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Employment Law
2024

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Employment Law

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[1] Textbook references are to the CLP Legal Practice Guides by CLP Publishing.

[2] References to Workshop tasks are to University of Law workshop tasks (which may be adopted by other LPC institutions). The content and structure of Workshops is subject to change at short notice and so task references should be treated as a general guide only.

1. Definition of an Employee, Contracts of Employment

Definition of an Employee

❖ *Employment Law & Practice, 1.3*

Overview

❖ Not all persons who perform work for others are employees.

❖ This is significant in practice because different rights may arise to individuals depending on whether they are categorised as either (a) an **employee**, (b) a "**worker**", or (c) a **self-employed contractor.**

❖ A summary of the rights that apply, depending on the person's status, is as follows:

Right	Employee	Worker	Self-employed
Unfair dismissal	✓		
Parental leave and pay	✓		
Redundancy	✓		
Right to make flexible working request	✓		
Written statement of terms	✓	✓	
National Living Wage	✓	✓	
Paid holiday	✓	✓	
Whistleblowing protection	✓	✓	
Discrimination protection	✓	✓	Limited

Employee

Employment Law & Practice, 1.3.2

s230(1) ERA 1996

❖ An "**employee**" is *"an individual who… works under… **a contract of employment**"* (s230(1), ERA 1996).

Is there a contract of employment?

❖ A "**contract of employment**" is "a ***contract of service***… *whether express or implied and (if it is express) whether oral or in writing*" (s230(2)).

Is there a contract of service?

The Multiple Factor Test

Employment Law & Practice, 1.3.2

❖ 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 must be fulfilled:

1. The servant must have agreed to **provide work in consideration for a wage**.
2. The servant must have agreed, expressly or impliedly, that they will be **subject to the master's [employer'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?"* 3. The **other provisions of the contract** must be **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): ➢ In *Autoclenz*, the Supreme Court held that car valets were employees, on the basis that certain terms in their written agreement, which might suggest that the valets were self-employed (namely that the valets were required to notify whether or not they were turning up for work; and that they could send a substitute in their place), were **not reflective of the true relationship between the parties.**
Workers *Employment Law & Practice*, 1.3.3 s230(3) ERA 1996	❖ A "worker" is: ➢ An employee (see above) (i.e., an individual who has entered into a contract of employment); ***or*** ➢ 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) (s230(3)). ❖ Therefore: ➢ ***All* employees** will be "workers"; but ➢ "Workers" ***can*** be persons who are not "employees" but are: ▪ Individuals who have entered into a contract with another party for **work or services**; ▪ Which they undertake to **perform *personally***;		

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Where the other party is <u>not a client or customer</u>.

❖ A right of “unfettered substitution” in the contract (a clause that allows an employee to appoint someone else to perform their duties, without the need to seek permission or approval from the employer), is <u>not</u> consistent with “personal performance”.

❖ However, a <u>conditional</u> right of substitution may be (this depends on the nature of the condition) (Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51 (upheld by the Supreme Court in Pimlico Plumbers Ltd v Smith [2018] UKSC 29 (see below))).
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<tr><td><u>Workers vs self-employed contractors.</u></td><td>
❖ The distinction between <u>workers</u> and <u>self-employed contractors</u> is significant as certain statutory rights apply to “workers”, but <u>not</u> “self-employed” persons, such as:

➢ The National Minimum Wage Regulations 1999;

➢ The Working Time Regulations 1988; and

➢ The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

<table>
<tr><td><u>Key features distinguishing workers from self-employed persons.</u></td><td><u>Personal Performance</u></td><td>
❖ A key feature distinguishing workers from self-employed persons is an obligation that <u>the person</u>, and <u>only that person</u>, may carry out the obligations under the contract.

❖ Self-employed persons will generally have the ability to appoint a substitute.

❖ 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 the claimant, Mr Smith, to have undertaken to perform his work personally. The court considered that Mr Smith <u>had</u> done so on the basis that:

➢ The terms of Mr Smith’s contract referred to <u>personal performance</u> (these referred to “your skills”).

