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Employment Law
2022 / 23

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Employment Law 2022

Colour Coding Guide	❖ Blue Text – Reference to statutes and case law. ❖ Green Text – Reference to textbook paragraphs and other notes in this guide. ❖ Purple Text – Reference to Professional Conduct Rules or Principles.

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Definition of an Employee

❖ *Employment Law, 1.3*

<table>
<tr><td>Employee

Employment Law, 1.3.2</td><td colspan="2">❖ s230(1) ERA 1996: An “Employee” is “An individual who… works under… a contract of employment”.
➢ s230(2): A “Contract of Employment” is “a contract of service… whether express or implied and (if it is express) whether oral or in writing”.</td></tr>
<tr><td rowspan="2">Identifying a Contract of Service

Employment Law, 1.3.2</td><td>The Multiple Factor Test</td><td>❖ A contract of service is identified using the “Multiple Factor” Test in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433:

❖ Three conditions are required:
1. The servant agrees to provide work in consideration for a wage.
2. The servant agrees, expressly or impliedly, that he will be subject to the master’s control in a sufficient degree.
▪ (Does the employer have “the power of deciding the thing to be done, the way… the means… the time… and the place?” – McKenna J, Ready Mixed Concrete)
3. The other provisions of the contract are consistent with it being a contract of service.
▪ E.g. ability to delegate may be indicative that there is NOT a contract of service.

❖ The Court will look at the true nature of the agreement, not just what is written down:
➢ Autoclenz ltd v Belcher [2011] UKSC 41
➢ The Supreme Court held that car valets were employees.
➢ Written terms in the agreement providing (a) that the valets were required to notify whether or not they were turning up for work, and (b) that they could send a substitute in their place, were not reflective of the true relationship between the parties.</td></tr>
<tr><td colspan="2"></td></tr>
<tr><td>Workers

Employment Law, 1.3.3</td><td colspan="2">❖ A “worker” is (per s230(3)):
➢ An employee (see above)
o i.e. An individual who has entered into a contract of employment. But ALSO:
➢ Someone who works under any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract (who is not a client or customer of the individual).

❖ Therefore:
➢ All employees will be “workers” (s230(3)).
➢ “Workers” can also be those who are not “employees” but are (s230(3)):
▪ Individuals who have entered into a contract with another party for work or services.
▪ Which they undertake to perform personally.</td></tr>
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A right of “unfettered substitution” in the Contract is <u>not</u> consistent with “personal performance”, however a conditional right may be (this depends on the nature of the condition) - see Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51 (upheld by the Supreme Court in [2018] UKSC 29 (see below)).

▪ Where the other party is <u>not a client/customer</u>.
</td></tr>
<tr><td><u>Workers vs Self-Employed</u></td><td>
❖ The distinction between workers and self-employed is significant as certain statutory rights apply to “workers” as well as employees, but not “self-employed” e.g.

National Minimum Wage Regulations 1999
Working Time Regulations 1988
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

<u>Key Identifying Factors</u>
<table>
<tr><td><u>Personal Performance</u></td><td>
❖ Pimlico Plumbers Ltd v Smith [2018] UKSC 29: The Supreme Court upheld the decision of the EAT and Court of Appeal that a plumber was a “worker”, and not “self-employed”.
❖ To qualify as a “worker” it was necessary for Mr Smith to have undertaken to perform his work personally.
❖ The Court considered that Mr Smith <u>had</u> done so:

The <u>terms of Mr Smith’s contract referred to personal performance</u> (these referred to ‘your skills’ etc.).
There was only <u>a very limited right of substitution</u> in the contract.

Mr Smith had an ability to essentially “swap shifts” with other Pimlico plumbers.
This right was significantly curtailed and the substitute had to come from the ranks of those bound to Pimlico in similar terms.

The tribunal was entitled to hold that the dominant feature of Mr Smith’s contract in such circumstances was an obligation of personal performance.

