

## Briefing Note: Garden Leave

### An Introduction to the Briefing Note

This Briefing Note outlines the purpose of garden leave, the circumstances under which an employee can be placed on garden leave and various other key issues.

This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

#### Briefing Note

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**For detailed advice on all employment law matters please contact:**

Paul Maynard  
Partner

01323 435912  
[paul.maynard@gabyhardwicke.co.uk](mailto:paul.maynard@gabyhardwicke.co.uk)

### 1. What is garden leave?

Garden leave refers to a situation whereby an employer requires an employee to refrain from coming into work, to remain at home, not working, whilst his contract of employment continues. Generally speaking, garden leave can be imposed at any point during the contract of employment – it is akin to suspension on full pay. However, it is most commonly utilised by an employer once notice of termination of employment has been served, whether by employer or employee. It is a relatively new concept having first developed in the 1980s.

The usual purpose of garden leave is to keep the employee out of the market place long enough in order to protect the employer's confidential information and goodwill. This is achieved because the value of any confidential information that the employee may have in their head, will deteriorate with the passage of time, particularly when the employee is out of the work place. Additionally, a period of garden leave enables the employee's successor to build up a relationship with customers without undue interference or influence from the employee, serving out his period of garden leave. In addition, the employer may require the employee during a period of garden leave to:

- Return all company property, including laptop, mobile phone and company papers.
- Have no contact with customers or suppliers.
- Have no contact with other employees.
- Make himself available upon the employer's order to deal with specific queries or to effect a handover.
- To resign any office, such as trusteeship or directorship.

As an alternative to the classic type of garden leave, an employer may reserve for itself the right to allocate the employee work on a specific project or even potentially to work in a different territory. When an employer seeks to enforce such a covenant, it is not, strictly speaking, seeking a garden leave injunction, but rather an order holding the employee to their contractual notice period.

### 2. When can the Employer Place an Employee on Garden Leave?

Any employer who wishes to place an employee on a period of garden leave is best advised to first ensure that there is an express garden leave clause in the contract of employment. This removes much of the uncertainty as to whether the employer has the contractual right to impose garden leave, although as we shall see, the existence of a garden leave clause does not necessarily ensure that a court will enforce the clause by means of an injunction.

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In the leading case concerning an employer's right to place an employee on garden leave the Court of Appeal said "in practice, an employer will need to stipulate for an express power to send his employee home on full pay, i.e. on garden leave, in all cases in which the contract of employment imposes on the employer an obligation to permit the employee to do the work contracted for".

In the absence of an express clause, the emphasis shifts to the question on whether the employee has a contractual right to work. Historically, it was thought that there was no implied contractual right to work - simply a right to be paid. However, more recently, the courts have been increasingly willing to find that employees have a right to work during the subsistence of their contract. The factors that support a right to work include:

- The seniority and uniqueness of the post.
- Whether the skills necessary to perform the role need to be exercised frequently to retain their currency.
- Whether the contract provides for hours and days of work to be filled and an obligation to carry out duties in a full and professional manner.
- The extent to which the employee may be deprived of remuneration, ie commission or bonus opportunities.

These conditions are extremely widely drawn and are likely to apply in most cases where the employee is important enough for the employer to wish to place him on garden leave. The courts have, however, innovatively created some exceptions to this general rule.

Where the employee, as a result of some prior breach of contract, has demonstrated in a serious way that they are not ready or willing to work or have rendered it impossible or reasonably impracticable for the employer to provide them with work during a period of notice, a period of garden leave may be imposed despite the absence of an express garden leave clause. However the breach of contract must constitute wrong doing from which the employee will at least potentially profit.

This principal was subsequently extended in a case involving commission only insurance agents who were in breach of their contractual duty of good faith and who purported to resign to join a competitor without giving the required period of notice. The employer held them to their contractual notice periods and sought an injunction restraining the agents from working for anyone else for the duration of the notice period. In light of the agent's wrong doing, an injunction was granted and the employer was released from any obligation to provide work, notwithstanding that this effectively denied the agent the opportunity to earn any remuneration.

In summary, an employer should not seek to place an employee on garden leave in the absence of an express garden leave clause in the contract unless there is clear evidence of serious wrong doing on the employee's part.

### **3. What are the Employees' and Employers' Rights During Garden Leave?**

It is essential that the contract of employment is kept alive in order for the employer to place an employee on garden leave. Where an employee purports to resign and gives less than the contractual notice period, the employer has the right to choose whether to affirm the contract and keep it alive for the duration of the contractual notice period.

As the employment contract continues to subsist the employer is obliged to perform all of the terms of the contract, to pay salary and provide all other contractual benefits. By the same token, the employee's duty of good faith and fidelity continues during any period of garden leave, at least to the extent that the duty imposes obligations to refrain from acting in a particular way.

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The employer is usually required to undertake to pay the employee his normal remuneration during any period of garden leave. However, the Court of Appeal has confirmed that such an undertaking and obligation to pay is not required unless the employee is ready and willing to work during the notice period.

