Restrictive Covenants – post termination restrictions

The most common restrictions are:

- Non-compete – This type of restriction prevents a person from directly competing or working for a competitor, usually within a specific area (e.g. 10 miles of your employer’s premises) and/or for a specific period of time (e.g. 6 months from termination).

- Non-dealing – This type of restriction prevents a person from working for your customers, clients and suppliers for a specific period of time (e.g. 6 months from termination).

- Non-poaching – This type of restriction prevents a person from enticing staff away from the business, again usually for a specific period of time (e.g. 6 months from termination).

Aim of the restrictions

Unless a restriction contained in a covenant protects a legitimate business interest, it is void on public policy grounds as being in restraint of trade. An employer may want to restrict an employee from working in a similar industry to protect their business interests. However, if the sole aim of the covenant is to prevent competition, it is unlikely that the courts will look at such a covenant favourably. In the event an employee is promoted or transferred the restrictive covenants ought to be reviewed to determine their appropriateness. Be mindful of breach of contract issues, arising as a result of the changing terms and conditions.
**Business interests**

A court will allow a restrictive covenant to be protected if it falls into the following categories:

- Trade connections (with customers, clients or suppliers) and, more generally, goodwill.
- Trade secrets and other confidential information.
- Stability of the workforce.

A business interest is capable of being protected even if it already exists in the public domain, East of England Schools CIC v Palmer and another, [2013] EWHC 4138 (QB).

**Ensuring that the covenants are incorporated into the contract**

It is important to ensure that restrictive covenants are incorporated into the contract of employment.

Burden on the employer to demonstrate validity of covenants The burden of proving is on the party asserting that a particular restrictive covenant is reasonable falls, (Herbert Morris Ltd v Saxelby [1916] 1 AC 688). The employer will need to demonstrate that the covenant provides adequate protection, but does not go further than is necessary to protect its legitimate interest.

Arguments by an employee, on the grounds of ignorance of the law and its practical implications of the restrictive covenants, are likely to fail. Failure by the employer to get the employee to sign the contract with the restrictive covenants, may render the covenants unenforceable.

**Timing of the agreement**

The reasonableness of a restrictive covenant is judged at the time it was entered into, normally at the commencement of employment. Court of Appeal’s decision in Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366

**Confidential information**

An employee is under an implied duty not to use confidential information following the termination of their employment, whether by reason of resignation or dismissal. Confidential information is usually defined in a contract of employment but typically
includes client information, customer accounts, price lists and quotes for tenders.

Factors that determine the reasonableness of the covenants in employment contracts

With regard to employment contracts, restrictive covenants are less likely to be regarded as reasonable, because of the unequal playing field between an employer and employee. These interests may be oppressive in nature, and if enforced, an employee would be deprived of the means to support themselves and their families. As such, "it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him...", Lord Atkinson - Herbert Morris, Limited Appellants v Saxelby Respondent, [1916] 1 A.C. 688. This is even if they acquired the skill and knowledge whilst working for you.

Covenants should be bespoke for the specific employee and their role. The court will take into account the parties’ individual circumstances. Factors that are relevant include the employee’s seniority, status and the fact that they were involved in negotiating the wording of the covenants at the time they entered into them.

Scope of the agreement
The overall scope, with regard to the length of the covenant and its geographical spread, will be considered by the courts. Joining a competitor "may well be held to be reasonable if limited to a short period" where other types of restriction did not offer sufficient protection, Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472. Lord Denning.

Salary levels
Salary levels are not a significant factor in determining the reasonableness of post-termination restrictions, Norbrook Laboratories (GB) Ltd v Adair and another [2008] EWHC 978 (QB).

Seniority of the employee
A senior employee who is likely to have knowledge of the business’s operational matters and confidential information would have more onerous restrictions upon their departure. In such circumstances, 12 month non-compete clause is permissible, Thomas v Farr plc and another [2007] EWCA Civ 118.

Summary - Reasonableness

In TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB) the High Court set out the following guidance for assessing the reasonableness of an employment restrictive covenant:

1. Step 1 – Consider what the covenant means;
2. Step 2 - Whether the former employer is able to demonstrate that it has legitimate business interests requiring protection in relation to the employee’s employment.
3. Step 3 - Is the restrictive covenant reasonable in scope for the protection of those interests.
4. Step 4 – if the court determines the covenant is held to be unreasonable, it renders the covenant void. However, even if the determination is held to be reasonable, the court has a discretionary power to grant an injunctive relief.
**Covenants not binding if employer is in repudiatory breach**

An employer’s breach of its terms contained in an employee’s employment contract, has the likely effect of releasing an employee from any post-termination restriction, *General Billposting v Atkinson (1909)*, *AC 118*. This principle only applies to wrongful dismissals and not unfair dismissals.

In the event the employer has breached the employee’s contract, and in order for the employee to be released from the restriction, there is no obligation on an employee to resign from their role. Even if an employer discovers evidence of the repudiatory breach post termination, the General Billposting principle would still apply in such circumstances.

**Remedy available**

The employer will have to show that a loss was suffered as a result of the breach, such as reduction in profits, or opportunities.

**Type of remedies available:**

- An injunction may be granted at the discretion of the court if it regards as fair in the circumstances;
- Damages from the employee for breach of the covenants;
- Others.