

Navigating Non-compete Clauses in a Competitive Tuition Industry

*Written by: Shjoneman Tan

I. Introduction

You work for a tuition centre, but you are overworked to the point where you have been repeatedly burning your weekends. Not to mention, you are also underpaid. You've tried raising these issues with your ex-boss but to no avail. "Enough!" you cry. You resign. Shortly after, you join your friend's tuition company. Enraged, your ex-boss sends you a letter, demanding that you pay liquidated damages for breaching the non-compete clause in your employment contract.

The above situation can be distressing for any ex-employee. Hence, this article seeks to educate employees, particularly tuition teachers, on non-compete clauses. It will also demonstrate why it is challenging for employers to enforce such clauses, largely due to the courts' strict approach when assessing the validity of such clauses.

II. Discussion

This section will set out what a non-compete clause entails, followed by whether you are bound by the clause and hence liable to pay liquidated damages.

A. *What is a non-compete clause?*

A non-compete clause is a term in your employment contract which, if enforceable, restricts you from joining a competing (tuition) business for a specified duration after leaving your ex-employer.¹

B. *Are you bound by the non-compete clause?*

Although you have signed the employment contract, the good news is that you may not be bound by the non-compete clause. Under Singapore law, non-compete clauses in employment contracts are generally unenforceable,² as they risk depriving employees of their livelihood

¹ Tay Yong Seng and Ang Ann Liang, "Restrictive Covenants in Employment Law" [2018] SAL Prac 17 ("*Restrictive Covenants in Employment Law*") at [1].

² *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2007] SGCA 53 ("*Man Financial*") at [45].

after leaving their ex-employer(s).³ Importantly, the law recognizes the value of “protecting a person’s fundamental liberty to earn a living, and to do so where and how he chooses.”⁴

Usually, a non-compete clause is unenforceable *unless* the employer can prove that:

- a. the clause protects a legitimate interest; and
- b. the scope of the clause is reasonable.⁵

(1) *Does the clause protect a legitimate interest?*

There are generally two legitimate interests which tuition businesses may use to justify a non-compete clause: the protection of (a) trade secrets and (b) customer connections.⁶

(a) Trade secrets

It will probably be difficult for tuition businesses to argue that teaching materials are “trade secrets”, which refer to information of a highly confidential nature,⁷ such as pricing and marketing strategies.⁸ For tuition businesses, teaching materials are unlikely considered “confidential” because they are widely disseminated to students. Further, if your employment contract contains a “confidentiality clause”, your ex-employer cannot rely on the protection of trade secrets as a ground to justify the non-compete clause,⁹ as the former already serves the purpose of protecting its materials. Thus, another legitimate interest is required to justify the non-compete clause.¹⁰

(b) Customer connections

Tuition businesses would more probably use the protection of “customer connections” as a ground to justify the non-compete clause. “Customer connections” refer to the relationships between the business and its students, which may be lost if employee-teachers leave to join another tuition business. When relying on the protection of “customer connections” as a ground

³ “Restrictive Covenants in Employment Law”, *supra* n 1 at [30].

⁴ *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] SGHC 64 (“*Lek Gwee Noi*”) at [33].

⁵ *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2011] SGHC 266 (“*Smile Inc*”) at [67].

⁶ *Lek Gwee Noi*, *supra* n 4, at [58].

⁷ *Man Financial*, *supra* n 2, at [83(b)].

⁸ “Restrictive Covenants in Employment Law”, *supra* n 1 at [16].

⁹ *Man Financial* at [92] citing *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR (R) 579 (at [48] – [49]).

¹⁰ *Ibid.*

to support a non-compete clause, the employer must show that the ex- employee had *influence* over students,¹¹ such that there is a risk of him diverting them to his new employer.¹²

Thus, it is important to consider the extent of your *influence* on students.¹³ The lower your extent of influence, the less likely your ex-employer can justify protecting “customer connections”.¹⁴ In our context, possible factors in assessing the extent of influence include:

- a. whether you were working part-time or full-time;
- b. your duration of employment at the centre;
- c. your seniority;¹⁵ and
- d. how lessons were conducted at the centre.

Regarding factor (a), part-time teachers generally take fewer classes, and thus the frequency of contact¹⁶ with students is lesser. The teacher-student relationships are likely to be less close as compared to full-time teachers, thus lowering the extent of influence. Similarly, for factor (b), the shorter your duration of employment at the centre, the less likely that the teacher-student relationships are close. For factor (c), the less senior your position is at the centre, the lower your level of influence. Lastly, for factor (d), some tuition centres hold classes in a big group, with little one-to-one interaction with students. Others adopt a method of one-to-one tuition in a group: a teacher moves around to individually help each student.¹⁷ For the latter, the teacher’s extent of influence on students is likely to be higher due to his or her ability to interact more personally with the students.

(2) *Is the scope of the non-compete clause reasonable?*

Importantly, the scope of the non-compete clause must be reasonable. Courts have applied this principle strictly and will readily strike down clauses if the scope is unreasonable.¹⁸ Thus, there is a good chance the clause may be unenforceable. There are four questions to consider in determining whether the clause is reasonable.

(a) Does the clause apply to all employees?

¹¹ *Id* at [93].

¹² *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 (“*Itochu*”) at [86] – [87].

¹³ *Lek Gwee Noi*, *supra* n 4 at [74(f)].

¹⁴ *Id* at [73] – [75].

¹⁵ *Id* at [74(e)].

¹⁶ *Id* at [74(c)].

¹⁷ Aspire Hub Education < <https://aspirehub.com> > (accessed 18 October 2021).

¹⁸ *Itochu*, *supra* n 12, at [90].