In principle, at least, it is permissible for an employer to incorporate an express clause which provides for the employee to receive a reduced level of remuneration during any period of garden leave. Whilst this may appear superficially attractive, the existence of such a clause may have an adverse impact on the way that court exercises its discretion in deciding whether or not to grant an injunction in support of garden leave. This is particularly so where most or all of the employee's remuneration is commission based.

It is, however, permissible, for an employer to include a term in an employment contract which provides that any outstanding holiday is deemed to be taken during that garden leave period.

### 4. Enforcing Garden Leave Through the Courts?

When an employee seeks to leave employment immediately without notice or by giving a reduced period of notice in breach of the contract of employment, the employer, who wishes to enforce a garden leave clause, should refuse to accept the termination and hold the employee to the obligation to give notice and then suspend him on garden leave for the duration of that notice period.

If the employee refuses to accept the terms of garden leave, then the employer can enforce a period of garden leave through the courts in order to protect its business. This means applying to the court for an interim injunction. It has always been the case that the courts will not grant an order of specific performance of a contract of personal service. Indeed, it was expressly prohibited by s236 Trade Union and Labour Relations (Consolidation) Act 1992, which was created to reflect the common law position. The concept of garden leave arose from the practice of employers offering undertakings to continue to pay employees who had given notice, in order to persuade the court to hold them to their contractual notice periods. In such circumstances, the court will apply the restraint of trade doctrine.

As with a restrictive covenant, a court will only grant a garden leave injunction if the employer can demonstrate the existence of a legitimate business interest that requires protection.

It is generally accepted that the three legitimate business interests that can be protected by a period of garden leave, are:

- Confidential information
- Customer connection
- Stability of the work force

It has been held that an employer in administration has a legitimate interest in enforcing a garden leave clause by way of interim injunction because the administrators were seeking to maximise the assets for the creditors by securing a valuable contract with another company. Consequently, the court was satisfied that the administrators were able to identify a protectable interest.

Whereas the court in a restrictive covenant case will never be prepared to rewrite the contract so as to reduce the period of restraint, thereby saving the clause from being struck down, a different approach is adopted in respect of garden leave – often because cases come before the court where there are no express garden leave clauses in the contract at all. The court's starting point is that the period of restraint should be the minimum necessary to achieve the claimant's legitimate purposes and not the maximum. The court has a wide discretion in both in terms of the period of an injunction and its scope. However, unlike a restrictive

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covenant, the enforceability of a garden leave clause is assessed at the time of enforcement, rather than when the covenant was first entered into.

Recent case law indicates that courts frequently impose an injunction which operates for only part of the contractual notice period rather than the whole of it, where the court is not satisfied that the full notice period is necessary for the protection of the employer. In one case, the court imposed a 13 week garden leave injunction where the contractual notice period was 20 weeks. In another case the High Court granted injunctions to enforce garden leave for a period of 12 months against a number of departing brokers when the claimant had argued for a period of 18 months protection. The fact that an employee will suffer no financial loss during any period of garden leave is a material factor that the court will take into account.

It is not enough for the employer to establish a legitimate interest. In order to obtain an injunction the employer must also satisfy a court that it has suffered or is likely to suffer detriment if employee is not restrained. For instance, where an employee has no intention to go to work for a direct competitor, it is unlikely that the employer will be able to demonstrate that it is likely to suffer a detriment and a court will be unwilling to grant any form of relief.

By the same token, the court will also consider whether the grant of a garden leave injunction will cause disproportionate harm to the employee.

In some circumstances, an employer may choose to place an employee on garden leave, not to prevent them leaving and joining a competitor but for other reasons, such as where the employee's activities are loss-making and there is a desire to make savings, or, indeed, to actually encourage the employee to hand in his notice. In such a scenario, the restraint of trade principles do not apply – rather the test is whether the employer's decision to impose a period of garden leave (in this case for the remaining 15 months of a 5 year fixed term employment contract) was taken:

- (i) Rationally and in good faith
- (ii) Consistently with its contractual purpose
- (iii) Taking the right matters into account
- (iv) So as to reach a decision that is not so outrageous that no reasonable decision maker can have arrived at it.

### 5. Relationship with Post-Termination Restrictive Covenants

Finally, it should be noted that where an employee is placed on garden leave, during the notice period, a court may be less likely to enforce post-termination restrictive covenants. It is a common practice for employers to provide in their restrictive covenant clauses that any time spent on garden leave will be set off against any post-termination restrictions. In respect of long notice periods or fixed term contracts, good procedure dictates limiting a period of garden leave to no more than one year.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard [paul.maynard@gabyhardwicke.co.uk](mailto:paul.maynard@gabyhardwicke.co.uk)

Gaby Hardwicke Solicitors  
33 The Avenue  
Eastbourne  
East Sussex  
BN21 3YD

Tel: 01323 435900  
Fax: 01323 435901  
[info@gabyhardwicke.co.uk](mailto:info@gabyhardwicke.co.uk)  
[www.gabyhardwicke.co.uk](http://www.gabyhardwicke.co.uk)