

Business protection and departing employees – an expensive lesson

The departure of key employees from a business is always a difficult time, especially where those employees are moving to a competitor. The case of *Kynixa Limited v Hynes and others* is a good example of where the employer has protected itself without relying on restrictions in the employment contract.

Three senior employees (Mr Hynes, Ms Preston and Ms Smith) left Kynixa Limited ("Kynixa") in early 2007 to join a competitor. They did not inform the Kynixa that this was their intention. Given the representations made during their departure discussions, Kynixa took a dim view of the conduct of these three employees once the truth was discovered. Kynixa commenced legal action against them. The claims brought by Kynixa included:

- a claim against all three that they had breached the implied duty of fidelity contained in every employment contract;
- a claim against Mr Hynes and Ms Preston that they had breached their fiduciary duties to Kynixa (on the basis that Mr Hynes was a director, and Ms Preston was a senior employee);
- a claim that Mr Hynes and Ms Preston had breached express restrictions contained in a

shareholder's agreement which they had signed; and

- a claim was also brought against Ms Preston and Ms Smith alleging that they had breached restrictions set out in their employment contracts, although that claim is not discussed in this note.

The Court found that all three employees were in breach of their duty of fidelity, and that Mr Hynes and Ms Preston were in breach of their fiduciary duty. The Court took particular interest in the fact that all three had misled Kynixa as to their future intentions. The Court also found that Mr Hynes and Ms Preston were in breach of their obligations under the shareholder's agreement, despite the fact that the restrictions were expressed to apply for 12 months.

These three employees were ordered to pay the costs incurred by Kynixa in bringing this claim. Such costs have been estimated as being in excess of £1 million and pending a detailed assessment of those costs, Mr Hynes was ordered to make a payment of costs on account of £250,000 and Ms Preston was ordered to pay £100,000.

From an employer's perspective this case illustrates that the courts are willing to find against employees that are involved in a plot to move as a team, especially where in making preparations to move such employees mislead the employer when asked about their plans. Whilst employers should always ensure as far as possible that they have in place appropriate restrictions in the contracts of employment issued to employees, this case highlights that there are other means of enforcement.

Of course, many employers will not wish to litigate such cases but may prefer to mention this case when discussing their position with a departing employee. Such discussions can take place prior to the employee leaving, or if wrongdoing is suspected, once the employer has written to the employee to seek an undertaking that they have not and will not breach their obligations. Where appropriate such undertakings should include a reference to the duty of fidelity and fiduciary duties in addition to the useful reference to express restrictions.

9th August 2008
Contact Mark Minns

t: + 44 (0) 118 900 1880
w: www.mpmlegal.co.uk
e: mark@mpmlegal.co.uk