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<tr><td><u>Not a Client / Customer</u></td><td>
❖ Pimlico Plumbers Ltd v Smith [2018] UKSC 29: The Supreme Court also held that factors within Mr Smith’s contract suggested he was <u>not a client/customer of Pimlico</u>.

❖ Most significantly, Pimlico exercised tight control over Mr Smith, including controlling:

Mr Smith’s attire
The administrative aspects of any job
“Severe” terms as to when and how much it was obliged to pay him
The suite of covenants restricting his working activities following termination.

</td></tr>
<tr><td><u>Cases re Particular Companies</u></td><td>
❖ <u>Uber drivers:</u> <u>Workers</u> and not self-employed contractors - Uber BV v Aslam and Others [2021] UKSC 5.

The Supreme Court emphasised that Uber exercised <u>significant control over drivers</u> and noted the following

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		factors, in particular, as being indicative of them being "workers": ○ Uber dictates the fee for a ride and therefore **controls how much drivers are paid**. ○ Contract terms are imposed by Uber and **drivers get no say in what these are.** ○ The driver's **choice about whether to accept requests for rides is constrained by Uber:** ○ E.g. the driver's rate of acceptance and cancellation is monitored and, if too many trip requests are declined / cancelled, the driver will be logged off of the app for ten minutes. ○ Uber exercises **significant control over the way in which drivers deliver their services**. ○ E.g. any driver who fails to maintain a required average "Uber rating" will receive a series of warnings and, if their rating does not improve, eventually have their relationship with Uber terminated. ○ Uber **restricts communications between passenger and driver to the minimum necessary to perform the particular trip** and takes active steps to **prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.** ❖ **Deliveroo riders**: ➢ **Not workers** on the basis they can appoint a substitute and therefore there is no personal service. ➢ *R (on the application of the IWGB) v CAC and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952. ➢ An obligation of personal service is an *"indispensable feature of the relationship of employer and worker".* The Court of Appeal noted that, in contrast to *Uber v Aslam*, Uber drivers do not have a right to substitute.
Zero Hours Contracts *Employment Law, 1.3.3 – Subheading "the Gig Economy".*	❖ There is no legal definition of a zero hours contract; the term is usually used to define a contract where there are no guaranteed minimum working hours for the employee. ❖ It can be difficult to demonstrate that those operating under zero-hours contracts are employees: ➢ To be an employee, there must be a "contract of employment". ➢ A key factor in determining whether "a contract" exists at all is **mutual obligations being owed between the parties** - *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471. ➢ The absence of: ▪ (a) a stipulation as to minimum hours and	

	▪ (b) any future commitment (key features of Zero-hours contracts) will generally be indicative of an **absence of mutuality of obligations** ▪ *Nethermere (St Neots) Ltd v Gardiner and Another* [1984] ICR 612. ❖ In *St Ives Plymouth Ltd v Mrs D Haggerty* [2008] WL 2148113 [1] the EAT found that while there was a zero hours contract, **there were mutual obligations**, such that Ms Haggerty was an employee. ❖ However, the absence of a minimum number of hours is not fatal to establishing that the individual is a *worker:* ➢ *Nursing and Midwifery Council v Somerville UKEAT/0258/20:* ➢ The Claimant sat on the Nursing and Midwifery Council's panel. There was no contractual obligation to offer the Claimant a minimum amount of sitting dates and the Claimant was free to withdraw from any of the dates he had accepted. The ET accordingly found there was insufficient *mutuality of obligation* to give rise to an overarching employment contract. ➢ The EAT did, however, hold that the Claimant had worker status, dismissing the Nursing and Midwifery Council's argument that the absence of an obligation on the Claimant to accept and perform a minimum amount of work meant he could not be considered a worker. An "irreducible minimum of obligation" is not a prerequisite for satisfying the definition of worker status.

Implied Terms in Employment Contracts

- *Employment Law*, 1.6 – 1.7
- A number of terms are **implied into a Contract of Employment by both (a) the Common law, and (b) Statute**. These implied terms and their effect are explained below.

