WRIGLEYS
— SOLICITORS —

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Employment Law BULLETIN

Welcome to our September employment law bulletin.

In this issue we cover a range of cases in the EAT and the High Court. In *Cetinsoy v London United Busways Limited* and *Costain Limited v Armitage* the EAT has decided cases on TUPE and constructive dismissal and the meaning of an "organised grouping of employees" for the purposes of TUPE and service provision change.

In *Hensman v Ministry of Defence* the EAT considered the balancing exercise an employer has to undertake when contemplating dismissal for gross misconduct where there are underlying issues of disability. *Plastering Contractors Stanmore v Holden* and *Windle v Arada* concern worker and employment status.

In *Ellis v Ratcliff Palfinger Ltd* the EAT expressed a view on the interplay between unfair dismissal and the right to time off to care for a dependant. Finally, in *Camurat v Thurrock Borough Council* the High Court ruled on whether the duty to disclose under the statutory safeguarding rules (where the employer's business involves children or vulnerable adults) overrode the terms of an agreed reference in a settlement agreement.

This month's client briefing is on the subject of garden leave.

May I remind you of our forthcoming events:

Click any event title for further details.

Unfair Dismissal Case Law Update
- Breakfast Seminar, 7th October 2014

Is excellent employee performance really achievable?
- HR Workshop, 4th November 2014

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing
- Full Day Conference, 15th October 2014

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1: TUPE and Constructive Dismissal

Does a change of location where the employee is required to work after a TUPE transfer justify a resignation and a claim for constructive dismissal?

Only where this amounts to a fundamental breach of contract or a substantial change in working conditions to an employee's material detriment, said the EAT in ***Cetinsoy v London United Busways Limited.***

In this case bus drivers were employed by CentreWest working out of its Westbourne Park depot. The bus route on which they were employed was transferred to London United Busways. A consequence of the transfer was that the claimants were required to move to Stamford Brook. This was uncongenial to them and they resigned claiming constructive dismissal and unfair dismissal. However the employment tribunal, with which the EAT agreed, considered that there was no standing to bring an unfair dismissal claim. Although it was a contractual term that the employees worked out of Westbourne Park and the requirement to work at Stamford Brook was therefore a breach of contract, it was not a fundamental breach of contract.

Furthermore, for the purposes of regulation 4(9) of TUPE the move did not involve a substantial change in working conditions to the employees' material detriment. The addition of between 30 minutes and 60 minutes travelling per day was not, in the opinion of the employment tribunal, substantial or to the material detriment of the employees.

This kind of evaluation, said the EAT, is one based on a factual assessment and could only be set aside if the answer to the question was perverse or had not been approached properly. The EAT considered that the judge was entitled to come to the view he did, assisted by the practical experience of the tribunal lay members.

2: Safeguarding duty trumps contractual duty to provide agreed reference

A settlement agreement will frequently include a form of reference which an employer agrees to provide for a departing employee. In such a case, the employer has a contractual duty to use the agreed wording in future references.

Where an employer's business involves children or vulnerable adults, the employer will also have statutory safeguarding duties which may conflict with the duty to provide an agreed reference.

In ***Camurat v Thurrock Borough Council*** the High Court considered whether the duty to safeguard children and vulnerable adults might override the terms of a compromise agreement (now termed a settlement agreement).

Mr Camurat was a teacher working for Thurrock Borough Council. After a number of allegations concerning the use of inappropriate force when dealing with pupils, he was given a final written warning and ultimately left his employment under the terms of a compromise agreement. The compromise agreement stated that the employer would provide a written reference to third parties in the form set out in a schedule to the agreement.

Following Mr Camurat's departure from the school, the Council reported him to the Independent Safeguarding Authority and provided a list of the alleged incidents to the police. A subsequent Enhanced Criminal Record Check requested by another school revealed some of these allegations

and led to Mr Camurat losing a new teaching job. The allegations remained on Mr Camurat's record for a further five years.

Mr Camurat brought claims including breach of contract and negligence against the Council in the High Court. However the Court held that the Council's duty to safeguard children must override its contractual duty to comply with the terms of the compromise agreement. Any terms of the agreement which restricted the Council in its safeguarding duty were void. The employer's duty to its employee to exercise reasonable care and skill in providing a reference was also found to be secondary to the duty to ensure the safety of the children in its care. In its reasoning, the Court stated that it is a matter of public policy that relevant disclosures to the police and other agencies should be encouraged.

