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## Garden Leave: How effective is it?

The Victorian Supreme Court has highlighted a number of issues that employers will need to consider before placing senior executives on garden leave during a period of notice.

“Garden (or gardening) leave” is a colloquial expression, referring to a situation where an employer directs an employee not to perform any duties during a period of notice, although the employee continues to be employed and paid during that period. It is often used as an alternative to (or in conjunction with) post-employment restraints as, during a period of garden leave, an employee cannot work for a competitor or otherwise act against the interests of the employer.

In the recent case of *BearingPoint Australia Pty Ltd v Hillard* the Court had to determine an application by BearingPoint to effectively force Mr Hillard, an executive, to serve out the period of garden leave and not work for one of BearingPoint’s competitors during that period.

By way of background, Mr Hillard was employed by BearingPoint in a senior management position. In December 2007, he advised BearingPoint that he had signed a draft letter of intent to accept an offer of partnership from Deloitte, one of BearingPoint’s competitors. BearingPoint treated this as a resignation and wrote to Mr Hillard on 17 December 2007 putting him on garden leave for the duration of his six month notice period, directing him not to contact clients and requiring him to return his laptop computer. BearingPoint then applied to the Court for an injunction enforcing these requirements and preventing Mr Hillard from working for anyone else during his garden leave.

In respect of garden leave, the Court held as follows:

1. Whether an employer may put an employee on garden leave depends on the terms of the employment contract. If there is an express term permitting it, then it is lawful.
2. If the employment contract is silent on the issue, garden leave will be lawful provided that there is no contractual obligation on the employer to provide work as well as pay wages. Whether there is an obligation to provide work depends on the express terms of the employment contract. However, generally, there will be no obligation to provide work except where:
  - the employee has particular skills or talents which the employee needs to keep in regular activity
  - the employee occupies a unique position, or
  - an aspect of the employee’s remuneration depends on work being performed.
3. In this case, BearingPoint had no contractual obligation to provide work and was lawfully permitted to put Mr Hillard on garden leave. The Court noted that Mr Hillard’s:
  - employment contract contained an express clause permitting

BearingPoint to vary or modify Mr Hillard’s duties, even to the extent of putting him on garden leave (even though the clause did not expressly deal with garden leave)

- remuneration would be the same whether he was on garden leave or not, as he was not paid on a commission basis and any performance bonuses were at the discretion of BearingPoint
- position, though senior and important, was not “special and unique”
- skills and expertise did not require frequent exercise during the notice period in order that they be enhanced and preserved, and the fact he was on garden leave did not preclude him from reading materials, attending seminars and workshops and communicating with experts in his field in order to maintain his skills and expertise.

Despite finding that BearingPoint had a contractual right to require Mr Hillard to go on garden leave, the Court refused to order an injunction enforcing the obligation. It held that this would be tantamount to ordering specific performance of the employment contract (which Courts have historically avoided).

The practical result is that if Mr Hillard breached his employment contract and left to work for a competitor during the six month notice/garden leave period, BearingPoint’s only real option would be to sue Mr Hillard for damages for breach of contract. Even BearingPoint conceded that any such damages would be difficult to identify and quantify.

### Implications for employers

This decision has three clear implications for employers:

1. A garden leave clause should not be seen as a complete alternative to effective post-employment restraints. If a court would be reluctant to require the employee to serve out the notice period (albeit from home), the clause may be of little practical effect in terms of protecting the employer’s business interests. The employer should ensure that the garden leave obligations are supplemented by enforceable contractual provisions restraining the employee’s activities following the end of the employment relationship.
2. That being said, employment contracts, especially those for senior executives, should always contain an express clause permitting garden leave. This will at least keep the employer’s options open and preclude any argument that garden leave is not permitted.
3. In any case, the employer should consider whether garden leave is a preferable alternative to having the employee work out the notice period.

## Implied term of mutual trust and confidence continues to gain ground

Last year we reported on the decision of Justice Rothman in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*. In that case, His Honour had to determine whether under Australian law a person's employment contract contained the implied duties of mutual trust and confidence and good faith. That is, the question was whether these duties should be regarded as automatically arising in the employment relationship.

In that case, His Honour found that the employment contract did contain the two implied duties. In broad terms, the duty of mutual trust and confidence was described as an obligation that a party would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or damage the mutual trust and confidence between employer and employee.

