Restrictive Covenants in Contracts of Employment – the exception proves the rule…

The recent English case of Egon Zehnder Ltd v Tillman (2017) is interesting. The defendant joined the claimant's recruitment business in 2002 on terms including a 6 month no-compete restriction. Her seniority and importance in the business increased significantly but she was never given a new contract. When she wished to take up a position with a New York competitor the claimant obtained an injunction, but was successful only on the basis that it was able to show that the restriction was intended to take into account the rapid promotion the defendant was expected to achieve. Otherwise, in line with earlier cases confirming that the reasonableness of a restriction has to be assessed at the time it is entered into, it would have been difficult for the claimant to show that a restriction entered into many years previously at the outset of the employment was necessary to protect the business at that time.

Whilst this is a decision of the High Court in England, it is of persuasive authority in the Isle of Man, and the lessons are clear: (i) restrictions must be tailored to the situation of the employee in his or her particular role (ii) they should be reviewed and amended as the employee's role in the business develops, particularly having regard to the risk that his or her possible departure to a competitor might pose to the business and (iii) it is useful to keep on the HR file a record of the way in which any changes in the restriction are linked to promotions or salary increases (and where the restrictions are unchanged that their continued applicability in the changed circumstances of the employment have actually been considered). any property that the company is entitled to, and/or vest any assets of the company into their names as agent. The receiver may also be permitted to bring or defend any action or proceedings in the name of the company.

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