



In this month's issue we look at:

Restrictive Covenants – In the first case of its kind in over a century the Supreme Court is reviewing a case involving employment contract clauses, specifically post termination provisions.

On Your Bike – Jess Varnish brought an employment tribunal claim against British Cycling and UK Sport to assert her status as an employee. We look at the outcome.

Side-Show Job – Henley Business School calculates that the average side hustler makes about 20% of their income through their second job. We look at this growing trend and how employers can best manage their entrepreneurial staff.

HumouR – Don't You Just Valentine's

Trending # HR related stories in the news

This Month's Events

Welcome to the latest edition of our free Employment Law update.

[Employment Protection Scheme](#)

The scheme is designed to act as an additional HR resource to cover the minefield of compliance and legislative issues that face many businesses. The firm can offer clients peace of mind through the provision of an insured arrangement for employment disputes. In addition, Samuel Phillips offer an audit facility, Help Line and this regular e-mail update to keep clients informed.

If you would like further information or you wish to nominate colleagues, friends and or associates to receive their own free subscription please forward details to [Sally Lomas Fletcher](#).



Robert Gibson

Robert heads the overall commercial division of the firm. He is a member of the Employment Lawyers Association an ACAS appointed Arbitrator and District Judge. Robert was educated at Newcastle Royal Grammar School and studied law at Newcastle University. He qualified as a solicitor in 1984 and not long after became a partner with Samuel Phillips. He enjoys travel, playing golf, walking and is a passionate fan of rugby union.



Sally Lomas Fletcher

Sally is an experienced partner who specialises in Employment Law. She regularly carries out detailed audits for clients to ensure compliance with employment legislation and prepare employment contracts, disciplinary and grievance procedures and all other policies needed in the ever-changing landscape of employment law.



Fresh Connection North

Fresh Connection North is a networking group consisting of professionals that are rising stars in the North East of England. The group aims to bring professionals together to assist in establishing relationships at the crucial stage of their careers. Contact us via e-mail for information info@freshconnectionnorth.co.uk

The firm has wide experience in dealing with:

- Unfair dismissal
- Redundancy
- Equal Pay
- Wages Act
- Discrimination
- Breach of Contract



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Restrictive Covenants

In the first case of this nature in over a century the Supreme Court will be hearing the matter of Egon Zehnder Ltd v Tillman and reviewing the contentious issue of restrictive covenants.

What is a Restrictive Covenant?

When evaluating corporate risk, losing competitive advantage through unauthorised and unwarranted sharing of information ranks high on an executive boards list of concerns. To counter such exposure, businesses have turned to the contracts of employment and specifically the use of **restrictive covenants** to protect their interests. These terms are in place within the contract to ensure the employee is aware of the rules whilst they are engaged by the business and importantly what they can and can't do in the event of their departure.

Typically a restrictive covenant is a clause in an employment contract which prohibits the employee from giving competitive advantage to competitors of the ex-employer. The restrictions in activities can be time limited to a specific period post departure or where intellectual property matters are concerned, directly prevent actions e.g. using knowledge of customers data/services/software to secure business.

Many cases have emerged through employment tribunals of customer data, detailed product information and proprietary technology falling into the hands of competitors through the hiring of key staff.

Whilst employed within the business, activities and behaviours can and should be managed in a reasonable manner within the terms of the contract.

Recent cases have proven far less straightforward notably when involving an employee resigning and the ex-employer attempting to then enforce the terms of a contract they determine to have been breached.

Background - Egon Zehnder Ltd v Tillman

Mary Tillman handed in her notice to her employer Egon Zehnder Ltd in January 2017. On 30th January 2017 Ms Tillman's contract was terminated with immediate effect and she was paid in lieu of notice. Tillman was moving to a competitor business and set to join them on 1st May 2017. Egon Zehnder promptly pursued an interim injunction, arguing that if Tillman joined her new employer on that date, she would be in breach of her employment contract's six month non-compete restriction, in effect until 30 July 2017.

Tillman contested this move stating that the restriction was unreasonably broad and wider than necessary for the purpose of protecting her ex employer's business interests. The key points:

- The broad terms of the covenant effectively made it unenforceable. By way of specific example, the line "*interested in a competing business*", would prevent an ex-employee from having a minority shareholding in a competing business.
- The Court of Appeal overturned the High Court's decision on the specific "interested in" phrase, concurring with Tillman's arguments above that it was too broad and unreasonable and would indeed make the contract unenforceable.

