Episode 6 – Business protection Part 1 – When a senior executive leaves with Patrick Brodie

Ellie Hi and welcome to the Work Couch podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the employment equality and engagement team here at RPC. And I'll be your host as we explore the constantly evolving and consistently challenging world of employment law - and all the curveballs that it brings to businesses today. We hope by the end of the podcast, you'll feel better prepared to respond to these people challenges in a practical, commercial, and inclusive way.

Today we're going to talk about business protection when a senior executive leaves. For example, how do you prevent a key individual from working for a direct competitor for a certain amount of time? How do you make sure that person cannot leak confidential information or trade secrets to a competitor? And how do you deal with a departing employee's attempts to poach other colleagues to also leave to work for the competitor? To answer these burning questions, we'll look at how contractual post-termination restrictions or restrictive covenants work in practice, including how the law might change in the future to limit the extent of non-compete clauses. We'll look at the issue of enforceability and associated tactics, and we'll also look at those difficult conversations with not only the departing employee, but also clients and remaining employees. Guiding us through this tricky area of employment law is an absolute expert on restrictive covenants, partner and head of employment engagement and equality here at RPC, Patrick Brodie, who regularly acts for clients in the Court of Appeal and Supreme Court on this very topic. Hi Patrick, thanks so much for joining me today.

Patrick Thanks, Ellie.

Ellie So, Patrick, as I said, we're going to discuss the legal options available to businesses when a senior exec leaves the organisation. And one of the most obvious protective mechanisms in a person's contract of employment are restrictive covenants. So, some common examples being restraint of trade or non-compete clauses. And they essentially prevent the employee from working for a competitor employer for a certain amount of time after they leave. So, before we dive into how those operate, Patrick, can you explain the rationale behind restrictive covenants? Why do we have them and how long have employers been able to use them?

Patrick Thanks Ellie, you've kind of opened the door for me to reflect on the history of our legal principles governing restraints of trade and restrictive covenants. It's a, how would I put it, a tour through our country's changing attitudes to our economy, trade, and the right of an individual to work. Put simply, it's the balance between a person's opportunity to earn a living, on the one hand, and the right of an organisation to protect its lawful business interests on the other. Our court's attitude on where this balance sits has changed over time. This is because our common law, with its ability to flex and change, creates a dynamic legal system that can evolve and change in a way that best reflects subtle changes in societal norms and interests without statutory interference.

Patrick Now to the history of restrictive covenants. This is a whistle stop tour. The restraint of trade doctrine can be traced back to the Magna Carta, so the early part of the 13th century. By the time of the Tudors, the doctrine was particularly draconian in that all restraints of trade were considered to be contrary to public policy and unenforceable. Now, over time, this was relaxed to allow for partial restraints as opposed to general restraints to be enforceable. The modern version of the doctrine works by introducing a presumption of unenforceability, save to the extent that, and this is the important part, that the particular restrictive covenant safeguards a lawful business interest and goes no further than is reasonably necessary in achieving that outcome. This approach is based on, as I said, public policy. The public interest is that so far as is reasonable and lawful,