The duty of good faith was described as requiring that a party exercise any of its rights or duties honestly and reasonably, with prudence, caution and diligence, and with due care to avoid or minimise adverse consequences to the other party that are inconsistent with the agreed common purpose and expectations of the parties to the contract.

In finding that there was an implied duty of mutual trust and confidence, Justice Rothman drew on both English and Australian precedent. In that regard, his finding that the implied term arose in that case was not particularly surprising. However, his finding of an implied duty of good faith was noteworthy as it was the first time a superior court in Australia had found that such a duty automatically arose out of the employment relationship.

Since the decision of Justice Rothman in February 2007, the courts have been required to consider the implied duty of mutual trust and confidence in a number of cases. There seems to be growing acceptance of the implied term in Australian law. For instance:

- Acting Justice Berman of the Supreme Court of New South Wales held that the implied term applies to the conduct of disciplinary investigations by an employer. Importantly, however, it does not require that the employer carry out an investigation to a standard which might be expected of the police nor does it require, generally, an obligation to afford natural justice to the employee: *Morton v The Transport Appeal Board*.
- Justice Anderson of the Supreme Court of South Australia held that an employer had breached the implied term by failing to provide an employee with adequate support in circumstances where the employee was suffering from work-related stress. His Honour said that the implied term required the employer to properly train, supervise and manage the performance of the employee, all of which had not taken place in that case: *McDonald v State of South Australia*.

- Justice Rothman found that an employer had breached the implied term by purporting to indefinitely “suspend” an employee from her duties: *Downe v Sydney West Area Health Service*.

It is worth noting that in the last decision, Justice Rothman confirmed the existence (at least in that case) of an implied term of good faith. His Honour did not elaborate as to why the duty arose in that case, other than to simply adopt his reasoning in the Russell decision.

To the best of our knowledge, there is only one other case in which the implied term of good faith has been held to exist. In *Taske v Occupational and Medical Innovations Limited*, Justice Moynihan of the Supreme Court of Queensland found that “[in] cases such as this there is an implied term that the parties act in good faith in a relationship of mutual trust and confidence”. In support of this statement His Honour cited the Russell decision.

It is relevant to note that the Russell decision has been appealed.

### Implications for employers

There appears to be a growing acceptance that under Australian law all employment contracts contain an implied term of mutual trust and confidence – that a party must not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or damage the mutual trust and confidence between employer and employee. However, the question is by no means settled. Until there is a definitive ruling by the High Court as to the existence of the term, there will be room to debate whether in a particular case the implied term arises.

Until that time, employers should be aware that the implied term is being increasingly used by disgruntled employees and former employees to challenge conduct by their employers. In some respects it could be said that the development of common law in this area has provided employees with an avenue to challenge the termination of their employment to replace those which might have been lost following the Federal reforms in 2006.

It is far less certain that there is an implied duty of good faith under Australian law. However, employers should expect that an employee who asserts the existence of a duty of mutual trust and confidence would also assert the existence of one of good faith.

Whether separately or combined, the implied terms would give an employee a basis to challenge any unreasonable or capricious behaviour by an employer during the employment relationship. The possibility that one or both of the duties might be found to exist in any given case should cause employers to be circumspect as to how they treat their employees, particularly in relation to matters such as performance management and disciplinary investigations.

## Take care with your calculations – Costly lessons for Tooheys

In recent proceedings before the Supreme Court of New South Wales, Tooheys Limited has been held to redundancy offers made to six brewery workers. The offers were collectively overstated by A\$640,000.

Production changes being implemented at Tooheys' Auburn Brewery led to eleven brewery technician positions being identified as surplus to requirements. The employees in those positions were offered the choice of redundancy or a transfer to Tooheys' packaging department at a lower wage.

Discussions between Tooheys and the affected employees occurred over some 10 months. During that period, Tooheys sent the employees several letters – three of which attached various calculations of the employees' applicable redundancy payment. The last letters, sent in January 2008, attached calculations that were published by mistake. The calculations had been made using an Excel spreadsheet and were not checked by anyone at Tooheys. There was no correlation between the basis for calculation of redundancy entitlements and the figures contained in the schedule. In each case, the redundancy component of the calculation had been made on the basis that each employee had completed 32.68 years of service.

