接洽的客戶名單。但是，原告在審訊期間撤回禁止第一被告在第二被告的公司任職的申請。

第一被告辯稱原告延遲撤回申請，而且限制條款並不合理，加上她是被逼接受載有離職後限制的合約，所以法庭應駁回有關申請。

裁決

法官向第一被告發出禁制令，禁止她向原告的客戶招攬生意或與他們有業務接洽，直至2015年8月17日為止。

原告得悉第一被告的彭博賬戶獲啟動當日，即提醒被告表示將會採取法律行動，而原告於17日之後取得第一被告違反合約條款的證據，並於13日之後申請禁制令。在此情況下，法官認為不能以延誤為由駁回有關申請。原告需要時間取得證據證明指稱屬實亦屬合理。

法官其後指原告尋求執行的限制內容清晰明確。此外，基於第一被告擔任的職位，讓她可以接觸機密資料，例如經紀佣金收費和原告提供的差價，並且對客戶有一定的影響力，所以原告有權透過限制條款保障其合法利益。

法官認為基於第一被告的職級，原告有合理的成功機會能夠於審訊中證明訂立有關限制屬合理所需。法官指以往涉及金融從業員的案例，均容許設定六個月或以上的限制期。僱主可於六個月內填補僱員離職的空缺，並讓新僱員建立業務聯繫。法官又指第一被告簽訂僱傭合約時並無受到不當影響或壓力，因為她當時有機會諮詢法律意見，只是她並無採取有關行動。

假如法庭拒絕發出禁制令，原告便要承受客戶轉投第一被告和第二被告的風險。假如第一被告利用機密資料，原告便無法取回有關資料，所遭受的損失將難以評估。相反地，假如向第一被告發出禁制令，則第一被告所受損失卻可以彌補。

人力資源管理專才注意事項

1. 香港法庭願意維護僱傭合約中的限制條款，以禁止僱員於離職後使用前僱主的客戶網絡或機密資料。只要法庭信納限制條款清晰明確，而且對於保障僱主合法商業利益屬合理所需，則會維護不接洽和不招攬客戶的限制條款。在上述案例中，法官認為對金融業高級僱員設定六個月的限制期，防止他們招攬或接洽指定的客戶，可以合理保障僱主的合法利益。
2. 僱主草擬僱傭合約的限制條款時，應考慮填補僱員離職空缺、培訓新僱員及與現有客戶建立關係爭取信任所需的時間，以防離職僱員於這段期間招攬客戶。
3. 僱主必須證明招聘新僱員填補離職空缺及熟習工作的時間需要超過六個月，方可執行為期超過六個月的不接洽和不招攬客戶限制條文，並視為合理保障僱主合法利益所需。假如未能提供有關證據，限制條文可能無法執行並視為超過合理保障僱主合法利益所需的範圍。
4. 僱主應盡早通知前僱員及其新僱主他們可能違反合約條款，並立即展開調查以確定對方是否違反合約條款，並且諮詢法律意見。

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