➢ Whilst there was a right of substitution in the contract, this was <u>very limited</u>. Mr Smith had an ability to essentially “swap shifts” with other Pimlico plumbers. This right was <u>significantly curtailed</u> and the substitute had
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			to come from the **ranks of those bound to Pimlico in similar terms.**
		Not a client / customer	❖ A person is more likely to be a worker if it is clear that they are not a client or customer of the employer. ❖ *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29: the Supreme Court held that factors within Mr Smith's contract suggested he was **not a client/customer of Pimlico**. ❖ 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; and ➢ The **suite of covenants** restricting his working activities following termination.
	Example Cases	**Uber drivers**	❖ Uber drivers were found to be **workers** and not self-employed contractors in *Uber BV v Aslam and Others* [2021] UKSC 5. ❖ The Supreme Court emphasised that Uber exercised **significant control over drivers** and noted the following 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. ❖ By contrast, where it was found that a taxi driver could provide services as **often or as little as they wanted**, could dictate **the timing** of them, and was **not** under the control of the employer as to **how the services were undertaken**, the driver *was not* found to be a worker (*Johnson v Transopco UK Ltd* [2022] EAT 6).
		Deliveroo riders.	❖ Deliveroo riders are **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"* (a comment that was **approved by the Supreme Court on appeal** (*Independent Workers Union of Great Britain v Central Arbitration Committee and another (Respondents)* [2023] UKSC 43).
Zero hours contracts. *Employment Law & Practice, 1.3.3 – Subheading*	❖ There is no legal definition of a zero hours contract; the term is usually used to describe 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".		

"the Gig Economy".	➢ 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 stipulation as to **minimum hours**, and any future commitment will generally be indicative of an **absence of mutuality of obligations** (*Nethermere (St Neots) Ltd v Gardiner and Another* [1984] ICR 612). These are key features of zero-hours contracts. ❖ 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 f**atal to establishing that the individual is a ***worker***: ➢ In *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 EAT 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

Overview	❖ 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

No duty to 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	❖ There are, however, three main exceptions where an employer may have a duty to provide work. These are: ➢ 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**; and ▪ 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, but is **unlikely to catch junior employees.**
Deductions from wages.	❖ Per 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**;

Employment Law, 1.8.3.2 / 1.11.1	➢ 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). ❖ Employers also have **statutory duties** under the Health and Safety at Work etc Act 1974 in respect of their employee's health and safety.
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). ❖ 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.	❖ The following are examples of situations where the duty of trust and confidence may be breached: ➢ **Unjustified imposition** of a final written warning (*Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] IRLR 52). ➢ A 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.

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<tr><td></td><td>➢ Raising <u>performance concerns</u> when employee was on a period of sick leave due to <u>depression</u> (Private Medicine Intermediaries Ltd v Hodkinson and Others (EAT/0134/15)).</td></tr>
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<tr><td><u>Duty to take reasonable care giving references.</u>

Employment Law, 1.7.1.5</td><td>❖ Employers are under an implied duty to take <u>reasonable care in compiling or giving a reference</u> and in verifying the information on which it is based.

❖ A failure to do so may render an <u>employer liable for economic loss</u> suffered as a result of a negligent misstatement.

❖ Caparo Industries v Dickman [1990] 2 AC 605</td></tr>
<tr><td><u>Duty to notify on termination without notice.</u>

Employment Law, 1.7.1.6</td><td>❖ An employer must notify an employee in clear terms that the contract is ended (Société Générale v Geys [2013] IRLR 122).</td></tr>
<tr><td><u>Duty to give reasonable notice.</u>

Employment Law, 1.7.1.7 / 2.3.3</td><td>❖ Employers are required to give notice of termination of employment of <u>at least the following statutory minimum periods</u> (s86(1) ERA 1996):

<table>
<tr><th><u>Period of Continuous Employment</u></th><th><u>Notice</u></th></tr>
<tr><td>1 month – 2 years</td><td>1 week</td></tr>
<tr><td>2 years – 12 years</td><td>1 week for each year</td></tr>
<tr><td>12 years+</td><td>12 weeks</td></tr>
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<tr><td><u>Working time regulations.</u>

Employment Law, 1.12</td><td>❖ Where the Working Time Regulations apply, workers are entitled to:

➢ Work an <u>average of 48 hours a week</u> in a 17-week period (which may be extended for up to 52 weeks), unless they specifically opt out (Reg 4).