Of particular interest here is the fact that the ex-employee had no interest in taking a shareholding but wished to use the restriction to drive an argument that the covenant was unreasonable thereby invalidating the section and contract enabling a "free pass" to join the competitor.

Despite the Respondent disputing the fact that the clause was drafted to cover the acquisition of a shareholding it was held by the Court of Appeal that the original judge had been wrong to assert that it did not prohibit shareholding and as such it was an unreasonable clause.

What Next.... On February 8th the Supreme Court will commence hearing the Egon Zehnder Ltd v Tillman case. Egon Zehnder are an executive search and management consulting group and the restrictive covenant in question, relating to shareholding is a commonly used in executive contracts within professional and financial service businesses.

If the Supreme Court rules the clause as being too broad in its interpretation, any similarly worded covenants will need to be reviewed and re-written potentially affecting thousands of employees.

The risk is that with such a widespread change and re-visiting of employment contracts employees may seek to capitalise and obtain more favourable terms. The impact could be far reaching.

How to Apply Restrictive Covenants

There are three primary types of restrictive covenant and not all are necessarily required for each and every employee. It is important for the employer to retain a balanced approach in applying such clauses, keeping them fair, reasonable and proportionate to the needs of the business.

It would be useful to retain a supporting explanation for employment contracts as to the purpose for applying specific restrictive covenants to ensure that they are applied in the most appropriate circumstances.

A heavy handed, one sided and overly threatening contract will also not present a positive image of your business but more likely speak of your fear of competitors. Competitive advantage should not be underestimated and where possible should be protected by the application of well drafted, unambiguous contracts of employment.

Non-compete Clause

If you are concerned that the post holder could pose an immediate commercial threat through the knowledge acquired working for you, a non-compete clause would work for you. This restriction prevents an employee working for a competitor or from setting up in direct competition for a period of time. This restriction can also extend to trading within a set geographical area

In these circumstances it's worth taking a view on the genuine risks to the business and if they do exist keeping the restrictions limited to the roles in which such actions carry the greatest threat.

Non-solicitation Clause

In most circumstances an employee will be keen to impress their new employer. What you need to protect is the risk that their enthusiasm isn't at the detriment of your business. Whilst famously difficult to enforce the fact the clause exists should help to keep ex-employees from proactively stealing your customers. Such restrictions cannot be in force forever but should allow for the business to recruit and communicate with their customer base and enable methods to protect any relationships that may prove vulnerable to competitors.

If a customer finds and approaches the ex-employee through their own efforts there is nothing further, you can do.

Non-deal Clause

As you've read above non-solicitation is the most common restriction requesting that the

ex-employee does not proactively approach your customers. The non-deal restriction literally intends to prevent the ex-employee from dealing with your customers under any circumstances, poached or unsolicited. Whilst the prospect of holding them to this restriction can give a level of reassurance to the business it's worth noting they can be very difficult to enforce and justify. Often a judge will see such clauses as a restriction too far, given the need for the employee to earn a living.

The chosen combination of restrictions should also be thought through carefully by employers. If a non-solicitation restriction provides enough protection, there may not be any justification for a non-compete clause as well.

Employers should think about its key employees and clients who are ripe for poaching and examine whether the departing employee worked with them. If not, it cannot be reasonable to restrict the employee from dealing with them going forward if they had no influence over them when employed.

On Your Bike – Athlete Loses Landmark Employment Tribunal Case

British cyclist Jessica Varnish, a former European team sprint champion and world silver medallist, began legal proceedings after claiming she was dropped from the UK's elite cycling programme after failing to qualify for the 2016 Rio Olympics. She also claimed British Cycling technical director Shane Sutton told her to "go and have a baby".

An investigation found that Shane Sutton, who had already resigned from the body, had used sexist language.

The Australian was however cleared of eight other charges, including making the "baby" comment.

The tribunal case heard in December, centred on Varnish's attempt to prove she was an employee by stating coaches had "extreme control" over cyclists.

The examples cited by Varnish include, coaches listening through hotel bedroom doors while away on training camps at the age of 15, regular blood tests and signing performance contracts.

She told the tribunal: "We had emails from coaches saying if you don't sign this, you won't get paid this month."

