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GARDEN LEAVE

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GARDEN LEAVE

INTRODUCTION

1. "Garden leave" involves a period of enforced absence from the work place, and usually suspension from duties, for an employee subject to notice of termination (whether notice was given by the employer or by the employee).

2. It has the merit, from the employer's point of view, of restricting competition, and making available the employee's services if desired, for a limited period of time.

3. Its major drawback is the cost to the employer, since the employer must pay for the privilege by providing the employee with the same salary and benefits as he would have done had the employee remained at work.

KEY ISSUES

4. This talk attempts to engage with three areas of particular interest in relation to garden leave:

   4.1. What is the effect of the case of *William Hill v Tucker*?

   4.2. Is there an obligation to provide work?

   4.3. Does the duty of good faith continue during garden leave?

5. Further, I intend to close with some comments arising out of the recent case of *TFS Derivatives Ltd v Simon Morgan*, unreported, 15 November 2004 in which Cox J made some passing remarks about the inter-relationship of garden leave and restrictive covenants.

William Hill v Tucker

6. The availability of garden leave has been reduced by the decision in *William Hill v Tucker*[1]. (This case encompasses the both the first and second matters outlined above.)

Background

7. There is an important background to *William Hill*. Historically, an employer faced a problem when confronted by an employee who, despite having entered into a contract of employment, refused to work. Worse still, the employee intended to leave without giving proper notice, in order to join a competitor. The employer was told that the courts would not grant an injunction which had the effect, albeit indirectly, of forcing the employee to work for the employer. (This undesired effect might materialise if the employee was prevented from working elsewhere, resulting in his idleness or starvation that forced him back to work for the current employer.) This left the employer with no effective remedy.

8. A number of exceptions were developed.

    8.1. First, if the employee was not compelled to go back to the employer and could realistically go and work elsewhere, albeit not with a competitor, then an injunction could be granted (e.g. *Warner Bros Pictures Inc v Nelson*[2]).

    8.2. Secondly, where the employee was happy to continue working for the employer, and trust and confidence was maintained, the courts were more inclined to grant an injunction to ensure the employee worked out his notice: *Evening Standard v Henderson*[3].

9. But a third exception to the traditional answer emerged. The employer agreed to pay the employee's salary and all benefits, would not insist on

[1] [1998] IRLR 313
[2] [1937] 1 KB 209
[3] [1987] ICR 588, [1987] IRLR 64

him coming to work and would not sue for his failure to work. He was put on garden leave.

10. The employer then faced a further problem. On behalf of employees, it was argued that the employer himself was in breach of contract by not allowing the employee to work. If the employer was in breach of contract, then the employee could say "you have broken the contract, I shall accept this breach by ending the contract; I am free to join the competitor". Whether the argument succeeded depended on whether the employer had a right to put an employee on garden leave. In *GFI v Eaglestone* [4] and *Eurobrokers v Rabey*[5], the courts began to grapple with this question. The existence or otherwise of a right to work was the issue in *William Hill*.

Facts

11. Five companies offered spread betting. William Hill Index Limited was one for which Mr. Tucker worked as a senior dealer. He was required to give six months' notice of termination.

12. Mr. Tucker purported to resign on one month's notice in order to join City Index, a rival to William Hill. William Hill responded on the basis that six months' notice was required, that Mr. Tucker was not required to attend work, and that he would receive his salary and other contractual benefits. They reminded him of his continuing duty of good faith.

13. William Hill applied for an injunction to restrain Mr. Tucker from joining a competitor until the expiry of his notice. The Judge refused the application. He stated that the employer was obliged to provide work for the employee which it did not do, entitling the employee to accept this repudiatory breach and end the contract. William Hill appealed.

[4] [1994] IRLR 119
[5] [1995] IRLR 206

Decision of the Court of Appeal

14. The Court of Appeal rejected Williams Hill's appeal, although on a somewhat different basis:

14.1. The Judge's decision was based on a duty on the employer to provide a skilled employee with work and the opportunity to exercise his skills save where there is an express or implied right not to do so. The Court of Appeal rejected that proposition.

14.2. Instead, the Court identified the proper approach to be adopted. Under the contract, what does the employer agree to do? The answer is based on terms of the contract in the light of all the surrounding circumstances.

14.3. Certain situations are recognised by the courts as giving rise to an obligation for the employer to provide work - for example, in the case of actors, who need to exercise their skills, or where publicity is of utmost importance. In contrast, the courts have in the past been reluctant to find an obligation to provide work in cases where an employee is engaged on an indefinite contract with a fixed wage and no remarkable features. It is this category which needs to be re-examined in the light of *William Hill*.

14.4. A new approach is found in the decision. The Court recognised the changed social conditions in which we live. This can be traced back to a comment of Lord Denning in a 1974 case of *Langston v AUEW*[6], right through to Lord Justice Dillon in *Provident Financial Group v Hayward*[7]. These changed social conditions must inform the legal approach to be adopted. It is not suggested that there is an obligation to find work if there is none to be done or none that can be done with profit to the employer.

[6] [1974] IRLR 15
[7] [1989] IRLR 84

15. The employer is not bound to allocate work to an employee in preference to another if there is not enough for both. Nevertheless, what the courts are now prepared to do, according to *William Hill*, is to find that there is a right to work in certain situations where previously there was none. How do you distinguish that certain situation? The *William Hill* decision points to three factors:

15.1. First, the post of senior dealer held by Mr. Tucker was specific and unique;

15.2. Secondly, the skills necessary to the proper discharge of his duties required frequent exercise;

15.3. Thirdly, the contract provided for the hours and days of work, and imposed on the employee the obligation to work those hours necessary to carry out his duties. There was also an express right of suspension. This term would be unnecessary if an implied right to place an employee on garden leave existed. If an employer were entitled to keep his employees in idleness, the investment in his staff (a commitment referred to in the staff handbook) would be as illusory as the limited power of suspension would be unnecessary.

