The supreme view on post-termination restrictions

By Sophie Vanhegan - 31 July 2019

To much fanfare and the great excitement of many employment lawyers, the UK Supreme Court recently delivered its first judgment on employment post-termination restrictions for a century in Tillman v Egon Zehnder. What was it all about and what does it mean for restrictive covenants going forward?

What this decision means for employers?

In this case, the Supreme Court accepted that the words "interested in" included in a non-compete restriction on a former employee were unenforceable (as they prevented her from simply holding a few shares in a competitor), but held that they could be struck out or "severed" from the rest of the non-compete clause, so that the non-compete became enforceable.

There are a few takeaways from this decision for employers:

- This decision may open the doors to more employers trying to enforce restrictions which have a couple of words which may fall foul as being too broad, on the basis that they can be severed. So we may see more willingness on employers to "have a go" at enforcement or threatening enforcement.
- Although the Supreme Court did sever the problematic words in the restriction in this case, it is still sensible to expressly carve out minority or passive shareholdings.
- Expect to see more arguments between employers and employees as to whether risky words can be deleted from covenants without generating a "major change" in the overall effect of the post-termination restrictions. What constitutes a "major change" is a point which we expect to see developed in future case law.
- But beware, as the Supreme Court has left open who should pick up the costs when an employer successfully persuades a court to sever certain words from a restriction in order to make it enforceable – it suggests that the employer may still have to pick up some or all of the legal costs for not getting the drafting of their restrictions right in the first place. So it still pays to carefully draft your post-termination restrictions and to keep them under review so that you don't have to rely on a severance argument in the first place.

The facts

Ms Tillman was a head-hunter for Egon Zehnder. In her employment contract, she agreed not to "directly or indirectly engage or be

concerned or interested in" any competing business for six months (a non-compete). She resigned and left Egon Zehnder in January 2017, and then sought to work for a competitor in May 2017 (before the non-compete expired). Tillman argued that the non-compete was not enforceable because the words "interested in" prevented her from holding even a small number of shares in a competitor, and it was therefore an unreasonable restraint of trade – as a guiding rule, post-termination restrictions will be in restraint of trade (and therefore unenforceable) if they are wider than is reasonably necessary to protect a legitimate business interest of the employer. The Court of Appeal agreed with Ms Tillman, so refused an injunction prohibiting her from joining a competitor before the term of the non-compete expired.

The Supreme Court decision and its impact on employers

Following their Court of Appeal defeat, Egon Zehnder appealed to the Supreme Court. The Supreme Court accepted that the words "interested in" were unenforceable, but held that they could be struck out or "severed" from the rest of the non-compete clause, so that the non-compete became enforceable. So, Egon Zehnder won. The Supreme Court held that there are three criteria to meet in order for severance to be possible:

1. The so-called "blue pencil" test – you must be able to remove the offending words without needing to add to or modify the remainder of the covenant.
2. What remains must continue to be supported by adequate consideration.
3. The removal of the offending provision must not generate any major change in the overall effect of the post-termination restrictions for the contract (and it is for the employer to prove this). (This is a **new** test.)

So if you have a post-termination restriction which would be enforceable if you can sever some words within it, these are the criteria which should now be looked at to see if the courts would allow this.