This case is important to note for employers whose activities concern children or vulnerable adults. The terms of a settlement agreement will not restrain what the employer must do under its duty to inform the appropriate authorities of safeguarding issues.

It should be noted that the claimant in this case has been given leave to appeal. It is also important to note that this judgment should not be relied upon by employers who do not work with vulnerable groups. Where there is no duty to safeguard, an agreed form of a reference should be adhered to. It is possible, however, to draft a settlement agreement which enables the employer to amend the form of reference should any new information emerge following completion of the agreement.

3: The interplay between conduct dismissals and disability discrimination

An employer may be in breach of the Equality Act 2010 if it treats a disabled employee or job applicant unfavourably because of something arising from his or her disability. Such treatment may be objectively justified if it is a proportionate means of achieving a legitimate aim.

In the case of ***Hensman v Ministry of Defence*** the EAT found that the employment tribunal had erred in its decision that an employee with Asperger's syndrome, who had been convicted of the criminal offence of outraging public decency, had suffered discrimination arising from disability and had been unfairly dismissed.

Mr Hensman was employed by the Ministry of Defence (MoD) and lived in accommodation provided by his employer. Following a suspected security breach, a search of Mr Hensman's living accommodation unearthed video footage of a colleague taking a shower. The footage had been covertly recorded while Mr Hensman was in shared accommodation. Mr Hensman was suspended on full pay. He was arrested and charged with various offences. At the criminal trial, he pleaded guilty to outraging public decency and received a three year community order. The judge expressly stated that Mr Hensman's offence was linked to his condition and stated that he “was not at fault” for the offence. The MoD then began protracted disciplinary proceedings against Mr Hensman and dismissed him two years after the criminal conviction, citing the breach of trust inherent in his covert filming of a colleague. Mr Hensman brought unfair dismissal and discrimination claims to an employment tribunal.

At first instance, the tribunal found that the claimant had suffered unfavourable treatment because of something arising from his disability. It referred in its decision to the comments of the Crown Court judge that the offence was linked to Mr Hensman's disability. While it found that the MoD had acted in furtherance of legitimate aims (maintaining standards of conduct and protecting its employees from such invasions of privacy), it found that dismissal was not a proportionate means of achieving these aims. The tribunal considered that the MoD might have issued a warning or transferred the employee elsewhere within the organisation. It took account of the fact that the

filming had taken place before the claimant had been moved from shared accommodation to single accommodation. It made reference to the fact that the MoD's own policies stated that dismissal might not be appropriate where the employee has "diminished mental competence". It also took into account the long length of service of the claimant, the protracted nature of the disciplinary proceedings and the comments of the judge at the criminal trial that Mr Hensman was not at fault.

The tribunal also concluded that the claimant had been unfairly dismissed as, in its view, dismissal was outside the band of reasonable responses. A reasonable employer, in its view, should have taken the comments of the judge into account along with the employee's medical conditions and twenty years of service to the MoD. A finding of 25% contributory fault was made due to the claimant's confused account of his conduct during the disciplinary proceedings.

On appeal, the EAT overturned the tribunal's decisions on both discrimination and unfair dismissal. In its balancing exercise when considering the discrimination claim, the tribunal had not given sufficient weight to the MoD's consideration of the effect of Mr Hensman's breach of trust on the organisation and its other employees. Likewise, when considering the band of reasonable responses in the unfair dismissal claim, the tribunal had relied too heavily on the findings of the criminal court rather than those of the employer's disciplinary proceedings. Key to this was the fact that Mr Hensman had provided different reasons for his actions in the disciplinary hearing from those provided by him in the criminal trial. The EAT upheld the finding of contributory fault and commented that dismissal proceedings based on a criminal conviction will usually lead to a finding that the employee has contributed to his or her dismissal. The case was remitted to a fresh tribunal.

It is important to note that the EAT did not find that the dismissal was objectively justified; rather the tribunal had not correctly approached the balancing exercise when considering the proportionality of the sanction. It should also be remembered that the ACAS Code on Disciplinary and Grievance Procedures expressly states that a criminal conviction will not automatically render a dismissal fair. The employer must consider the particular offence and how it affects the employee's performance of his or her duties and relationships within the organisation and between colleagues and customers.