Her claims were backed by her partner and former GB BMX star Liam Phillips and her agent James Harper.

British Cycling maintained Varnish was dropped on the basis of performances alone.

After five hours of cross examination and questioning by British Cycling's lawyer, Thomas Linden QC he told the tribunal that Varnish was telling "half-truths".

"This is a case of the highest public interest and extremely important to athletes, sport and the funding bodies, so it is vital a true and fair picture is presented," he said.

In a further pointed statement he said, "What we have witnessed here is the difference between

self-interest and the public interest."

It was suggested that a win for Varnish in this case, resulting in a higher duty of care imposed on UK Sport as an employer and the consequential costs would put as many as a 1000 athlete's in jeopardy of receiving up to £25,000 per annum tax free support.

Repercussions

The judgment will be a relief for UK Sport and British Cycling however there may be an appeal or subsequent cases demanding greater support for young athlete's demanding changes within the current structure of sport funding and talent management.

Side-Show Job

Employed-Preneurs are on the Rise do you have any in your business?

The term "Side-Hustle" grew out of the fast-moving entrepreneurial hot bed of Silicon Valley, California. In simple terms, a side-hustler is someone in paid employment who also earns income via a small business they own a personal passion, preferred interest or hobby.

The Side-Show Jobbers have been turbo boosted by technology which has enabled an almost instant move from idea to action without the previously limiting concerns over set up costs and risk.

A recent report by Henley Business School (HBS) highlighted the significant growth of such activity and the impact on our economy.

HBS state that as much as £72bn or 3.6% of GDP is generated in the UK each year and it's set to increase. Interestingly the research by HBS indicates a significant percentage of the population undertaking such extra curricula income generation. In the UK, on average 25% of the adult population participate in such activity with the North East of England being the top region showing 30% of adults operating side hustles.

As an employer it would be helpful to know those members of staff who are undertaking such activity. You will of course need to be mindful that if their side-hustle is legal and not impacting either their performance or the competitive advantage of your business you have no automatic right to know what they are doing.

What may be helpful is an inclusive approach that encourages side-hustlers to come forward and benefit from the experience of your organisation, who knows they may be on to the next "big idea". As long as there is no direct conflict or loss of focus within their employed role the supportive, mentoring of your in-house side-hustlers will engender greater trust and more likely keep you "in the loop" with regards to their longer-term ambitions. Any suggestion that their employed position may be in any jeopardy must be very clearly conveyed throughout this communication process as it will be an anxiety point of the employee which may prevent them from coming forward.

We need to accept that we are living in a fast-evolving uncertain world and employee fears over the UK's future economic position and mid to long term employment prospects are sound reasons to seek alternative income streams.

The HBS research identified that more than 50% of business leaders admitted that they had no policy on side-working, and no process to record and monitor these activities among their workforce.

The majority of bosses were also not expecting any significant increase in the trend over the next five years. Given an average of 25% already participating in the practice those who continue to ignore the trend will be entrenched in traditional 9-5 workplace-based thinking.

The HBS research highlighted that employees increasingly want to work with businesses who embrace change and that those who are prepared to support their side-hustling staff will be rewarded with a happier, more fulfilled workforce.

HumouR

Here are a few romantic funnies collated with 14th February in mind...

A woman walks into a post office one day to see a middle-aged, pin-stripe suited man standing at the counter methodically placing "Love" stamps on bright pink envelopes. He then takes out a perfume bottle and starts spraying scent all over them. Her curiosity getting the better of her, she goes up to the suited man and asks him what he is doing. He says, "I'm sending out one thousand Valentine cards signed, 'Guess who?'"

"But why?" asks the woman.

"I'm a divorce lawyer," the man said with a smirk.

Two antennas met on a roof on Valentine's day, fell in love and decided it would be romantic to get married on the following Valentine's day.

Unfortunately, their wedding ceremony was very poor.

The reception, however, was excellent.

Why should you never breakup with a goalie? Because they're a keeper.

A woman was taking a nap on Valentine's Day afternoon. After she awoke, she told her husband, "I just dreamed that you gave me a gorgeous and expensive diamond necklace for Valentine's Day! What do you think it means?"

"You'll know tonight," he said.