	everyone should have the freedom to work and we shouldn't deprive our society or economy of a person's skill or talent.
Ellie	So in your view then, should restrictive covenants still exist in today's economy, which is obviously still very much struggling, or are restrictive covenants actually impeding the economy's recovery by restraining people from working freely for whoever they choose, which was actually recently suggested by the government when it made various announcements as part of its "Smarter regulation to grow the economy" measures. What's your opinion on that, Patrick?
Patrick	That's a really interesting question. Indeed, it's one our government has struggled with or rather reflected on in the last 10 years. We've had two consultations on whether our laws on restrictive covenants are fit for purpose. As you said, the concern is that any limitations on a person's ability to freely trade or work is bad for all of us because it unnecessarily limits our opportunities for economic growth by stifling innovation and placing an unnecessary anchor to the evolution of ideas that would otherwise be to the benefit of our society. By removing post-termination restrictions, the marketplace is then opened up and innovation accelerated with the consequential economic and technological advances. So, this must be good, but the counter position is that lawful restrictions actively encourage companies to innovate, drive their R&D, and by the work of their teams build their trade connections without the fear that the people they're invested in might leave and damage their business interests by exploiting confidential information, trade connections or the relationships they've built with other employees. Now because the doctrine is based on public policy, which necessarily as mentioned earlier changes with time, there is an inbuilt flexibility to its scope and operation. It's for these reasons of flexibility that judges have been reluctant to fence the doctrine within a definition. For example, in a decision reached just before the turn of the 20th century, it was said, and let me just find the quote. Here it is. "Trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It's not surprising to note that our laws have also expanded and that legal principles have developed so as to suit the exigencies of the age in which we live." The quote, which I've just read, recognises that our laws on restrictive covenants will evolve to reflect changing industrial and technological landscapes. It's as relevant now as then. So yes, I do think our common laws allow for innovation by striking the right balance between employee freedoms and company interests without the need for parliamentary intervention. Arguably, this is supported by financial and business statistics. For example, the UK has more financial unicorns than any other European country and is only third behind the US and China with our greater populations and resources. However, our government's view is that the subtlety of the current position, balancing freedoms and protections reached by our courts over several hundred years is too restrictive limiting the ability of employees to move to better jobs and stifling competition and innovation. Therefore, on 10 May, as we'd said earlier, it announced that it will, at a time to be decided, legislate to limit post-termination non-compete covenants. The proposed new law will restrict the duration of these covenants to three months post-termination of employment. It's worth bearing in mind non-solicitation covenants and garden leave provisions will remain untouched. The detail is limited and will also be subject to parliamentary debate. Now one consequence of the suggested change is that it may catalyse employers to review more closely how they safeguard the confidential information to which employees have access.
Ellie	And picking up on the government's concerns then that non-compete clauses inhibit workers from looking for better paying roles and that they stifle competition, innovation, there are actually other countries that have already taken that approach, aren't there?
Patrick	That's right, Ellie. The most obvious reference point is the US, where an increasing number of states are restricting or banning the use of post-termination non-compete provisions. For example, Maryland won't enforce non-competes for employees earning less than a certain amount. Virginia has a similar rule. Washington has also broadly outlawed non-competes other than for high wage earners and provided that certain drafting and notice requirements are also met. California is probably the most high profile state to ban employment related non-competitor agreements. This is probably because of the association between this policy and perceived tech innovation. And recently, the Federal Trade Commission proposed to outlaw the use of non-competes. The proposed rule will go further than simply banning the use of non-compete terms. It will also stop employers from representing to their employees that they are subject to a non-compete when an enforceable one doesn't exist. But interestingly, our common law flexibility achieves the goal of protecting those in less well paid and more precarious employment by regarding restrictions that attach to less influential employees as being unenforceable, saying that these restrictions would otherwise go further than is reasonably necessary to protect any lawful interest. Nonetheless, it might be that the perceived correlation between limits on the enforceability of post-termination non-compete covenants and tech growth in the US has encouraged our government's decision to intervene on restrictive covenants.