Obligations on an Employer

Duty to Pay Wages and Provide Work *Employment Law, 1.7.1.1*	❖ Generally, an employee has **no right to work.** ❖ This means that an employer **does not breach the contract of employment if the employee is kept idle** (*Turner v Sawdon* [1901] 2 KB 653). ❖ **Exceptions** ➢ Workers **whose livelihoods depend on publicity** e.g. actors and singers. ➢ **Employees who are paid by commission** or **piece workers** (i.e. they are paid per unit produced). ➢ Employees who are: ▪ In a **"specific and unique post".** ▪ Where the skills necessary for the proper discharge of their duties **require frequent exercise**. ▪ Where the terms of the contract impose an obligation to work the hours necessary to do the job in a full and professional manner. ▪ *William Hill Organisation Ltd v Tucker* [1998] IRLR 313. ▪ In *William Hill*, the employee was the only "Senior Dealer" in William Hill's fixed odds compiling department – the post was unique to him. ▪ This exception will potentially catch **senior employees. It is unlikely to catch junior employees.**
Deductions from Wages *Employment Law, 1.8.3.2 / 1.11.1*	❖ s13 ERA 1996: An employer may not make a deduction from wages unless: ➢ It is **authorised by statute** e.g. PAYE, NI contributions. ➢ It is **authorised by the contract**. ➢ The worker has **previously consented in WRITING** to the making of the deduction. ➢ OR ➢ An employer is **recovering overpayment of wages** or expenses paid by mistake to the worker (s14(1)).
Duty to Indemnify an Employee *Employment Law, 1.7.1.2*	❖ The employer must **indemnify an employee for expenses and liabilities** incurred in the course of employment. ❖ *In re Famatina Development Corporation Ltd* [1914] 2 Ch 271
Duty to take reasonable care of the employee's safety and working conditions *Employment Law, 1.7.1.3*	❖ Employers are under an implied duty to **provide adequate plant and premises, competent fellow workers and a safe system of work.** ❖ *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57

Duty of mutual trust and confidence *Employment Law, 1.7.1.4*	❖ Employers must not: ➢ *"Without reasonable and proper cause* ➢ *Conduct themselves in a manner calculated or likely to* ➢ ***Destroy or seriously damage the relationship of mutual confidence and trust between employer and employee".*** ➢ *Woods v WM Car Services (Peterborough) Ltd* [1983] IRLR 413, (CA). ❖ Breach of this implied term will **AUTOMATICALLY BE REPUDIATORY** i.e. it will give the employee a right to terminate the contract. ➢ *Morrow v Safeway Stores* [2002] IRLR 9. ❖ **Examples of Breach:** ➢ Unjustified imposition of a final written warning ▪ *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] IRLR 52. ➢ Serious breach of the employer's duty to make reasonable adjustments ▪ *Greenhof v Barnsley Metropolitan BC* [2006] IRLR 98. ➢ Sex discrimination ▪ *Shaw v CCL Ltd* (UKEAT/0512/06. ➢ Use of foul and abusive language ▪ *Horkulak v Cantor Fitzgerald International* [2003] IRLR 756 ▪ Frequent use of such language does not 'sanitise its effect' so as to remove its power to offend. ➢ Raising performance concerns when employee was on a period of sick leave due to depression ▪ *Private Medicine Intermediaries Ltd v Hodkinson and Others* (EAT/0134/15)
Duty to Take Reasonable Care Giving References *Employment Law, 1.7.1.5*	❖ Employers are under an implied duty to take **reasonable care in compiling or giving a reference** and in verifying the information on which it is based. ❖ A failure to do so may render an **employer liable for economic loss** suffered as a result of a negligent misstatement. ❖ *Caparo Industries v Dickman* [1990] 2 AC 605
Duty to Notify on Termination Without Notice *Employment Law, 1.7.1.6*	❖ An employer must notify an employee in clear terms that the contract is ended. ❖ *Société Générale v Geys* [2013] IRLR 122
Duty to Give Reasonable Notice *Employment Law, 1.7.1.7 / 2.3.3*	❖ Employers are required to **give notice for at least the Statutory minimum periods** set out in *Employment Law, 2.3.3* (s86(1) ERA 1996): **Period of Continuous Employment** / **Notice** 1 month – 2 years / 1 week 2 years – 12 years / 1 week for each year 12 years+ / 12 weeks
Working Time Regulations *Employment Law, 1.12*	❖ Where the Working Time Regulations apply, workers are entitled to: ➢ Work an average of 48 hours a week in a 17 week period (which may be extended for up to 52 weeks), unless they specifically opt out (**Reg 4**).

