

In *BearingPoint Australia Pty Ltd v Hilliard* [2008] VSC 115 a managing director, Hilliard, of a management technology consulting company signed a letter of intent with a competitor. BearingPoint treated Hilliard as having effectively resigned and put him on garden leave during his notice period of 180 days. There was no provision in Hilliard's contract of employment that allowed BearingPoint to put Hilliard on garden leave. Hilliard argued that BearingPoint had a duty to provide him with work. BearingPoint argued that there was an implied term in the contract allowing them to put Hilliard on garden leave for the duration of the notice period.

The court rejected Hilliard's argument that his position was one which fell into a special category that obliged his employer to provide him with duties. The court found that;

1. It was understandable and legitimate for BearingPoint to remove Hilliard from contact with client's once it learned that Hilliard intended to take up a position with one of its competitors.
2. Hilliard could not argue that his remuneration was dependent on performance because the bonuses that were potentially available to Hilliard were discretionary. Given Hilliard had signalled an intention to work for a competitor it was unlikely he would have been paid the bonuses anyway.
3. BearingPoint could not be criticised for not making any attempt to utilise Mr Hilliard's insistence that his contract had been terminated and his refusal to meet with his superiors.
4. Mr Hilliard's position as a managing director and leader of the information management team was not a "special and unique post" as understood and discussed by previous court decisions.
5. Mr Hilliard's skills and expertise did not require frequent exercise during the notice in order to enhance and preserve them. Mr Hilliard was not prohibited from reading materials, attending seminars and workshops, communicating with experts in the field and otherwise developing his skills during the garden leave. Mr Hilliard's absence from participation in the market place was not comparable to an actor or television presenter in the same circumstance.
6. The fact that Mr Hilliard was required to work whatever hours were required to properly discharge the duties of his position was not enough to obligate BearingPoint to supply him with work.

Consequently the court found that there was an implied term in Hilliard's contract allowing BearingPoint to direct him to go on garden leave for the duration of his notice period.

Despite finding the existence of such a term in the contract the court ultimately declined to order an injunction forcing Hilliard to serve out his notice period. The court found that to make such an order would involve ordering specific performance of a contract of employment, something that courts have traditionally been reluctant to order. The court also declined to grant the injunction on discretionary grounds, principally that;

1. The purpose of such a notice period was to allow the employer to arrange for a substitute employee. BearingPoint had already arranged a substitute employee who had been in the position for 6 to 7 weeks.
2. The court formed the impression that the principle purpose for the injunction was to prevent Hilliard from competing with BearingPoint for as long as possible, which was not a legitimate purpose.
3. There was no reason why BearingPoint's remedy should be limited to damages.

The decision in *BearingPoint* demonstrates that there are a number of considerations in determining whether an employer is entitled to direct an employee to take garden leave. Employees need to consider whether their employment falls into a special class recognised by the court as having a right to perform work or whether the construction of the employment contract and relationship lends itself to an implied duty to provide work. If your employer is directing you to take garden leave you should seek legal advice about your situation from Maurice Blackburn Employment Lawyers on 1800 810 812.