4: Pay review clause in employment contract did not entitle employee to automatic increments in pay

In ***The Equality and Human Rights Commission v Earle*** the EAT overturned the employment tribunal's interpretation of a written contract containing an entire agreement clause and an oral assurance that annual pay increases would be "virtually automatic".

When a court interprets a written contract, it considers the objective meaning of its words (that is, as a reasonable person would understand them). It does not take into account the subjective intentions of the parties making the contract. It is possible for a contract to include terms which are not written, for example oral assurances from the employer to the employee. But contracts often contain an "entire agreement" clause which makes clear that any previous statements or agreements do not form part of the contract; the only terms are those in the written contract.

Finally, where the contract gives employers a discretion, for example to increase pay, that discretion must not be exercised irrationally or perversely.

The claimant in this case, Ms Earle, was employed as a senior legal policy advisor by the Equality and Human Rights Commission. On starting work and before receiving her formal offer letter, Ms Earle expressed her disappointment at the starting salary and received an oral assurance from a human resources officer that she would not remain on the lowest salary for the role for

long and that she would receive salary increases conditional upon satisfactory performance.

The written contract stated that salary reviews would take place annually until the maximum rate for the role was reached. It stated that reviews would include an assessment of performance and that EHRC was not obliged to increase pay. The written contract included an entire agreement clause which stated that it superseded all previous oral or written agreements.

Due to significant government funding cuts, EHRC imposed a pay freeze. It therefore made the decision not to conduct any salary reviews as it was certain that no pay increases could be made.

Ms Earle brought a breach of contract claim in the employment tribunal, claiming that she should have been entitled to annual pay increases given that her performance in the role had been satisfactory.

At first instance, the tribunal found for the claimant that she was contractually entitled to annual salary increments. It found that the oral assurance of the HR officer had contractual effect. It also found that the employer had perversely exercised its discretion by not conducting salary reviews. The tribunal did not rule on the question of whether the failure to hold annual salary reviews was a breach of contract.

On appeal, the EAT found that the tribunal had erred in its interpretation of the written contract. The objective interpretation of the words: “there is no obligation on the EHRC to increase the level of your basic salary at review” was clear. The contract did not give rise to an obligation to award automatic annual pay increases.

The EAT stated that the decision not to increase salaries was a rational exercise of the employer's discretion as it was based on practical circumstances which meant no pay increases could possibly be awarded for the time being.

When considering the oral assurance given by the HR officer, the EAT overturned the tribunal's ruling. Due to the entire agreement clause in the written contract, any previous statements or agreements made between the parties were superseded.

The EAT did state that the failure to review the claimant's salary was a breach of contract. However, it found that the claimant had suffered no loss as it was certain that no pay increase would have been awarded even if a review had been held.

Employers should note that there were exceptional circumstances in this case due to the universal pay freeze made necessary by external funding cuts. Despite the fact that no damages were awarded here, it is always advisable for employers to conduct salary reviews if these are provided for in the employment contract.

5: Employment status

In ***Plastering Contractors Stanmore Ltd v Holden*** the EAT upheld an employment tribunal decision that an employee who accepted £200 to become a labour-only sub-contractor was a worker.

Legislation defines a worker as an individual who works under a contract of employment, or who works under a contract to perform services personally, where the “employer” in the contract does not have the status of a business client or customer of that individual.

The test for a worker was set out in *Byrne Brothers (Formwork) Ltd v Baird and others* [2002]

IRLR 96. For an individual to be a worker, there must be: an obligation to provide work and an obligation to accept that work; an obligation to perform services personally (a limited ability to send a substitute to perform the work can exist); and no client or customer relationship (in other words the individual is not carrying on a business). A business relationship is less likely to be found where the employer has significant control over how and when the work is done, when the individual cannot work for other organisations, when the employer supplies necessary equipment and when the individual takes on little financial risk.

Mr Holden was employed for four years by Plastering Contractors Stanmore Ltd (PCS) as a general labourer on construction sites. He then agreed to become a labour-only sub-contractor in exchange for a payment of £200. After offers of work from PCS decreased, Mr Holden stopped working for the company. In early 2014 he brought claims for unpaid holiday pay against PCS under the Working Time Regulations 1998 and for unlawful deductions from wages under the Employment Rights Act 1996.