Ellie	And we'll keep a close eye on the changes to legislation in the UK. And we'll also look at the American position in relation to the proposed outright banning of non-compete clauses in a bit more detail on a future episode of the Work Couch. So do look out for that one. So Patrick, can you just run through the types of restrictive covenant that you'll commonly come across within a senior exec's contract of employment and what they're designed to do?
Patrick	Post-termination restrictive covenants broadly fall into four buckets of protection. Non-compete clauses that prevent an employee from working in a competing business. For this type of restriction, the employer is looking to safeguard its confidential information and trade secrets. Then you have restrictions against the solicitation of employees. These seek to protect the stability of an employer's workforce. There's then non-solicitation of clients and customers, which can include prospective clients and customers. Here the restriction is designed to safeguard trade connections and relationships. And finally, post-termination restrictions that prohibit dealing with customers and clients. This provision goes further than a non-solicitation, stopping any active engagement with an ex-customer or client in relation to a competing business activity, even if the employee has not solicited the work. These covenants have the benefit of avoiding an argument about whether or not solicitation has occurred, but they're harder to enforce. Non-dealing covenants are often more appropriate where the employee has significant influence because of strong personal connections over customers who are likely to move with the employee without active solicitation.
Ellie	The post-termination obligations in these clauses won't last forever, will they? There's usually a very clear period of time during which that obligation applies, after which the individual isn't subject to those obligations.
Patrick	Yes, there's always a time period after which restrictions will cease to be lawful. This is because all post-termination restrictions must go no further than is reasonably necessary to protect the relevant business interests. The first step is to identify that business interest, whether as mentioned, the integrity of the workforce, trade connections, or confidential information. The second step is to ensure that in relation to the protectable business interests, the restriction does not, including in relation to its duration, extend beyond what is reasonably necessary to afford full protection. Now, what is reasonably necessary will vary between industries, the role of the employee, and the influence they have over customers or employees. In terms of time periods and employment, you rarely see restrictions extending beyond 12 months from the employee's last date of active participation in the business. Post-termination non-compete provisions are often much shorter and we can't ignore either the government's proposal when parliamentary time allows to reduce non-compete covenants to three months post-termination.
Ellie	But the question of how reasonable that period of time is often leads to disputes and in some cases litigation. So what factors will be relevant in assessing the reasonableness of that timeframe?
Patrick	The reasonableness of a covenant unusually is judged at the time that the covenant is entered into, not the time that it's enforced. This places an emphasis on the employer to ensure that as a person moves progressively into more senior roles, it considers the appropriateness of new or revised restrictive covenants. Relevant factors will, depending on the nature of the restrictive covenant, include the employee's influence and seniority, the time it will take the business to re-establish relationships with customers' employees, the intensity of the loyalty of customers to the employee, the period it will take for goodwill attached to the employee to dissipate and return again to the employer, or the time period before the employee's knowledge of confidential information ceases to be current. The enforceability of restrictive covenants is judged against the circumstances of the particular individual, including their role and responsibilities, and the character and operations of the particular business. What is enforceable for one person may not be enforceable for another. For example, one person may have closer and stronger relationships with customers, whilst another might have greater access to confidential information, both qualitatively and quantitatively.
Ellie	Absolutely. So that's the timeframe, but it's also possible, isn't it, that for various reasons a particular restrictive covenant may not be enforceable. So tell us about some examples of clauses that have been found to be unenforceable and why.
Patrick	You're absolutely right in that occasionally, restrictive covenants don't have the accuracy the existing employer might have wished for. As said, covenants are enforceable provided that they go no further than is reasonably necessary to protect a lawful business interest. I've mentioned that the wording of covenants is critical in that every word serves a purpose in the meaning and reach of a covenant. So if there's a stray word or phrase such that the restrictive covenants overreach what is reasonably necessary, the whole restriction potentially falls. Our courts sometimes refer to this excess wording, and I enjoy this term, as "legal litter". In effect, words that taint the enforceability of the restrictive covenant, and these words should be swept away and removed, allowing the restriction to be tidied up. It's worth bearing in mind that our courts will be prepared to, subject to certain limitations, delete words in order to make a restriction lawful, but they won't

	introduce or modify words. The deletion of words to make the restriction enforceable is colloquially referred to as “blue pencilling”. As said, excess words or the absence of a sufficient narrowing of a restriction can have a disastrous effect where that effect is that the whole of the covenant falls away. So for example, a covenant which prevented the employee from working across the UK when their work was only limited to a particular part of the UK was held to be too wide and unenforceable. As a second example of a failed restrictive covenant, this time a non-dealing restriction which was struck down, and quoting from the restrictive covenant, “any business dealings with any client of the company in the previous year and with whom the employee dealt”. This restriction was too wide because it covered all business dealings with no connection to those of the company or the employee.
Ellie	You acted for Egon Zehnder in their very high profile, and ultimately successful, appeal in the Supreme Court back in 2019. Summarise for us what the issues were in that case.
Patrick	It was the first time in about a hundred years that the Supreme Court had looked at restraint of trade in an employment setting. The reality is that most cases are answered positively or negatively depending on whether you’re on the winning or losing side at the point of a high court litigation. Indeed, most are settled through negotiation after some sparring on the enforceability of the covenant. In Egon Zehnder, the Supreme Court was asked to look at three issues. First, bearing in mind that the concept of restraint of trade is capable of evolving over time, whether the concept had altered over the years. The second was whether the meaning of the words “interested in” could hold more than one meaning, depending on the setting of that phrase. And third, and most relevantly, in what circumstances and conditions could the courts remove excess wording from what would otherwise be an unenforceable covenant, such that the remaining words produced an enforceable restriction? It’s this third question that has had the most impact on interpreting and enforcing covenants that might otherwise have failed. The court allowed for the deletion- or “blue-pencilling” if certain conditions were met. Ultimately, the decision makes blue pencilling slightly easier than might otherwise have been the case if the reasoning in another line of cases had been followed.
Ellie	So let’s take a step back for a moment then from litigation and talk about the actual situation on the ground, as it were, and the people challenges that you’ll need to address. So let’s say you’ve got a pretty watertight non-compete clause, and yet despite that, your departing senior exec has said they’re going to work for a competitor straight away in breach of those post-termination obligations. How far should the organisation go in enforcing that non-compete clause? Because the reality is that that’s going to be viewed in a certain way by the market as well as existing employees.
Patrick	As is often the case, there’s no one single answer to the best approach. Much depends on the facts and context. The starting point and often the end point is cost. This is not exclusively cost viewed through the lens of legal fees, but a holistic review of cost as an aggregation of economic damage caused by the potential for market competition, the risk to the stability of the workforce or customer connections, or the likelihood of the exploitation of confidential information, or the damage to brand in a departure that is uncoordinated and unplanned. Alongside these balanced interests, the employer will recognise that enforcing restrictive covenants, especially by injunction, will absorb significant senior leadership time over a short and intense preparatory period when the relevant evidence is being collated and curated. Now all the time employees and potential competitors, including possibly the current recruiting company, will be watching the employer’s response carefully because that reaction will illustrate, to a degree, the employer’s appetite to hold its employees to their prior promises and to protect its interests, including by the ultimate route of litigation. The employee and future employer will face the same challenges – cost, reputation, market perception. They’ll be weighing up the same concerns, albeit from the other side of the fence. Ultimately, and there’s a truth to this, no one is sleeping well, not least because litigation is to some degree a gamble. Naturally, there are circumstances where the relationship is so toxic and destructive, or the approach of one party so unreasonably intransigent that the ability to resolve the potential dispute is negligible. However, in recognising the mutual discomfort to all in litigation and also the relatively logical nature of the law, resolution should be possible. However, that’s best achieved by balanced objectivity, which is not always easy when relationships are broken down. The very best lawyers I have worked opposite are those who protect that clear sighted objectivity, that quality of robust and strong diplomacy whilst maintaining a preparedness to litigate.
Ellie	Putting to one side those various factors you mentioned, if you do decide to litigate, how do you deal with that interim period while you’re awaiting the outcome of the injunction application? Because you’re going to have to think really carefully, aren’t you, about what you say to clients and colleagues about what’s happening?
Patrick	That’s right. It’s ultimately about establishing a clear narrative about what is happening and why. That narrative, both internal and external, must be consistent, reassuring markets, customers, and existing employees, especially those close to the departing person. Their legal strategy must dovetail with any PR and