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11 hours of rest between working days (Reg 10).
A minimum of one 24 hour period of rest in a seven day period (1 day off per week) (Reg 11)
A 20-minute break where a working day is longer than 6 hours (Reg 12).
5.6 weeks' paid leave per year (Reg 13).

❖ Most of these rules are subject to exceptions e.g. for workers in emergency / armed services.
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<td>National Minimum Wage Regulations

Employment Law, 1.8.3.1</td>
<td>
❖ Employees are entitled to a Minimum Wage paid at the following rates:
<table>
<tr><th></th><th colspan="2">5 April 2021 – 6 April 2022</th><th colspan="2">5 April 2022 – 6 April 2023</th></tr>
<tr><th>Age</th><th>Hourly Wage</th><th>Minimum Annual Wage (Assuming 40 Hour Week)
(Wage x Hours per Week x 52)</th><th>Hourly Wage</th><th>Minimum Annual Wage (Assuming 40 Hour Week)
(Wage x Hours per Week x 52)</th></tr>
<tr><td>23+ (The National Living Wage)</td><td>£8.91</td><td>£18,532.80</td><td>£9.50</td><td>£19,760</td></tr>
<tr><td>21 – 22</td><td>£8.36</td><td>£17,388.80</td><td>£9.18</td><td>£19,094.40</td></tr>
<tr><td>18 – 20</td><td>£6.56</td><td>£13,644.80</td><td>£6.83</td><td>£14,206.40</td></tr>
<tr><td>Under 18 + Finished School</td><td>£4.62</td><td>£9,609.60</td><td>£4.81</td><td>£10,004.80</td></tr>
<tr><td>Apprentice</td><td>£4.30</td><td>£8,944.00</td><td>£4.81</td><td>£10,004.80</td></tr>
</table>
❖ You can check the applicable rate here: https://www.gov.uk/national-minimum-wage-rates.

❖ Note that if a worker is permitted to sleep during a shift and is only required to respond to emergencies, the hours spent sleeping are not included in the NMW calculation. The worker must be awake for the purpose of working (Royal Mencap Society (Respondent) v Tomlinson-Blake (Appellant) [2021] UKSC 8).
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<td>Statutory Sick Pay (SSP)

Employment Law, 1.8.3.3</td>
<td>
❖ There is no obligation on an employer to pay an employee their salary whilst they are off work sick, they must pay the employee SSP.
❖ SSP must be paid for up to 28 weeks in any three years.
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</table>

	❖ As a result of Covid-19, the Government announced that SSP is **payable from day 1, not day 4.** Previously an employee **was only eligible if they had been off work for more than three consecutive days.** **Rate of SSP** ❖ *6 April 2022- 5 April 2023:* **£99.35 per week** ❖ You can check the applicable rate here – **ask your tutor which rates apply to the exam**. ❖ Note that there is a **possibility that an implied duty to pay an employee's salary whilst they are ill may arise through custom and practice** e.g. if an employer usually pays his staff their salary when they are off sick for a set period of time.

