# The often overlooked competition law aspects of restrictive covenants in contracts

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We are all familiar with the perennial conversations around restrictive covenants in employment contracts and service contracts of a similar nature. Employers want maximum restriction on employees who leave but must be careful not to overstep the mark as covenants which are unduly restrictive risk being struck out by the courts.

From an employment perspective it is a question of balancing competing interests. An employer will have a legitimate business interest in limiting the sharing of confidential information and business knowledge to which employees may be privy and ensuring that such information does not fall into the hands of competitors especially in smaller economies such as Guernsey. Employees will have a right to work and earn a living doing the job that they are skilled and practised in which, as noted, may necessitate them going to work for a competitor. A benchmark of twelve months is often cited as the average lifespan of usefulness of business data and confidential information albeit that deviation from this may be justified in specific sector circumstances.

Other factors will include the seniority of the employee and the nature of their relationship with the organisation. Longer periods may be justified where a person is a partner in a business rather than a salaried employee and the courts will look at the reality of the nature of the role and relationship rather than simply title.

Another dimension, which is often overlooked, is the impact of the Competition (Guernsey) Ordinance, 2012 (the **Competition Ordinance**) since it came into force on 1 August 2012 which we have recently seen used in disputes. There are two ways in which the Competition Ordinance may be relevant to restrictive covenants in employment contracts and service contracts of a similar nature (and indeed in contracts generally) and both are under limbs of the legislation which seek to regulate conduct in the marketplace.

Firstly, an unduly onerous restrictive covenant may amount to anti-competitive practices in contravention of Section 5 of the Competition Ordinance, by virtue of having the "object or

effect of preventing competition within any market in Guernsey for goods or services". It is important to note that this means that an employer does not need to intend to prevent competition; the mere fact that a restrictive covenant might have such an effect would be sufficient.

Secondly, if the employer enjoys a dominant position in a particular market in Guernsey an unduly onerous restrictive covenant might also amount to an abuse of dominance and contravene Section [1] of the Competition Ordinance.

In either case, there are a number of consequences which might flow from such a finding in addition to the provision being void as might also happen under a traditional employment law analysis. The employer could be exposed to significant financial penalties (up to 10% of worldwide turnover for up to three years); punitive or exemplary damages as well as directions from the Guernsey Competition and Regulatory Authority (**GCRA**) which has wide statutory powers to investigate, request information and interview personnel.

Employers should be aware that a disgruntled employee could file a complaint with the GCRA and might also bring a civil action for damages pursuant to section 42 of the Competition Ordinance. Both employers and employees would do well to remember that if an investigation is opened following a complaint to the GCRA, such investigation may continue regardless of whether the parties settle their differences in the meantime. In other words, GCRA is not representing an employee's interests but rather considering public policy.

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