➢ <u>11 hours of rest</u> between working days (Reg 10).

➢ A minimum of <u>one 24-hour period of rest</u> in a <u>seven-day</u> period (1 day off per week) (Reg 11).

➢ A <u>20-minute</u> break where a working day is <u>longer than 6 hours</u> (Reg 12).

➢ <u>5.6 weeks' paid leave</u> per year (Reg 13).

❖ Most of these rules are <u>subject to exceptions</u> (e.g., for workers in emergency / armed services).</td></tr>
<tr><td><u>National Minimum</u></td><td>❖ Employees are entitled to a <u>minimum wage</u> paid at the following rates:</td></tr>
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Wage Regulations

Employment Law, 1.8.3.1

National Minimum Wage Rates

	5 April 2023 – 6 April 2024		5 April 2024 – 6 April 2025	
Age	**Hourly Wage**	**Minimum Annual Wage (Assuming 40 Hour Week)** (Wage x Hours per Week x 52)	**Hourly Wage**	**Minimum Annual Wage (Assuming 40 Hour Week)** (Wage x Hours per Week x 52)
23+ (The National Living Wage)	£10.42	£21,673.60	£11.44[1]	£23,795.20
21 – 22	£10.18	£21,174.40		
18 – 20	£7.49	£15,579.20	£8.60	£17,888
Under 18 + Finished School	£5.28	£10,982.40	£6.40	£13,312
Apprentice	£5.28	£10,982.40	£6.40	£13,312

- 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 national minimum wage calculation. The worker must be awake for the purpose of working (*Royal Mencap Society (Respondent) v Tomlinson-Blake (Appellant)* [2021] UKSC 8).

Statutory Sick Pay (SSP)

Employment Law, 1.8.3.3

- 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**.

Rate of SSP[2]	**6 April 2023 – 5 April 2024**	**6 April 2024 – 5 April 2025**
	£109.40 per week. Paid for a **maximum of 28 weeks (£3063.20).**	£116.75 per week. Paid for a **maximum of 28 weeks (£3,269).**

- 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 their staff their salary when they are off sick for a set period of time).

[1] From 1 April 2024, all workers aged 21 and over will be entitled to the National Living Wage

[2] You can check the applicable rate here: https://www.gov.uk/employers-sick-pay/entitlement. Ask your tutor which rates apply to the exam.

Obligations on an Employee

Overview	❖ The following obligations on employees will be implied into the employment contract.

Duty to give personal service. *Employment Law, 1.7.2.1*	❖ An employee **may not delegate performance** of their 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 **to not wilfully 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 their duties. ❖ The employee will breach this duty if they are **negligent** and will be liable to indemnify their 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 compete** with their employer.

Examples of breaches.	❖ An employee may breach the implied duty of good faith where they: ➢ **Copy customer contact details** and sales figures (*Crowson Fabrics Ltd v Rider and Others* [2007] EWHC 2942 (Ch)). ➢ **Deliberately mislead** an employer about their intention to work for a competitor (*Kynixa Ltd v Hynes and Others* [2008] EWHC 1495 (Comm)). ➢ **Work for a competitor** where this causes particular harm to an employer (*Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169).

		➢ **Make 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). ➢ Try 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). ➢ **Reveal 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[1]

❖ *Employment Law, 1.8.7.1*

Overview	❖ Employers often include **restrictive covenants** in employment contracts which intend to restrict an ex-employee from: ➢ **Competing** with the ex-employer (a non-competition clause); ➢ **Approaching** (soliciting) **former customers** of the ex-employer (a non-solicitation clause); ➢ **Poaching** the ex-employer's **staff** (a non-poaching clause); or ➢ **Dealing with former clients** of the ex-employer even where they approach the ex-employee (a non-dealing clause).

