

A reflection on the legality of restraining clauses in contracts of employment

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In the modern employments, it becomes increasingly important to the employers to protect their confidential information, insider knowledge, trade secrets, proprietary interests and to prevent solicitation of trade associates. Therefore, employers incorporate restraining clauses in contracts of employment. An employer could incorporate a restraining clause that favours him, and the employee is not in a position to resist it because of his unequal bargaining power. Such restraining clauses may become a violation of freedom of employment of the employee and violation of public policy. In this conundrum, the research problem is whether incorporation of a restraining clause in a contract of employment is lawful. The main objective of the research is to analyze lawfulness of a restraining clause in a contract of employment. The research is qualitative in nature, based on the analysis of legal materials, in particular, judicial decisions and statutory provisions. A clause which restrains an employee during employment is generally lawful as trust, confidence and fidelity are expressed or implied conditions of certain employments. A clause which restrains an employee in post-employment should be an expressed one. The clause is lawful if it is fair, reasonable and not in violation of public policy. The recent judgment of the Indian Supreme Court in *Vijaya Bank* case justifies a restraining clause/restrictive covenant which restrains an employee from resigning within a specified period and imposes a liquidated damage for default. In this case, the Indian Supreme Court justified the clause considering the expensive and time-consuming recruitment process and the impact of early resignation on smooth functioning of the workplace. In India, the legal validity of a restraining clause is tested on the touchstone of Section 27 of the Contract Act. It is suggested to amend the Unfair Contract Terms Act of Sri Lanka to expressly provide that a restraining clause in a contract of employment is void unless it is fair and reasonable.

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