



How your employment contract may still apply after you leave employment

By Geoffrey E. Odongo



X was employed as a school manager at B school. His contract of employment provided that he would not be employed or carry on business with B's competitors within a period of two years after leaving employment with B. It also provided that during the two-year period, he would not solicit for business from anyone who was a pupil or a parent at B School at any time during the last 12 months of his service with B, that he would also not directly or indirectly entice away from B School, a pupil, teacher, or employee of B and that he would not join a competing school or operate/ run a school.

The above scenario is a case of a Restrictive Covenant in an employment contract. Restrictive covenants are meant to protect an employer's legitimate business interests including trade secrets, goodwill and business connections. Restrictive covenants in employment contracts can take four forms i.e.

1. Non-disclosure clause: Where an employee agrees not to disclose trade secrets or information, he obtained during the period of his employment, which the employer considers confidential.

2. Non-compete clause: Where the employee agrees not to operate a business similar to his former employer's business within a certain radius or within a certain period after leaving employment or not to be employed by a competing business.

3. Non-solicitation clause: Where the employee agrees not to solicit for business or entice a person who was a customer of the employer.

4. Non-poaching clause: Where the employee is restricted from enticing the employment of former colleagues

Generally, a person is bound by the terms of a contract including restrictive covenants. It is assumed that such an employee was not under any undue influence or coercion when signing the said agreement. Therefore, restrictive covenants are legal and enforceable. However, the employer has to show that indeed the employee has breached the covenant and that as a result, the employer has incurred losses.

The Court has previously held that in order to be enforceable, such restraining agreements must seek to restrain the use of only that which is uniquely that employer's secret and not knowledge and skill which can be acquired by learning, experience or development in technology. The Employer must therefore demonstrate –by providing evidence, the nature of the secrets or information that the employee gained access to and the manner in which he is likely to divulge or use the same in his current employment to the detriment of the employer.

The Court has the power to declare the provisions of such contract void where the Court is of the view that the covenant is not reasonable either in the interest of the parties or it is against public interest. For instance where the employee is likely to unreasonably suffer loss of employment based on the restrictive clause.

Important to note is that generally, an employer who unfairly terminates or dismisses an employee is not allowed to enforce any restrictive covenant in the employment contract.