	corporate communications teams, especially as it often does, the litigation is likely to hit the press. A message of considered and calm control is critical, particularly as an injunction hints that the potential damage a departing employee can cause to the business. After all, an injunction is only brought because the conduct that an employee is seeking to restrain will, if left unchecked, harm the company significantly.
Ellie	So, let's say you're an organisation and you've been informed that one of your senior execs is going off to work for a competitor and they've had access to valuable confidential information and trade secrets. What would the organisation actually need to be saying at that point to the departing employee?
Patrick	As an organisation, you'll want to move quickly and robustly. It's not a moment for delay or indecision. The first step is to be resolutely clear to the employee about what is expected of them with a focus on their existing and future obligations. These obligations will embrace those duties that run through employment, fidelity, trust and confidence and for senior employees, fiduciary duties. There'll be deeper and broader express rights in the employment contract in relation to trade secrets and confidential information. These will be repeated. And in the hope that they exist, an employer will repeat also post-termination restrictive covenants and emphasise the absolute requirement to comply with these terms. This requirement might be further supported by a request that the employee provides an undertaking to comply with any restrictions. More practically, the employer will be ensuring the return of all property assets and information, especially laptops, mobiles, passwords. Decisions will also have to be taken in relation to what the employee can or cannot do during any period of notice, including whether they stay at home without access to employees, customers or company communications.
Ellie	Okay, so continuing with that scenario then, the bad news is that when you look at the particular restrictive covenant, you realise that actually the way it's been worded means that it's not entirely enforceable. How would you deal with that tactically?
Patrick	There's a judgment call to be made. That call will need legal and business input. The question comes back to the blue pencil test I talked about earlier. The issue is whether the defect in the restrictive covenant can be remedied by deleting the offending wording so that the remaining language creates an enforceable restrictive covenant. Ultimately, it's only the court that can affect this change, making what is otherwise unenforceable, enforceable. The change creates a benefit for the existing employer, where but for the amendment, the benefit would be unavailable. And the courts have said that in the more recent blue-pencilling cases that they will make this change, but that it will be at a cost to the existing employer. Now that cost manifests itself through the litigation costs regime. The ordinary rules on costs allow the winning party, so here it would be the employer enforcing a lawful restrictive covenant, to recover their costs from the losing party. However, where the employer has had to blue pencil a restrictive covenant to win that case, the courts are likely to apply a less advantageous cost regime, reducing significantly the cost that the winning ex-employer can recover. But one possible way for an ex-employer to avoid this negative cost regime if blue pencilling is required, is to, from the very start, identify the drafting failure to the other side, describing the words to be removed and the enforceability of the retained clause. However, this often feels counterintuitive for teams who believe that litigation is best advanced by not identifying any weaknesses. The downside of treating litigation as a series of bold and forceful assertions is that it comes back to bite in the form of an adverse cost findings. And that could have been avoided by a more measured and nuanced approach.
Ellie	And looking at it from the other side, because you advise both organisations and senior individuals, what would the departing employee's strategy be if they want to work for a competitor, but they've got post-termination restrictions in their contract?
Patrick	Yes, I sometimes move from gamekeeper to poacher acting for the departing senior employee. Broadly, there are one of three options to manage their departure. However, before going into the options, I'm working on the assumption that the restrictions are enforceable, including by blue pencilling. Equally, I'm assuming, and I know that this is a significant assumption, that the employee has done nothing to breach any of their normal freestanding employment duties of trust, confidence, and fidelity. And they haven't, in securing that role, encouraged others to join or do business with them. And also, they haven't abused confidential information.
Patrick	There are no offending emails, texts or WhatsApp messages, so they're the holy grail, the perfect employee. So to the three general options, the first is the dynamite option. Can the employee identify any behaviour of their employer that could amount to a repudiatory breach? Or alternatively, can the employee agitate so that their employer acts irrationally, allowing the employee to rely on that behaviour to hint at constructive dismissal?