The employment tribunal considered whether Mr Holden was a "worker" and so entitled to protection under the legislation. While there were a number of factors suggesting Mr Holden was not a worker (he was labelled a sub-contractor, he was occasionally paid by piecework and he provided his own safety boots), the tribunal was swayed by the following factors. Mr Holden was under the supervision and control of the site supervisor; his rate of pay was not negotiated but fixed by PCS; Mr Holden submitted no invoices; and he was provided with some safety clothing and a vehicle by PCS. The tribunal found that there was no mutuality of obligation to provide and accept work but noted that he worked almost exclusively for PCS and did not offer his services as a labourer to the world in general.

On appeal, the EAT clarified that where an individual works on a series of short-term contracts, it is still possible for there to be a mutual obligation to provide and accept work which exists during the term of each contract. Mr Holden may not have been obliged to accept a contract at the outset, but once he had accepted it, PCS was obliged to provide work and Mr Holden was obliged to accept it. In upholding the decision that Mr Holden had a contract to provide personal services, the EAT found that there was no express provision in the contract about the right to send a substitute to complete the work, and in fact Mr Holden had never actually sent a substitute. The EAT also noted that in practice PCS exercised a high degree of control over the work of Mr Holden and that he was recruited by PCS to work as an integral member of its workforce rather than actively marketing his services. Mr Holden's claim could therefore proceed.

Employers should note that an agreement to change status from an employee to a sub-contractor will not necessarily mean the individual loses his or her protections as a worker. A tribunal will consider the reality of the situation and come to a decision based on an assessment of all the relevant facts. Individuals working on a series of short-term contracts may be entitled to the protections accorded to workers, for example those relating to working time and holiday pay.

6: TUPE and service provision change: "organised grouping of employees"

In ***Costain Ltd v Armitage and another*** the EAT considered the position of an employee who worked on in a number of different contracts, including one subject to a TUPE transfer.

It is one of the conditions of a service provision change that there must be a pre-existing "organised

grouping of employees" whose "principal purpose" is carrying out activities on behalf of the client. In order to transfer under TUPE an employee must also be "assigned" to that organised grouping.

The case concerned Mr Armitage, a Project Manager employed by ERH Communications Ltd (ERH). His work included managing the All Wales Regional Maintenance Contract (AWRMC) as well as other contracts. ERH lost the contract for the AWRMC to Costain Ltd and in February 2013 a service provision change took place. ERH had estimated that Mr Armitage spent 80% of his time on the AWRMC and so he was told that his contract of employment would be transferred to Costain Ltd. Costain questioned this as it considered that Mr Armitage spent a significant amount of time on other contracts. As Mr Armitage brought various claims in an employment tribunal, the identity of his employer fell to be decided.

At a preliminary hearing, the tribunal determined that Mr Armitage was assigned to a relevant organised grouping of employees and that his employment contract had transferred automatically to Costain on the TUPE transfer.

On appeal, the EAT held that the tribunal had erred in its approach. It should have begun by specifically defining the organised grouping of employees and then deciding whether Mr Armitage was assigned to it. The EAT reiterated the following principles. For an organised grouping to exist, the employer must have deliberately put the employees together into a team in order to carry out work for the client. When deciding whether an employee has been assigned to a group, it is important not to assume that every employee who carries out work for that client is part of the transferring group. The fact that an employee was working on the transferring activities immediately before the transfer is not on its own sufficient to show assignment to the grouping.

Employment tribunals must first define the organised grouping of employees: a group which has been consciously put together with the principal purpose of carrying out relevant activities for the client. They should then determine whether the individual in question was assigned to that grouping. In doing this they should look at all the facts of the case. This case warns against placing too much emphasis on the percentage of time the employee spends working on the relevant contract. The relative amounts of time spent on different contracts by the employee will be taken into account, but will be only one of a number of relevant factors.

7: Court interpreters engaged in a series of short-term contracts could be in "employment" for the purposes of race discrimination claims

In ***Windle v Arada and another*** the EAT considered whether interpreters who were self-employed for tax purposes and who took on a series of short-term assignments for Her Majesty's Court and Tribunals Service (HMCTS) were in "employment" as it is defined in the Equality Act 2010 (EA 2010).