Firstly, does the non-compete clause restrain all employees regardless of their seniority or nature of work? As held in *Powerdrive*,¹⁹ such clauses are unenforceable as their true purpose is to restrain competition, rather than to protect a legitimate interest.²⁰ Thus, if the non-compete clause is present in employment contracts for all employees — whether full-time teachers, part-time teachers, HR staff or other staff, it is likely that the clause is used to restrain competition, and it would thus be unenforceable.

(b) What are the activities being restricted?

This question concerns the “activities” which the non-compete clause restricts you from doing. If the clause is an extremely wide one which completely prohibits you from working in the tuition industry, it is likely to be unreasonable.²¹ However, if it only restricts you from engaging in certain specific activities which you were involved in when working for your ex-employer, it may be reasonable.²² For example, if you were teaching mathematics for your ex-employer, a clause which restricts you from teaching mathematics (but not other subjects) after your employment ends may be reasonable.

(c) What is the duration of the restriction?

If no duration for the restriction is stated, the clause is considered unreasonable as a clause with no time limit could potentially mean the restriction on the employee would last forever.²³ Moreover, where a duration for the restriction is stated, whether this stated duration is reasonable depends on whether the employer can provide justification.²⁴ Relevant factors include: the extent of the employee’s influence on students²⁵ and the nature of the industry.²⁶

A two-year restriction would likely be unreasonable for tuition teachers; courts have permitted such a duration only for specialised industries such as the marine hydraulic installations industry.²⁷ Conversely, a shorter duration of six months to one year may be reasonable.

¹⁹ *Powerdrive Pte Ltd v Loh Kin Yong Philip* [2018] SGHC 224 (“*Powerdrive*”).

²⁰ *Idat* [26] and [126].

²¹ “Restrictive Covenants in Employment Law”, *supra* n 1 at [30]; *PH Hydraulics* at [67].

²² *Ibid.*

²³ *Smile Inc*, *supra* n 5 at [101].

²⁴ *Powerdrive*, *supra* n 19 at [47].

²⁵ *Man Financial*, *supra* n 2 at [118], citing *Cactus Imaging Pty Limited v Glenn Peters* [2006] NSWSC 717 at [56].

²⁶ *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] SGHC 133 at [67].

²⁷ “Restrictive Covenants in Employment Law”, *supra* n 1 at [81].

(d) Are there geographical restrictions?

This question concerns the areas to which the restrictions apply. As held in *Buckman Laboratories*,²⁸ the geographical restriction is reasonable if it is limited to the area where the employee had actual and significant contact with customers.²⁹ Conversely,, a non-compete clause which has no geographical limits or, in our context, one which applies to the entire Singapore, is likely to be unreasonable.

However, a restriction which applies only to a small area near your ex-employer's business may be reasonable. In *Lyons*,³⁰ the non-compete clause restricted employee-dentists from joining any rival clinic within five miles of their ex-employer. The court found this to be reasonable as patients may not want to be inconvenienced by travelling to a clinic outside the five-mile radius.³¹ In our context, a similar geographical restriction may be reasonable, given that students are unlikely to join the ex-employee's new tuition centre if it is too far from the original centre, for reasons of convenience.

C. Do you have to pay liquidated damages?

"Liquidated damages" is a pre-determined amount which you must pay for breaching a non-compete clause and causing your employer to suffer losses. For example, the contract may stipulate that you must pay \$500 if you breach the non-compete clause. Given the courts' strict approach towards non-compete clauses, the clause will likely be unenforceable in the first place unless it was drafted extremely carefully in terms of activities, duration and geographical restrictions.

However, even if the non-compete clause was valid, you might still not be liable to pay liquidated damages. Courts will consider whether the amount of liquidated damages stipulated is a genuine estimation of the losses your ex-employer will suffer.³² For example, where the sum of liquidated damages specified by the employer is so extravagant that it far outstrips the greatest possible loss your employer could possibly suffer from you joining a competitor, the

²⁸ *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR (R) 205 ("*Buckman Laboratories*").

²⁹ *Id* at [24].

³⁰ *Lyons v Multari* [2000] OJ No 3462 ("*Lyons*") at [29].

³¹ "Restrictive Covenants in Employment Law", *supra* n 1 at [60] – [61], citing *Lyons v Multari*.

³² *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another* [2020] SGCA 119 at [152].

clause will be unenforceable. This is because the intent of such a clause is to punish you, rather than to compensate your employer for his loss.³³

III. Conclusion

Due to the need to establish a “legitimate interest” and “reasonableness” before a non-compete clause can be enforced, it will likely be challenging for tuition businesses to enforce non-compete clauses against ex-employee teachers. Therefore, tuition teachers should refrain from paying any demands by ex-employers.

Despite being challenging to enforce, non-compete clauses are still often included in employment contracts, as they can be used by employers as a “scare tactic” to warn ex-employees not to divert any business away from them. Practically speaking, employers are unlikely to sue employees due to the high costs of litigation. Still, you may attempt to prevent a possible escalation of the matter to the courts through communicating with your ex-employer. For instance, you could give assurances that you will not solicit any former students. You could also explain your reasons for leaving: being overworked and underpaid. If you are a part-time employee earning less than \$2,600,³⁴ you could highlight your entitlements under the Employment Act with regards to rest days, working hours and overtime pay.³⁵ For example, part-time employees are not required to work more than 6 hours without a break.³⁶ By explaining these reasons, perhaps your ex-employer might be “convinced” to drop his claim altogether.

³³ *Id* at [94].

³⁴ Employment Act (Chapter 91, Rev Ed 2009), (“Employment Act”), s 35(b).

³⁵ Employment Act at s 38(4), read together with Employment (Part-Time Employees) Regulations (Rg 8, Rev Ed 1997), rg 5(1).

³⁶ Employment Act, s 38(1) and s 2(1).