Patrick	This is important because a breach of contract by an employer, including a constructive dismissal termination means the restrictive covenants fall away, being unenforceable. However, this route is genuinely attritional. It also results in bridges being burned and is more obviously appropriate in an already challenging environment. If an employee can co-exist with uncertainty or friction, then it offers a route. But this is not for everyone and equally would be inconsistent for employees in an ordinarily supportive environment where a departure is for career progression rather than a rejection of the existing company. The other two options flow from a situation where the contract is not terminated by the employer in breach. The options fall broadly into two ethical considerations of permission or forgiveness. The best approach then falls outside of the law and into a reflection on the personalities, aspirations and on occasion the idiosyncrasies of those involved. This will include the relationship between the current and future employer. The negotiations between the parties, provided they are not beyond all repair, will involve some give and take. For example, negotiating away a non-compete for an undertaking to comply with non-solicitation provisions. Also, I've known companies to "trade" employees, swapping one for another.
Ellie	Interesting. So finally, I just want to ask you about the situation where a departing senior exec poaches existing employees to work for a competitor and how the organisation deals with that because that can be hugely damaging to a business.
Patrick	I would anticipate the employer to have processes and protocols in place for dealing with a departing employee. This clearly avoids delay and hesitation. The key, as mentioned previously, is to be able to move quickly and robustly. The protocols will include the capture and review of information held on company systems and platforms, including a proper analysis of data that has been transferred to other devices or externally. An employer will look to communicate directly with the senior executive, repeating and reinforcing their obligations, including in relation to restrictive covenants. The duty of fiduciary will be of particular importance, especially in relation to any wrongdoing during employment. Property should be returned immediately, especially mobiles and laptops. And then depending on the circumstances a lockdown of IT systems should also be effected. The net and review will in all likelihood extend also to the other employees. And ultimately, it's a situation where, as an employer you'll be gearing up to launch an injunction. And it's just worth bearing in mind that in team moves, there's always a breach.
Ellie	Well, Patrick, thank you so much for joining me today and providing such a comprehensive explanation of how restrictive covenants operate to protect businesses in the UK and how to navigate those tricky situations. Today, we obviously focused on what happens when a senior individual leaves their organisation. And in a follow-up to this episode, we'll be looking at how businesses can proactively avoid that situation by supporting and retaining their senior talent, which is going to be a key priority for people teams, given the UK's aging workforce and the government's push to boost the numbers of older people in work. So do look out for that. If you would like to revisit anything we discussed today, you can access transcripts of every episode of the Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch. Or if you have any questions for me or Patrick or perhaps suggestions of topics you'd like us to cover on a future episode, please get in touch by emailing us at theworkcouch@rpc.co.uk. We'd really love to hear from you. And finally, if you enjoyed this episode, we'd be so grateful if you could spare a moment to rate, review and subscribe, and please spread the word by telling a colleague about us. Thank you all for listening and we hope you'll join us again in two weeks.