When will a restraint of trade clause be enforceable?	❖ To be upheld, a restrictive covenant which seek to restrain trade must be "**reasonable**" to protect the "**legitimate interest**" of the business. ❖ This has two components:		
	The Employer must have a legitimate business interest to protect.	❖ There is no exhaustive definition of what a "legitimate interest" is, but broadly it will be a genuine **commercial interest of the business**, such as:	
		Protecting trade secrets / confidential information.	❖ It is a legitimate interest for the business to seek to protect "**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"** are defined by the Trade Secrets (Enforcement, etc) Regulations 2018 (SI 2018/597) as information which is: ➢ **Not generally known** among, or readily accessible to, persons within the circles that **normally deal** with the kind of information in question; ➢ Has **commercial value**; and ➢ Has been subject to **reasonable steps… to keep it secret.**

[1] Workshop 1, Workshop Task 2

		Protecting trade connections.	❖ It is a legitimate interest to protect relationships with customers or 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).
		Protecting the employer's interest in maintaining a stable and trained workforce.	❖ It is a legitimate interest to seek to maintain a stable and trained workforce (likely to be most relevant to non-poaching clauses). ❖ *Dawnay, Day & Co Ltd v Braconier d'Alphen & Others* [1997] IRLR 442
	The restraint must be reasonable in time and area.	❖ The clause must be "**no wider than necessary"** to protect the employer's legitimate interest. ❖ What is "no wider than necessary" depends on the **type of clause being dealt with.**	
		Non-competition clause. *Employment Law, 1.8.7.2 – Subheading, "Non-Competition"*	❖ A non-competition clause is one which prohibits the employee from **carrying on business in which the employer is engaged** for a specified time, within a specified number of miles of the employer's premises. ❖ In order for the restraint of trade clause to be considered "no wider than necessary", the restriction must normally meet the following criteria[2]:
			It must be no wider than the *business* in which the employee was employed. — ❖ For example, if an employer is a coach tour operator who provides excursions, and there is a covenant which purports to restrict an employee who leaves from working for *"**any** coach company or other tour operator",* this is potentially too broad. It would restrict the employee working for ***any travel operator or coach service.***

[2] Workshop 1, Task 2

				❖ The scope of employment the clause seeks to restrict **must not generally be broader than the employee's previous work**. ❖ *Scully UK Ltd v Lee* [1998] IRLR 259
			It must seek to impose time restraints that are *reasonable.*	❖ A covenant which seeks to restrain an employee working for a competitor for **more than 1 year** is usually only justifiable in **exceptional circumstances**.
			It must seek to restrict employment to a *reasonable* geographical area.	❖ The restriction 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. ❖ This is 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 (e.g., in *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).
			It must be a proportionate means of protecting the employer's business interests	❖ The restrictive covenant may not be upheld where other covenants are available which provide 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. ❖ Consider whether clauses this length or geographical scope are **customary in the business area.**
			Non-Solicitation Clause *Employment Law, 1.8.7.2 – Subheading, "Non-Solicitation"*	❖ A non-solicitation clause prohibits the employee from seeking business from (i.e., **approaching**) people who **were customers of the employer**, for a specified period prior leaving. ❖ In order for a non-solicitation clause to be considered "no wider than necessary", the restriction will normally need to be: ➢ 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 the employee leaving. ▪ The court will **balance this** with the first factor above. ▪ E.g., in *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"*	❖ A non-poaching clause prohibits the employee from persuading **other employees** to **go with them** to a new employer. ❖ In order for a non-poaching clause to be considered "no wider than necessary", the restriction will normally need to be: ➢ Restricted to poaching of ***senior*** employees; or ➢ Restricted to poaching of employees ***known to the ex-employee.*** ❖ In addition, the legitimate interest the employer is seeking to protect should be the **stability of its workforce** (*TSC Europe (UK) Ltd v Massey* [1999] IRLR 22). **Balance of convenience.** ❖ When considering whether or not to grant an **injunction** to restrain the poaching of employees, the court will consider the "balance of convenience" test. ❖ In other words, it will assess the level of harm that will be done to the *ex-employer* if the injunction is granted, and balance this again the level of harm that 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"*	❖ A non-dealing clause prevents the employee from **dealing with clients of the employer even if *they approach* the employee**. ❖ In order for a non-poaching clause to be considered "no wider than necessary", the restriction will normally need to be **reasonable in** time (i.e., the shorter it is, the more likely it is to be reasonable). ➢ E.g., in *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. ❖ The court will have regard to: ➢ **The length** of the restriction. ➢ The **nature of the industry**. ➢ The **seniority** of the employees. ➢ The evidence that this restriction was an **industry standard**.

