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Supreme Court backs employers seeking to enforce restrictive covenants: Tillman v Egon Zehnder Ltd

The Supreme Court in Tillman v Egon Zehnder Ltd has determined that where post-termination restrictive covenants (i.e. “non-compete” clauses) in employment contracts go further than reasonably necessary to protect an employer’s business interests, it can apply the ‘blue pencil test,’ severing the offending words and leaving the remaining enforceable clause in place.

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The new test for severance is whether the objectionable words can be deleted without:

- adding to the remaining wording; or
- generating any **major change** in the overall effect of all the post-employment restraints in the contract.

It therefore appears that previous case law decisions (indicating that all restrictive covenants containing unreasonable restrictions are void in their entirety for restricting trade) has been overruled.

However, what constitutes a “major change” was not defined in *Tillman* and so this will likely be debated in future litigation and case law.

This decision is good news for employers seeking to curtail an ex-employee’s activities after termination. Even where there may be an element of unreasonableness in the employment contract, employers should still be allowed to enforce all reasonable restrictions.

However, relying on the Court should not be regarded as a substitute for making sure covenants are carefully worded in the first place.

Employers may be penalised when it comes to costs if it is found that the restrictions ought to have been more tailored in the first place. And of course - even in the absence of any costs penalties - it is ultimately far better to avoid this costly kind of litigation.

The *Tillman* litigation will have cost the parties at least six figures in costs each and, as is usual in litigation, the successful party will likely only recover around 2/3 of its costs against the unsuccessful party.

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