Under the EA 2010, an individual will be taken to be "in employment" if he or she is employed "under a contract of employment, a contract of apprenticeship or a contract personally to do work". A "contract personally to do work" may cover a range of different types of contract, including those who are considered by HMRC to be self-employed. The Supreme Court in *Jivraj v Hashwani* [2011] IRLR 827 made clear that the key question with this category of contract is whether or not the individual is "in a relationship of subordination" with the person who receives the services.

The case involved two foreign language interpreters who worked for HMCTS as well as for the police and the NHS. They brought race discrimination claims, arguing that their terms of service were less favourable than those of British Sign Language interpreters. The interpreters in this case worked under terms of service under which there was no obligation for HMCTS to offer

work and no obligation for the interpreters to accept it. However, in the handbook for freelance interpreters, it is made clear that it is a criminal offence to send a substitute to fulfil an engagement once the work had been accepted.

At first instance, an employment tribunal held that the interpreters were not in employment for the purposes of the EA 2010 as there was no mutuality of obligation (in other words no obligation to provide or accept work) between assignments. The tribunal also decided that they were not in a subordinate relationship to HMCTS; but they were self-employed professionals carrying out a business undertaking.

The EAT overturned this decision. It stated that it was irrelevant whether there was any mutuality of obligation during the time between the different assignments. (This is a question only when considering someone employed "under a contract of employment", not someone employed "under a contract personally to do work".) Rather the tribunal should have considered the obligations once an assignment had been accepted. At this point, the interpreter was prohibited from sending another person to fulfil the contract.

In remitting the case to the same tribunal, the EAT made it clear that the questions now to be considered are: are the claimants in a relationship of subordination to the HMCTS and are they integrated into the HMCTS' organisation? These factors would indicate they are in “employment” for discrimination purposes. Or, are they carrying out an independent business in which the HMCTS is receiving services as a client or customer, indicating they are not in “employment”?

It may be that the tribunal will once again conclude that the claimants are not in a subordinate position when it revisits the case. However, the EAT stated that the tribunal should take a purposive approach, taking into account the purpose of the legislation, i.e. to protect individuals from discrimination. Employers should note that the definition of employment for the purposes of Equality Act claims is wider than that for other claims. Individuals who are nominally self-employed may well come under its protections.

8: Unfair dismissal and time off to care for dependant

Under the Employment Rights Act 1996, employees have the right to take a reasonable amount of unpaid time off work due to matters affecting their dependants. This right only applies if employees inform their employer of the reason for their absence as soon as it is reasonably practicable to do so and state the length of time they are likely to be absent. Where an employee is dismissed because (or principally because) he or she has exercised this right to time off, the dismissal will be automatically unfair.

Previous EAT case law has clarified that what is a reasonable amount of time off will depend of the nature of the incident affecting the dependant and the employee's circumstances. It has also stated that disruption to the employer should not be taken into account.

In the recent case of ***Ellis v Ratcliff Palfinger Ltd*** the EAT upheld an employment judge's finding that an employee had not been unfairly dismissed after taking time off in connection with his heavily pregnant partner's illness and the birth of their child.

Mr Ellis had previously received a final warning due to absence issues in November 2011. This warning was stated to be live for 12 months and it was made clear to Mr Ellis that further breaches of the employer's sickness absence policy could result in dismissal. On 6 February 2012, Mr Ellis took time off due to the illness of his pregnant partner. He did not contact his employer to inform them of the reason for nor likely length of his absence. Mr Ellis's father contacted the employer on the afternoon of that day. The following day, Mr Ellis's partner was admitted to hospital and gave birth to her baby. Mr Ellis did not attend work and he did not make contact with his employer until he received a text asking him to do so on 8 February. Following a disciplinary hearing, Mr Ellis

was dismissed. The employer considered that Mr Ellis had failed to make reasonable efforts to inform it of his absence due to his partner giving birth. The live warning on Mr Ellis's file was taken into account.

Mr Ellis brought a claim for automatic unfair dismissal for exercising the right to take time off for dependants.

At first instance, the employment tribunal held that the right to take time off for dependants did not apply in this case as the employee had not informed the employer of the reason for his absence as soon as it was reasonably practicable to do so. Mr Ellis's explanation that his mobile phone battery had run down was not considered sufficient to render contact with his employer reasonably impracticable.