Garden leave clauses. *Employment Law, 1.8.7.3*	❖ A potential alternative to a restrictive covenant restraining trade is a "garden leave" clause. ❖ If the employment contract contains a garden leave clause, the employer will be **entitled to exclude an employee from the workplace during their notice period**, however the employee must be paid. ❖ Typically, the clause will also prevent an employee from **having contact with colleagues or customers.**	
	Use for Employers	❖ A garden leave clause helps: ➢ **Prevent poaching**: the employee **remains subject to all of the express terms of the contract** (e.g., they will still have confidentiality and fidelity obligations, perhaps exclusive service clauses), whilst simultaneously **being kept away from other employees**, and clients (etc.) so they are **less easily poached**; and ➢ **Prevent access to information**: a period of garden leave will ensure the employee **does not have access to up-to-date confidential information** at the time of them leaving, such as pricing strategies, customer lists etc. ❖ It is an alternative to a non-competition clause, which is 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,*** where there is **evidence of wrongdoing**, employers can place an employee on gardening leave, *even in absence of a contractual right*

		(*SG&R Valuation Service v Boudrais* [2008] EWHC 1340, in which a period of garden leave was permitted where an employee helped themselves 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**.
The "blue-pencil test". *Employment Law, 1.8.7.2 – Subheading, "Enforcement"*	❖ If a clause ***is*** found to be wider than necessary, it will **not** be enforceable unless **the courts can apply the blue-pencil test.** ❖ This allows the court, if a clause is too wide, to **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	❖ An example of how a clause may be drafted so that a section which is "too wide" may be removed is as follows: *"the Employee… will not within 12 months… work for any coach company ~~or other tour operator~~ within 25 miles of the Employer's premises"*[3]. ❖ *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 the blue pencil test be applied?	❖ Three-stage approach (*Tillman v Egon Zehnder* [2019] UKSC 32): ➢ Can the unenforceable provision be removed without needing to **add to or modify the wording of what remains**? ➢ Are the remaining terms **supported by adequate consideration**?

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	➢ Does the removal change the **character of the overall effect** of all the post-employment restraints in the contract?
Remedies for breach of a restraint of trade clause. *Employment Law, 1.8.7.2 – Subheading, "Mode of Enforcement"*	❖ Breach of a restrictive covenant entitles the employer to: ➢ **Damages** ➢ **An injunction**: ▪ That is, an injunction to prevent the ex-employee from carrying on a competing business; soliciting customers; or poaching staff. ▪ This is *discretionary*, and will only be available where **damages are not an adequate remedy**. ➢ **The employee can also be compelled to hand over** documents (for example trade secrets in their possession).

Effect of wrongful dismissal.	❖ Any restrictive covenants **cannot be enforced**, even if they are **valid**, if an employer commits a repudiatory breach of contract (*General Billposting Company Ltd v Atkinson* [1909] AC 118). ❖ This will impact restrictive covenants where: ➢ The employee **resigns in light of a repudiatory breach** (i.e., they are constructively dismissed); or ➢ The employer **sacks the employee without notice** where there is no PILON clause, and in-so-doing commits the repudiatory breach.