Are you too interested in your former employees' post-termination restrictions?

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We are often asked to review employment contracts, including post-termination restrictions. It is increasingly common to see covenants that impose some form of restriction on the amount of shares an employee can hold or "be interested in" for other companies whilst they are still an employee. There is no problem with such clauses.

We also see a number of post-termination restrictions that either restrict the former employee from holding "any interest" in a competing business, or limiting the amount of shareholding that they can have. If your employment contracts use this language then this could lead to the entire restrictive covenant being unenforceable.

As a reminder, the legal position in relation to restrictive covenants in Guernsey and Jersey is very similar. Restrictive covenants are a restraint of trade and therefore they are unenforceable as a matter of public policy, unless the covenants protect a legitimate business interest and the covenant is no wider than necessary to protect that interest. The applicable principles in both islands are also comparable to those in England and, in the absence of local judgments, the Jersey courts will look to decisions from England (CPA v Keogh [2015] JRC091) and the Guernsey courts are likely to do the same. As a result, English decisions on restrictive covenants are likely to be persuasive in the courts in both islands.

A recent English Court of Appeal decision, Tillman v Egon Zehnder Limited [2017] EWCA Civ 1054, highlights the need to carefully consider how these clauses are drafted. The employer in this case was unable to enforce the restrictive covenants, and also ended up having to pay the former employee's legal costs. In this case there were two relevant restrictions:

"*You shall not, during the course of your employment, directly or indirectly, hold or have any interest in, any shares or other securities in any company whose business is carried on in competition with any business of the Company or any Group Company, except that you may hold or have an interest in, for investment only, shares or other securities in a publicly quoted company of up to a maximum of 5 per cent of the total equity in issue of that company*"

"You shall not without the prior written consent of the Company directly or indirectly, either alone or jointly with or on behalf of any third party and whether as principal, manager, employee, contractor, consultant, agent or otherwise howsoever at any time within the period of six months from the Termination Date:

> *- directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company or any Group Company which were carried on at the Termination Date or during such period*"

The two clauses above would need to be read together, and it is clear from the contract that "interested in" was meant to include holding or purchasing shares. The Court of Appeal held that "interested in" must be given its ordinary and natural meaning. Even holding a single share in a listed company is sufficient for someone to have an interest for the purposes of the above clauses. The post-termination restriction therefore attempted to prevent former employees from holding any shares in any competing businesses. This was too wide a restriction and led to the whole restrictive covenant being unenforceable.

The two clauses also created a problem, as existing employees were entitled to hold up to 5% of the shareholding in a competing business, but former employees were not allowed any shares at all. This could not be justified and would create an anomalous situation.

The Court of Appeal was also of the view that the covenant attempted to restrict a former employee from being indirectly concerned with any competing business. The effect of this was similar to the attempt to prevent any interest in a competitor. Both phrases restricted any shareholding in a competitor and therefore the Court of Appeal held that the restrictive covenant was unenforceable.

As a result of this decision, we strongly suggest that you review your employment contracts, in particular the restrictive covenants, to see if they contain any wording that does or could be seen to attempt to restrict a former employee from holding shares in any other business. If so, then these covenants should be redrafted as a matter of urgency.

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