That evening, her husband came home with a small package for her. Thrilled, she opened it and found a book titled "The Meaning of Dreams"

Trending # HR related stories in the news

» Redundancy Protection for Pregnant Employees

The Government recently announced a consultation which is seeking views on extending redundancy protection for pregnant women and new parents. It also sets out more widely what the Department for Business, Energy & Industrial Strategy is doing to tackle pregnancy and maternity discrimination and explain the current law on redundancy protection.

The consultation recommends that the Govt extend the current protection to cover the period of pregnancy and a period after, an extension of 6 months. It asks how best to achieve that and who would be covered, for example, those taking Shared Parental Leave or Adoption Leave. The consultation will stay open until 5th April 2019.

» Salvation Cry for Employability Support

The Salvation Army's UK employability support, "Employment Plus", helps the unemployed find meaningful work. The successful scheme receives 60% of its much-needed funding from the European Social Fund (ESF). The grants allow the Salvation Army to support anyone seeking work, whether or not they are claiming out-of-work benefits.

Post 2020 there is significant uncertainty around the future of this funding stream. If it stops and cannot be replaced vulnerable members of the community will lose out. The Salvation Army is seeking confirmation that when the money returns to the UK via the ESF it is ring-fenced to guarantee continuation of this invaluable service.

» Move Up the Pecking Order – Launch of Gen Z App Fledglink

LinkedIn might need to keep an eye on this newly launched app [Fledglink](#) which addresses a gap in the employee/ employer relationship by meeting the needs of recent school/ college leavers and graduates for the time when they're looking to get that first foot on the career ladder.

The app platform offers a free-to-use dedicated social network for 16-24 year olds offering educational and professional support.

Events this Month

Event Title

Raynaud's Awareness Month 2019

Start Date

01-Feb

Hashtag Name

#Raynaud'sAwarenessMonth2019

LGBT History Month 2019	01-Feb	#LGBTHistoryMonth2019
Wear Red Day 2019	01-Feb	#WearRedDay2019
World Wetlands Day 2019	02-Feb	#WorldWetlandsDay2019
Sexual Abuse & Sexual Violence Awareness Week	04-Feb	#SexualAbuseAwarenessWeek2019
World Cancer Day 2019	04-Feb	#WorldCancerDay2019
Sign2Sing Week 2019	04-Feb	#Sign2SingWeek2019
National Sickie Day 2019	04-Feb	#NationalSickieDay2019
Tinnitus Awareness Week 2019	04-Feb	#TinnitusAwarenessWeek2019
Children's Mental Health Week 2019	04-Feb	#Children'sMentalHealthWeek2019
Chinese New Year 2019	05-Feb	#ChineseNewYear2019
Safer Internet Day 2019	05-Feb	#SaferInternetDay2019
World Nutella Day 2019	05-Feb	#WorldNutellaDay2019
Time To Talk Day 2019	07-Feb	#TimeToTalkDay2019
Send a Card to a Friend Day 2019	07-Feb	#SendCardtoaFriendDay2019
Toothache Day 2019	09-Feb	#ToothacheDay2019
National Pizza Day 2019	09-Feb	#NationalPizzaDay2019
World Day of the Sick 2019	11-Feb	#WorldDayoftheSick2019
International Epilepsy Day 2019	11-Feb	#InternationalEpilepsyDay2019
Valentine's Day 2019	14-Feb	#Valentine'sDay2019
International Book Giving Day 2019	14-Feb	#InternationalBookGivingDay2019
Singles Awareness Day 2019	15-Feb	#SinglesAwarenessDay2019
Care Day 2019	15-Feb	#CareDay2019
Random Acts of Kindness Day 2019	17-Feb	#RandomActsofKindnessDay2019
Student Volunteering Week 2019	18-Feb	#StudentVolunteeringWeek2019
National Salt Awareness Week 2019	18-Feb	#NationalSaltAwarenessWeek2019
National Love Your Pet Day 2019	20-Feb	#NationalLoveYourPetDay2019
World Encephalitis Day 2019	22-Feb	#WorldEncephalitisDay2019
Real Bread Week 2019	23-Feb	#RealBreadWeek2019
Eating Disorders Awareness Week 2019	25-Feb	#EatingDisordersAwarenessWeek2019
Fairtrade Fortnight 2019	25-Feb	#FairtradeFortnight2019
Rare Disease Day 2019	28-Feb	#RareDiseaseDay2019

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