On appeal, the EAT upheld the tribunal's decision. It distinguished between the first day of absence (which had been due to the illness of Mr Ellis's partner and for which the employer had received an explanation from Mr Ellis's father) and the subsequent days of absence which were due to Mr Ellis's partner giving birth. The employer was found not to have been told of the reason for this absence as soon as it was reasonably practicable to do so.

The EAT reiterated previous case law, stating that it is necessary to look at the facts of the particular case when determining what is reasonably practicable. It made clear that it had taken into account the employee's individual circumstances and mental state as testified to by the claimant. It also made clear that disruption or inconvenience to the employer had not been taken into account in its decision.

Employees should be aware of their responsibilities under the organisation's absence policy and under the relevant legislation. The right to take unpaid time off when necessary to deal with circumstances affecting dependants comes along with the responsibility to contact the employer as soon as is reasonably possible to explain the reason for the absence and to give the likely date or time of return. Employees are expected to prepare for such circumstances by having contact numbers available and ensuring they have some means to contact their employer.

9: Client Briefing: Garden Leave

This client briefing explains when an organisation may be able to place an employee on garden leave. The briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

What is garden leave?

When an employee decides to leave employment or where the employer decides that the employee should leave, the organisation might want to stop the employee from performing their regular duties immediately. However, at the same time, they may want to retain the employee for the notice period, typically requiring them to stay at home, and to keep away from any competitor for as long as possible. This is known as placing the employee on “garden leave”.

An organisation may use garden leave to:

- Keep the employee out of the market place long enough for any information they have to go out of date; and
- Enable that employee's successor to establish themselves, particularly with clients, to protect goodwill.

Having an express garden leave clause in the employment contract may help deter a competitor from poaching employees in the first place and may also increase the employer's bargaining position with any disaffected employees

Can the organisation place the employee on garden leave?

There are two situations.

Express contractual rights in the employment contract

If an organisation wants to put an employee on garden leave, it is helpful to be able to rely on express contractual provisions within the employment contract. For example:

- A right to withdraw the employee's duties and exclude them from the premises will prevent the employee from resigning and claiming constructive dismissal when placed on garden leave; and
- A restriction on other business activities during employment will draw the employee's attention to the purpose of the garden leave, that is to restrain them from carrying out any business activities, and allow an order enforcing it to be more precisely framed.

No express garden leave clauses in the employment contract

If an organisation places an employee on garden leave without an express entitlement to do so, a court will consider whether the employee has a contractual right to work. Over the years, most case law decisions have suggested that there is no implied contractual right to work, but simply a right to be paid.

On this basis, placing an employee on garden leave would not be a breach of contract, even without a garden leave clause. However organisations should be aware that, more recently, the courts have been increasingly willing to find that employees do have a right to work.

The contract of employment continues to exist during garden leave

The employment contract continues to exist during any period of garden leave. Therefore the organisation must continue to

- Perform all terms of the contract;
- Pay salary; and
- Provide all other contractual benefits (such as medical and pension benefits).

Enforcing garden leave

An employee will breach their contract if they leave employment without giving notice. If an organisation wants to enforce a garden leave clause, it should refuse to accept the termination of the contract and suspend the employee for the duration of that notice period. The same applies if an employee seeks to resign with immediate effect claiming constructive dismissal.

Protecting the employer's legitimate interests

It is likely that a court will only enforce a garden leave provision by way of an injunction if it is used to protect the employer's legitimate interests, such as confidential information. For example, an employee proposing to work for a competitor is likely to damage the employers' business interests.

Length of garden leave period

The longer the period of proposed garden leave, the less likely a court is to enforce it in full. For example, where there is a two year notice period, it is unlikely that an employer would be able to serve notice and place the employee on garden leave for the whole of that notice period.

Relationship with a restrictive covenant

Where an employee is placed on garden leave during his or her notice period, a court may be less likely to enforce post termination restrictive covenants to enable an organisation to protect its interests by restricting an employee's activities for a period of time after the employment has ended.

It is sensible to limit the period for which the employee can be sent on garden leave during notice as this will increase the likelihood that it will be held to be enforceable. This will be particularly important if the employee has a long notice period. So for example, if an employee has a notice period of, say, a year a period of garden leave of more than 6 months might be unenforceable.

If there are restrictions on the employee's activities after termination, it is sensible to reduce the period of those restrictions by the amount of time that the employee spends on garden leave immediately before termination. This is usually done by an express clause in the employment contract.

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