

# Gardening Leave: The Pros and Cons for Employers and Employees

“Gardening leave” is a practice whereby an employee leaving a job or being made redundant or dismissed is instructed by the employer to stay away from the workplace during the notice period while still on the employer’s payroll.

This is the strategy employers use to protect their business interests when the employee is leaving. It is generally applied to senior employees such as executives, directors, and managers. These employees have greater access to the employer’s sensitive, restricted or confidential information, including detail of their clients.

The aim of gardening leave is to keep employees out of the marketplace long enough to protect the employer’s goodwill.

The contract of employment continues to exist during this time, and parties are expected to comply with the terms and conditions of such an agreement.

The employer is expected to continue to pay the employee his or her regular salary and provide the same contractual benefits.

The employee, on the other hand, is expected to be available and not work for any other employer.

The benefits of garden leave are the following:

1. It ensures an efficient handover process as the employees are available for any queries/help.
2. It prevents the employees from doing anything contrary to the employer’s business interest until the contract is terminated.
3. It ensures that employees are, during the notice period, still bound by the contract and need to comply with clauses such as confidentiality.
4. It prevents the employees from misusing the data they acquired from the employer.
5. It prevents the existing employees from making contact with colleagues or clients.

6. It protects the goodwill of the company.

The disadvantages of gardening leave are the following:

1. In certain circumstances, the employee could feel forced to resign and claim constructive dismissal.
2. Where the employee's salary depends on commission or a professional skill level, any failure to provide the employee with work could result in a breach of contract.
3. There is no guarantee that things will run smoothly. This can be a prostrating time for the employee who wants to get on with their new employment.

In the case of *Vodacom (Pty) Ltd vs Godrey Motsa (J74/16)*, the Labour Court ruled in favour of Vodacom. Mr Motsa was ordered to comply with the garden leave and restraint of trade clause.

Mr Motsa was the senior executive at Vodacom and resigned on 23 December 2015, effective from 1 January 2016. He had received an offer from MTN. The employment contract, amongst others, required a six-month notice period.

This is a relatively new concept in our legal system. However, it can be applied in thoroughly considering the reasonableness of such clauses. The constitution should also be considered in the interpretation of such.

Employers must follow current procedures in implementing such a process, as any failure can lead to additional costs and damages claims.

The employer should also include clauses in employment contracts, especially with senior managers, that cater for the terms applicable to gardening leave.

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