SQUIRE PATTON BOGGS

UK Supreme Court Shines Spotlight on Restrictive Covenants

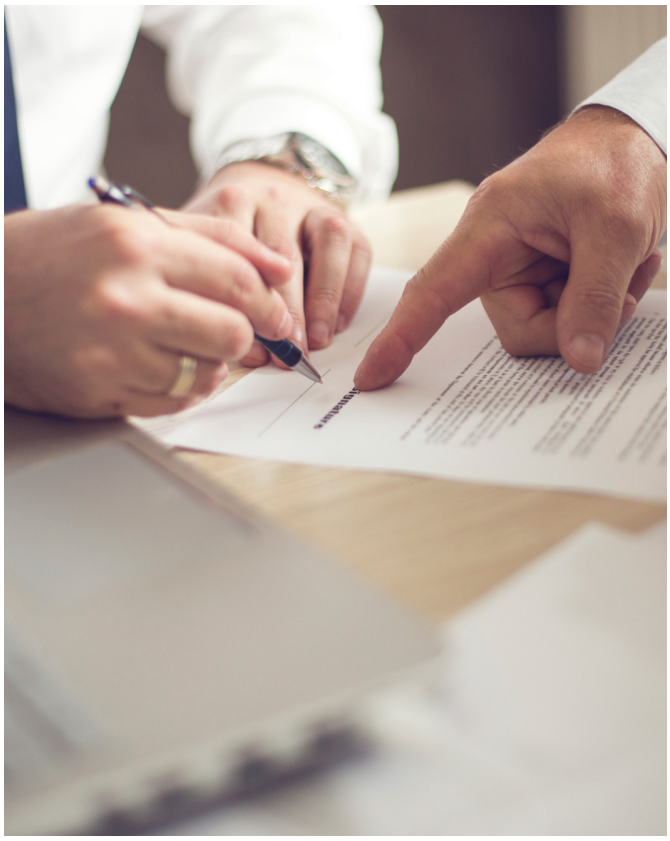
11 July 2019

The UK Supreme Court has given its judgment in *Tillman v Egon Zehnder Ltd*, the first time it has considered a case involving restrictive covenants in the employment context in more than 100 years.

Ms Tillman started work for Egon Zehnder in 2004 and went on to become joint global head of its financial services practice area. Her contract of employment (the terms of which remained largely unchanged despite her various promotions) contained a number of post-employment restrictive covenants. The focus in this case was on the non-competition clause, the key bit of which said that for six months post-employment she would not "directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of [Egon Zehnder]". Elsewhere in her contract was a prohibition on holding during her employment more than 5% of the shares of any competing company.

In January 2017, Ms Tillman resigned. She indicated that she would be bound by all her restrictive covenants except for the non-competition provision, as above, which she claimed was an unreasonable restraint of trade and, therefore, void. Her argument was that by prohibiting her from being "interested in" a competing business she could not even hold a minority shareholding in such a company. Although she had no intention of actually holding any such shareholding, she claimed that the mere inclusion of these words made the clause impermissibly wide and, therefore, unenforceable. So there were three questions: (i) did "interested in" include a minority shareholding; (ii) if it did, did that make the clause too wide-reaching to be enforceable; and (iii) if it did, could it still be saved by severing (or "blue pencilling", after the tool of wartime censors) those words?

Egon Zehnder sought an injunction to restrain Ms Tillman from starting work for the competitor. The High Court granted this, but the Court of Appeal subsequently set the injunction aside. The Supreme Court has now overturned the Court of Appeal's decision and ruled that it was appropriate to grant an injunction. Even though this was no longer a live issue here, as the restrictive covenants expired in 2017, a final determination on the merits was required because we understand it had repercussions for the parties' cost positions and on Egon Zehnder's undertaking on damages to Ms Tillman had the injunction failed.



In answer to those three questions, the Court agreed that including the words "interested in any business" in the non-competition clause rendered it impermissibly wide, as it would have prevented Ms Tillman from holding even a minority shareholding in a competing business. It also made no sense that while she could hold 5% of a competitor's shares *during* her employment, she could not hold *any* for six months after it ended. In response to the third question, the Court considered two conditions to the wielding of the blue pencil – first, that it could only delete and not add or amend and, second, that the deletion should not materially alter the sense of the thing. The burden will be on the employer to show this. It went on to say that in this case these words could be severed and removed from the rest of the clause to leave a binding non-competition provision. This was because the removal of the prohibition against Ms Tillman being "interested in" a competing business would not generate any major change in the overall effect of the restraints. She would still have been prevented from being actively interested in a competing business.

This decision is a useful one for employers, as it means that if part only of a restrictive covenant is found to be an unreasonable restraint of trade, this will not necessarily render the whole covenant unenforceable. While blue-pencilling remains a discretionary remedy, this represents a more liberal and purposive approach to the issue of severance.

This case is of relevance to employers because the "interested" wording of the non-competition clause is fairly typical, although we would always recommend that you include an express carve-out to allow a minority shareholding in a competing business, especially if this is okay *during* employment. The Supreme Court also looked at the word "concerned" as in the common formulation "concerned or interested". Did that create the same problem? No, because "concerned" implied some active engagement or involvement in the competing business and it would not be too wide to prohibit that for a period post-termination.

This decision does not mean that employers no longer have to take care when drafting restrictive covenants in the expectation that any restrictions which are too wide will simply be deleted by the courts, not least because the deletion remedy has significant limits to its application and most employers will not want to go to the time and expense of litigating over the enforceability of restrictive covenants.

Remember, the starting point is that restrictive covenants are void as being an unlawful restraint of trade. They are only enforceable to the extent they go no further than is reasonably necessary to protect the employer's legitimate business interests.

Another learning point to take from this case is the importance of reviewing and updating restrictions when an employee is promoted or changes role. In this case, Ms Tillman was employed throughout her time at the company on the terms of her original contract. In this case nothing turned on it, as the restrictive covenants were still relevant to what she was doing when she left the business, but this will not always be the case. If you do not review and amend restrictive covenants to reflect what an employee is actually doing, you might find yourself exposed as and when they leave the business. They might have transferred to an activity not covered by the early-days covenant, for example, or might still have, say, their initial three month restraints when their later seniority really required six or 12.

Contacts

Caroline Noblet
Partner, London
T +44 207 655 1473
E caroline.noblet@squirepb.com

Annabel Mace
Partner, London
T +44 207 655 1487
E annabel.mace@squirepb.com

Charles Frost
Partner, Birmingham
T +44 121 222 3224
E charlie.frost@squirepb.com

Bryn Doyle
Partner, Manchester
T +44 161 830 5375
E bryn.doyle@squirepb.com

David Whincup
Partner, London
T +44 207 655 1132
E david.whincup@squirepb.com

Natalie Bellwood
Partner, London
T +44 207 655 1542
E natalie.bellwood@squirepb.com

Ramez Moussa
Partner, Birmingham
T +44 121 222 3346
E ramez.moussa@squirepb.com

Matthew Lewis
Partner, Leeds
T +44 113 284 7525
E matthew.lewis@squirepb.com

Janette Lucas
Partner, London
T +44 207 655 1553
E janette.lucas@squirepb.com

Miriam Lampert
Partner, London
T +44 207 655 1371
E miriam.lampert@squirepb.com

Alison Treliving
Partner, Manchester
T +44 161 830 5327
E alison.treliving@squirepb.com

Andrew Stones
Partner, Leeds
T +44 113 284 7375
E andrew.stones@squirepb.com