

Garden leave in trouble as a business protection strategy

By **Jeff Krins**, Special Counsel, Rigby Cooke Lawyers

In our fast paced economy, stopping your departing employees from joining the competition, while their contacts and knowledge of your business is still fresh in their minds, is critical.

Until now, you have had two main legal strategies (either together or separately) to prevent departing employees from joining the competition and giving them a springboard advantage over you.

1. When an employee resigns, you keep them on the payroll for their notice period but direct them to stay away from the office and your clients/customers.
2. Prior to employment or promotion at your organisation, you place a post-employment restraint of trade clause (that is, a non-compete clause) in the employee's employment contract.

Lawyers have generally held the view that, given the difficulties of enforcing a restraint of trade, garden leave provides a broader more reliable protection. Reserving the right to use garden leave has led some employers to insert substantial notice periods of six months or more in their employees' contracts.

However, for garden leave to be a comprehensive form of business protection, the courts must be willing to order your employees to specifically perform their employment contract and 'remain' employed, even if merely by being on-call, until the end of their notice period.

Garden leave reviewed

The use of garden leave has now been comprehensively considered by a superior Australia court for the first time.

In *BearingPoint v Hillard* [2008] VSC 115, the Victorian Supreme Court upheld an employer's right to place an employee on garden leave.¹

But, in a severe blow to employers, the court also ruled that the only legal remedy available in most cases would be compensation for any damage caused by the employee walking out —

and not an order that the employee specifically perform their employment contract and 'remain' employed.

While suing an employee for damages for walking out can still be a powerful tool, if you can show what damage has been caused, it does not have the overwhelming effect that an order enforcing the garden leave would have had.

So what options do you have now?

With garden leave reduced to a basis for damages only, we now fall back to using restraints of trade as the primary mechanism for stopping your departing employees taking your clients/customers with them when they leave.

To be effective and legally enforceable, restraints of trade should be tailored to your business, the particular employee concerned and those clients/customers with whom they deal. Generic restraints for all of your employees are unlikely to be legally enforceable and should be avoided.

You should also resist seeking overly long or geographically broad restraints unless they have a very narrow effect.

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Note

- 1 Rigby Cooke Lawyers were intimately involved in the *BearingPoint* case as the Victorian solicitor agents for BearingPoint and its Sydney lawyers ●