Lessons to be learned

16. First, given the wider range of contracts where a right to work may exist, there is an increased necessity for the employer to incorporate an express garden leave clause into contracts.

17. Secondly, even where there is an express garden leave clause the Courts will not necessarily grant an injunction. The Courts have recognised that garden leave provisions are capable of abuse. If an employer seeks a garden leave injunction then it must be justified on similar grounds to that necessary to

the validity of a restrictive covenant. This reflects what was said in the 1996 case of *Cantor Fitzgerald v George*[8].

18. Thirdly, the precise ambit of the right to work remains unclear. Lord Justice Morritt identified three criteria. The first is that Mr. Tucker held a specific and unique post. But that could be said of many people who are employed in a position of seniority or importance. Secondly, spread-betting skills require frequent exercise. That argument can apply with equal force across a whole range of professions. Thirdly, there must be consideration of the terms of the particular contract. But most contracts identify specific hours and days of work, impose on the employee an obligation to carry out duties, contain a limited power of suspension, and staff handbooks often refer to the employer's investment in staff. In practice, therefore, deciding what the courts will do is not easy.

Symbian Ltd v Christensen

19. This case casts doubt on the proposition that the duty of good faith continues during a period of garden leave.

Facts

20. Mr Christensen was Executive Vice President, Sales & Marketing, for Symbian, subject to 6 months' notice of termination.

    20.1. Christensen accepted an offer to join Microsoft, a competitor, with effect from 1 April 2000.

    20.2. Christensen told Symbian that he would be joining Microsoft, and was put on garden leave.

    20.3. Christensen accepted that he was required to give 6 months' notice of termination, but claimed his new position would not be competitive with Symbian.

[8] Unreported

20.4. Christensen resigned with immediate effect.

20.5. Symbian commenced proceedings for an injunction.

20.6. Symbian's application came before Scott VC.

20.7. Christensen's contract provided:

20.7.1. That he would not during the term of the agreement be engaged in any other business (clause 4.3);

20.7.2. For garden leave during notice (clause 12.3); and

20.7.3. That, for 6 months from the earlier of (i) garden leave starting, or (ii) termination of employment, he would not engage in business of a similar nature to that he had engaged in over the previous 12 months'.

21. Symbian sought an injunction restraining Christensen from:

21.1. Undertaking employment with any present or intended future competitor of Symbian, and

21.2. Otherwise acting in breach of his duties of good faith.

Scott VC's Judgment

22. Scott VC (unreported) found the first head of relief too wide, and the second unsupportable. He stated that:

22.1. The serving of garden leave notice by an employer destroys the employment relationship (although not the employment contract);

22.2. The implied duty of good faith does not survive during garden leave; and

22.3. A garden leave injunction cannot be based on the implied duty of good faith.

23. Scott VC did, however, grant an injunction restraining Christensen from working for Microsoft during the garden leave period based upon the express "exclusive service" term at clause 4.3 of his contract (see paragraph 20.7.1 above).

The Court of Appeal's decision

24. The Court of Appeal dismissed the appeal without dealing with Scott VC's observations on garden leave and the duty of good faith. It noted, however, that counsel for Christensen "confessed to some difficulty" in seeking to justify that part of Scott VC's judgment in his favour.

TFS Derivatives Ltd v Morgan

25. *TFS Derivatives*[9] largely deals with the reasonableness of a 6 month non-compete covenant in the context of an equity derivatives broker ("the broker"). (Because of the precise wording of the covenant, it was upheld – with a little "blue lining".)

26. However, during the hearing Counsel for the broker in question advanced the proposition that the relevant covenant was in restraint of trade because an alternative clause would have been more appropriate, ie. a clause providing for six months' notice entitling the employer to place the broker on garden leave for the whole of that period. He accepted that there was little authority on the interplay between garden leave and restrictive covenants. But he asked the court to take the opportunity "to say something about the reasonableness and greater attraction of garden leave clauses generally" and to strike down the clause in question.

27. Mrs Justice Cox declined the invitation. But she did say that she was not persuaded that garden leave clauses negated the necessity for non-compete clauses, particularly on the facts of the particular case, citing the following reasons:

[9] [2004] EWHC 3181 (QB), 15 November 2004, Cox J.

27.1. Six months' garden leave could be regarded as more onerous as it prevented the broker from working in any capacity rather than in the particular business area covered by the covenant.

27.2. A garden leave clause would not be sufficient protection if the employee was summarily dismissed or walked away without giving notice.

27.3. Enforced garden leave might be a breach of the implied term of trust and confidence.

27.4. Just because the employer had to pay for garden leave did not make it more reasonable for the employee.

28. Clearly this did not form the reasoning of the decision. But it raises interesting questions.

CONCLUSION

29. *William Hill* marks a significant shift in the balance of power to employees. Even if there is no general right to work, an employer will be taken to be under an obligation to provide work to the employee far more than previously.

30. However, the correctness of Scott VC's dicta in *Symbian*, to the effect that garden leave destroys the implied duty of good faith, is doubtful. It is difficult to reconcile with the Court of Appeal's statements in *Provident v Hayward* (above). Despite this, some contracts now expressly provide that the duty of good faith continues during garden leave.

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