Obligations on an Employee

Duty to Give Personal Service *Employment Law, 1.7.2.1*	❖ An employee may not delegate performance of his duties. ❖ This is a key factor when determining whether someone is an employee or not.
Duty to obey reasonable orders *Employment Law, 1.7.2.2*	❖ The employee is under a contractual duty not wilfully to disobey a lawful order ❖ *Laws v London Chronicle Ltd* [1959] 2 All ER 285
Duty of reasonable care and indemnity *Employment Law, 1.7.2.3*	❖ The employee is under a duty to exercise reasonable care and skill in the performance of his duties. ❖ Employee will **breach this duty if he is negligent and will be liable to indemnify his employer.** ❖ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.
Duty of fidelity or good faith *Employment Law, 1.7.2.4; 1.7.2.6-1.7.2.8*	❖ Employees have a duty to: ➢ **Keep information confidential** and ➢ **Not to compete with their employer.** **Examples of Breaches** ❖ **Copying customer contact details and sales figures.** ➢ *Crowson Fabrics Ltd v Rider and Others* [2007] EWHC 2942 (Ch). ❖ **Deliberately misleading an employer about their intention to work for a competitor.** ➢ *Kynixa Ltd v Hynes and Others* [2008] EWHC 1495 (Comm). ❖ **Working for a competitor where this causes particular harm to an employer.** ➢ *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169). ❖ **Making a list of existing customers with the intention of using it after the termination of the employment relationship:** ➢ *Roger Bullivant Ltd v Ellis* [1987] ICR 464 ❖ **Trying to memorise a list of existing customers with the intention of using it after the termination of the employment relationship:** ➢ *Robb v Green* [1895] 2 QB 315

	❖ **Revealing trade secrets or information which is by its nature confidential, or has been impressed upon the employee as being confidential.** ➢ *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617.
Duty not to make secret profits *Employment Law, 1.7.2.5*	❖ An employee must not make a secret profit. ❖ If an employee does so, he can be compelled to account to his employer for the profit made. ❖ *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339

❖ Note that the protection provided by some implied terms **lasts beyond the contract of employment e.g.** duty not to reveal trade secrets or confidential information.

Restraint of Trade Clauses

- *Employment Law, 1.8.7.1*
- Employers often include **restrictive covenants** in employment contracts which intend to restrict an ex-employee from:
  - **Competing with the ex-employer** (Non-Competition Clause)
  - **Approaching (soliciting) former customers of the ex-employer** (Non-Solicitation Clause)
  - **Poaching the ex-employer's staff** (Non-Poaching Clause), or
  - **Dealing with former clients of the ex-employer even where they approach the ex-employee** (Non-Dealing Clause).

When will a Restraint of Trade Clause be Enforceable?

The Employer must have a legitimate business interest to protect.	❖ "**Legitimate Business Interests":** 1. Protecting "**trade secrets"/confidential information** which, if disclosed, would cause *"**real or significant damage** to the owner"* ▪ *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418 ▪ **"Trade secrets" =** ▪ Defined by the *Trade Secrets (Enforcement, etc) Regulations 2018* (SI 2018/597) as information which is: • (a) **Not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information** in question, • (b) **has commercial value** …, and • (c) has been **subject to reasonable steps … to keep it secret'**; 2. **Protecting trade connections** ▪ i.e. relationships with customers/clients. ▪ The employer must demonstrate that a breach will result in actual or potential harm to the employer's business (*Jack Allen (Sales and Service) Ltd v Smith* [1999] IRLR 19). 3. **Protecting the employer's interest in maintaining a stable and trained workforce**. ▪ *Dawnay, Day & Co Ltd v Braconier d'Alphen & Others* [1997] IRLR 442
The restraint must also be reasonable in time and area.	❖ The clause must be "**no wider than necessary" to protect the employer's business interest.** ❖ What is "no wider than necessary" depends on the **type of clause being dealt with.** This is examined in relation to each clause below.

