MEDICAL SPECIALIST GROUP FINED £1.5M FOR INCLUDING BROAD POST TERMINATION RESTRICTIONS IN CONSULTANTS' CONTRACTS

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In September 2021, the Guernsey Competition and Regulatory Authority (GCRA) found that the Medical Specialist Group LLP (MSG) had breached Guernsey's competition law by including unduly broad post-termination restrictions in its partnership agreements and employment contracts. The restrictions in question prevented MSG's consultants from joining another medical practice or setting up their own medical practice for between 18 months and five years after leaving MSG.

Guernsey's competition law prohibits undertakings from agreeing terms which have the object or effect of restricting competition in the relevant market, unless those terms can be objectively justified. GCRA found that the post termination restrictions in MSG's contracts were unlawful, as they had the object of limiting choice for consumers, and their duration and scope went beyond what was necessary to protect MSG's business. On 16 December 2021 GCRA announced that they had decided to impose a fine of over £1.5 million in relation to this infringement. We understand that MSG is appealing the GCRA's findings.

Whatever the outcome of the appeal, this case reminds us how important it is to ensure that post-termination restrictions in employment contracts and other documents go no further than is necessary to protect the company's legitimate business interests. If the restrictions are too broad they will be considered void and unenforceable under common law, even in the absence of any competition law issues. Given the nature of Guernsey's small island community there is a real risk for many businesses of also breaching competition legislation if restrictions are excessive in a way that may not be the case in a larger employment marketplace.

Post-termination restrictions should therefore be carefully tailored to the individual's specific role and responsibilities, and should be reviewed if and when that role or those responsibilities change. This is an area in which a 'one size fits all' approach doesn't work when looking to maximise the likelihood of enforceability.

When drafting restrictions, we would usually recommend that organisations start by asking themselves what type of harm could be caused if the individual did not have post-termination restrictions in their contract and left to work for a competitor. For example, is there a real risk that confidential information may be disclosed, and/or that the organisation's relationships with its customers would be affected? If so, how long will those risks realistically persist?

The answers to these questions can be used to determine what types of restriction should be included in the contract, and what may be reasonable in terms of their scope. Careful drafting is key to ensure that the restrictions adequately protect the company, while going no further than is necessary. It is also important to draft the restrictions in such a way as to minimise the risk that the whole clause would become unenforceable if part of it turns out to be too broad.

If you would like to discuss these issues further, please contact Danielle Brouard.