When Tooheys became aware of the miscalculation it attempted to rescind the offers. However, by this time, six of the employees had returned signed forms electing to take redundancy. A number of other employees had not yet returned their elections.

The Court held that, by inviting employees to indicate their acceptance of the redundancy package, it was making an offer in accordance with the attached calculations. Tooheys had not placed any relevant qualifications on its offer in the letters. In particular, it had not stated that any redundancy payment would be in accordance with any industrial award or policy. It had also used the term "redundancy package", which, the Court found, suggested that Tooheys was offering something more than that to which the employees would otherwise be entitled.

The Court ruled that Tooheys was bound to make the offered payments to the six employees who had returned their signed election forms. Those employees each received somewhere between A\$54,000 to A\$163,000 in excess of their actual entitlement. Tooheys, however, was not required to make the offered payments to the employees who had not signed and returned their elections before the offer was rescinded.

### Implications for employers

In light of this decision, employers should take extra care to make sure that any calculations provided to employees are correct. Where the calculations are estimates, employers should ensure that they are clearly qualified and that the basis on which the calculation is being made is clear. In addition, care must be taken with any correspondence to ensure that the terminology used properly conveys the intent of the writer.

## Parental and carers' responsibilities in Victoria – New obligations from 1 September 2008

For some time the *Equal Opportunity Act 1995* (Vic) (EO Act) has prohibited discrimination on the basis of a person's parental status or status as a carer in certain areas of public life, including employment. Discrimination against job applicants, employees, contract workers and partners in firms is specifically prohibited.

The Victorian Parliament has passed legislation to amend the EO Act so as to further the protections provided to employees who have responsibilities as a parent or carer. The *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) (*Amendment Act*) received assent on 11 February 2008 and will come into operation on 1 September 2008.

The main purpose of the Amendment Act is to expand the range of what constitutes discrimination against parents or carers in employment. Specifically, it introduces into the EO Act new provisions which state that an employer must not unreasonably refuse to accommodate a person's responsibilities as a parent or carer in relation to the work arrangements of:

- a person offered employment
- an existing employee.

As examples, the Amendment Act suggests that an employer might be able to accommodate the parental responsibilities of a job applicant by agreeing that he or she can work additional daily hours to provide for a shorter working week or occasionally work from home. Similarly, an employer may be able to accommodate an employee's carer responsibilities by allowing the employee to work from home one morning each week or have a later start time on a certain day. Depending on all the circumstances of each individual case, there may actually be a number of different ways in which an employee's responsibilities can be reasonably accommodated.

In determining whether an employer has unreasonably refused to accommodate the parental or carers' responsibilities of an employee or job applicant, all relevant facts and circumstances will need to be considered, including:

- the nature of the role
- the individual's circumstances (including the nature of his or her responsibilities as a parent or carer)
- the arrangements required to accommodate those responsibilities
- the financial circumstances of the employer
- the size and nature of the workplace and the employer's business
- the effect on the workplace and the employer's business of accommodating those responsibilities, including:

- the financial impact
  - the number of persons who would benefit or be disadvantaged and
  - the impact on efficiency and productivity and, if applicable, on customer service.
- the consequences for the employer of making such accommodation
  - the consequences for the person of not making such accommodation.

This list is not intended to be exhaustive, and the legislation makes it clear that none of these factors are determinative on their own. They are, however, intended to reflect a common-sense approach to balancing the needs of both parties.

Examples of other factors that could be relevant in a particular case might include when the arrangements are to commence, how long they will continue, what information has been provided by the individual in respect of his or her situation and whether there are any legal or other constraints that affect the feasibility of the employer accommodating the responsibilities.

The Amendment Act provides that it will be unlawful discrimination for an employer to contravene the requirement to accommodate family responsibilities. An individual will be able to make a complaint to the Victorian Equal Opportunity and Human Rights Commission (Commission) but will not have to prove direct or indirect discrimination (as defined in the EO Act) to make out the complaint – it will be enough to demonstrate that the employer failed to reasonably accommodate the person's parental or carer responsibilities.

Practical guidance about these new requirements is contained in guidelines that have been published by (and are available through) the Commission.

### Implications for employers

All Victorian employers should now consider how they might be able to accommodate their workers' family responsibilities in the arrangements implemented at the workplace. Employers should not refuse to accommodate family responsibilities unless it is unreasonable in all the circumstances.

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