Non-Competition Clause

❖ *Employment Law, 1.8.7.2 – Subheading, "Non-Competition"*

What is it?	❖ Prohibits the employee: ➢ For a **specified time**, within a **specified number of miles** of the employer's premises. ➢ From **carrying on business in which the employer is engaged**.
No Wider than Necessary?	❖ **The restriction must be no wider than the business in which he was employed**: ➢ *Scully UK Ltd v Lee* [1998] IRLR 259 ➢ E.g. in WS 1, Task 2, the covenant purported to restrict the Employee, who worked for a coach tour operator, from working for *"any coach company or other tour operator".* This is potentially very broad as it could apply to any travel operator or coach service i.e. broader than the employee's previous work. ❖ **Time restraints must be reasonable:** ➢ **1 year+** usually only justifiable in **exceptional circumstances**. ❖ **Area must be reasonable:** ➢ Must be **no wider than the geographical area within which the employer did business.** ➢ E.g. *Hollis & Co v Stocks* [2000] IRLR 712 – a covenant restraining a solicitor from working within a 10 mile radius of a firm of solicitors in Nottingham for 1 year was enforceable. ❖ Very **factually dependent**, but the court will consider: ➢ The **size of the employer** – where does it conduct its business? Is the area restriction reasonable having regard to this? ➢ The **nature of the market** in which the employer operates. ➢ The **seniority of the employee** ▪ *PAT Systems v Neilly* [2012] EWHC 2609 (QB) – the Court held that a 12 month non-compete clause was unreasonable on account of the employee's very junior role. ➢ **Whether the existence of other restrictive covenants are a more proportionate means of protecting the employer's business interests** ▪ E.g. *Associated Foreign Exchange Ltd v International Foreign Exchange (UK Ltd)* [2010] EWHC 1178 – a 6 month non-dealing clause was held to provide sufficient protection, therefore a 12 month non-solicitation clause was held to go further than was reasonably necessary. ➢ Are clauses of this length/area **customary in the business area**?

Non-Solicitation Clause

❖ *Employment Law, 1.8.7.2 – Subheading, "Non-Solicitation"*

What is it?	❖ Prohibits the employee: ➢ From **seeking business from (i.e. approaching) people who were customers** for a specified period prior to the employee leaving.
No Wider than Necessary?	❖ More likely to be upheld if the clause is: ➢ **Restricted to customers the employee had personal contact with** during the specified period (*WRN Ltd v Ayris* [2008] EWHC 1080). ➢ **Restricted to people who were customers for a comparatively short time** prior to employee leaving. ▪ The court will balance this with the first factors aove. ▪ E.g. *Coppage & Another v Safetynet Ltd* [2013] EWCA Civ 1176 – a non-solicitation clause was reasonable even though it was **not restricted to customers the employee had personal contact** with, was it was only for **6 months**.

Non-Poaching Clause

❖ *Employment Law, 1.8.7.2 – Subheading, "Non-Poaching"*

What is it?	❖ Prohibits the employee from **persuading other employees to go with him to a new employer.**
No Wider than Necessary?	❖ More likely to be enforceable if: ➢ It is restricted **to poaching of senior employees**. ➢ it is restricted to **poaching of employees known to the ex-employee**. ➢ The **legitimate interest the employer is seeking to protect is the stability of its workforce (***TSC Europe (UK) Ltd v Massey* [1999] IRLR 22**).** ❖ **Balance of convenience**: The court will consider this when granting an injunction to restrain the poaching of employees ***"what harm will be done to the Ex-Employer if the injunction is granted vs what harm will be done to the Ex-Employee if the injunction is not granted?"***

Non-Dealing Clause

❖ *Employment Law, 1.8.7.2 – Subheading, "Non-Dealing"*

What is it?	❖ Prevents employee **dealing with clients even if they approach the employee**.
No Wider than Necessary?	❖ How long does the restriction last? The shorter it is, the more reasonable. ➢ E.g. *Beckett Investment Management Group Limited v Hall* [2007] EWCA Civ 613 ▪ A 12 month non-dealing clause was held to be reasonable, but the Court commented that a period longer than 12 months would have been unreasonable. ▪ Have regard to: • **The length** of the restriction. • **The nature of the financial services business**. • The **seniority** of the employees. • The evidence that this restriction was an **industry standard**.

Alternatives to a Restraint of Trade Clause - Garden Leave Clauses

What is it? *Employment Law, 1.8.7.3*	❖ The employee is paid **but is excluded from the workplace during their notice period**. ❖ Typically this also prevents an employee from **having contact with colleagues or customers.** ❖ Useful for employers because: ➢ The employee **remains subject to all of the express terms of the contract** e.g. they still have confidentiality and fidelity obligations, perhaps exclusive service clauses etc. whilst simultaneously keeping the employee away from employees, clients etc. so they are less easily poached. ➢ Also ensures the employee does not have access to up-to-date confidential information at the time of them leaving e.g. pricing strategies, customer lists etc. ❖ Alternative to a non-competition clause; **more readily upheld by the courts** (*Eurobrokers Ltd v Rabey* [1995] IRLR 206).
When is it Enforceable?	❖ A right to put employee on gardening leave **should be included as an express term in their contract.** ❖ If it is not: ➢ The risk is that an employer will **breach an express or implied right for the employee to be provided with work** on their notice period ▪ *William Hill Organisation Ltd v Tucker* [1998] IRLR 313 ➢ **HOWEVER** employers can place an employee on gardening leave, even in absence of a contractual right, where there is **evidence of wrongdoing:** ▪ *SG&R Valuation Service v Boudrais* [2008] EWHC 1340 (where the employee helped himself to confidential information prior to move to a competitor). ❖ The court will not enforce a contractual clause unless it is: ➢ A **reasonable restraint** and ➢ The employer is seeking to protect a **legitimate business interest**. ➢ (*Provident Financial Group plc v Hayward* [1989] ICR 160). ➢ The **longer the period of leave the less likely it is to be reasonable**.

ENFORCEMENT

❖ *Employment Law, 1.8.7.2 – Subheading, "Enforcement"*

❖ If a clause **is** wider than necessary, it will not be enforceable UNLESS **the Courts can apply the Blue-Pencil Test.**

The "Blue-Pencil Test"

What is it?	❖ If a clause is **too wide, the court may sever part of the clause** and leave the remainder as an enforceable clause. ❖ This is important to consider when drafting: ➢ If the clause is found to be too wide it should be **worded in such a way so it can be severed such that the remaining clause is valid.**

	➢ The court **will not re-write the clause**, merely strike a "blue pencil" through the part that is too wide.
Examples	❖ *"The Employee… will not within 12 months... work for any coach company ~~or other tour operator~~ within 25 miles of the Employer's premises".* ❖ *TFS Derivatives Ltd v Morgan* [2005] IRLR 246: ➢ A clause that purported to restrict an employee from being employed was "blue-pencilled as follows: *"in either any business which is competitive with ~~or similar to~~ a relevant business within the territory".*
When can it be applied?	❖ Three-stage approach – (*Tillman v Egon Zehnder* [2019] UKSC 32): 1. Can the unenforceable provision be removed **without needing to add to or modify the wording of what remains.** 2. Are the remaining terms **supported by adequate consideration**? 3. Does the removal **change the character of the overall effect of all the post-employment restraints in the contract?**

Remedies *Employment Law, 1.8.7.2 – Subheading, "Mode of Enforcement"*	❖ Breach of a restrictive covenant entitles the employer to: ➢ **Damages** ➢ **Injunction** ▪ Where damages are not an adequate remedy. ▪ I.e. an injunction to prevent the ex-employee from: • Carrying on a competing business • Soliciting customers • Poaching staff. ➢ **The employee can also be compelled to hand over documents** ▪ E.g. trade secrets in his possession.

Effect of Wrongful Dismissal	❖ If an employer commits a repudiatory breach of contract i.e.: ➢ The employee resigns in light of the breach (i.e. they are constructively dismissed). ➢ The employer sacks the employee and in-so-doing **commits the repudiatory breach** (i.e. termination without notice where there is no PILON clause). ❖ Any **restrictive covenants CANNOT BE ENFORCED even if they are valid.** ❖ *General Billposting Company Ltd v Atkinson* [1909] AC 118