Garden leave: remedy for protecting employer's business (2/49/19)

When it comes to giving notice to terminate an employment contract, the employer wants to not only carry out their statutory obligations but also protect their business interests. Latvian law is silent about the employer's right to prevent the employee from coming to work during the notice period. Anglo-Saxon law has dealt with this situation since late last century using the legal concept of garden leave.

What is garden leave?

Garden leave means that during the employee's notice period, the employer continues to pay the salary and other benefits prescribed by the employment contract but may impose various conditions, such as prohibiting the employee from doing work and from being at work to safeguard the employer's business interests from any adverse consequences a dissatisfied employee might cause. An order that prohibits the employee from coming to work provides a distance that is both physical and informational.

Latvian law

Although Latvian law is silent about garden leave, Sweden and Finland have put this concept into practice, so we need to assess whether it could also be applied to Latvian employment contracts.

Any clause in an employment contract or in the employer's order that unlawfully worsens the employee's legal position is invalid under the Labour Code. An employee on garden leave receives the salary and other payments due under the Labour Code and the employment contract. The employee is not suffering any financial loss, so we could recognise that garden leave has no adverse consequences and does not worsen the employee's position.

However, any restriction on the employee's rights should be reasonably necessary even if it does not appear to infringe on the employee's interests or if the infringement is minimal. For example, we could talk about the employee's rights being restricted if keeping up the employee's professional skills means that long breaks are not permissible. Anglo-Saxon law has dealt with a number of such cases but all of those involved a notice period considerably longer than what is permitted by Latvian law.

Latvia offers no grounds for assessing a restriction on the employee's rights from this aspect because any notice period longer than one month is invalid under the Labour Code. A one-month period cannot lead to a loss of professional skills because the statutory annual leave of four weeks would then also be too restrictive.

A clause in an employment contract

When it comes to inserting a garden leave clause in an employment contract, the employer should first evaluate the employee's role, the information available to them, and other matters such as what adverse consequences the employee might cause during the notice period. We need to avoid a situation where garden leave is applied to all employees without assessing the characteristics of each role.

Before using garden leave, we need to assess whether any damage the employee might cause to the employer is greater than the restriction on the employee's rights and whether the employer's business interests therefore prevail over the employee's rights. The scope of restriction arising from garden leave should be clearly defined in the employment contract as a separate clause.

Conclusion

Garden leave is a remedy for protecting the employer's business interests where it is necessary to limit the adverse consequences a dissatisfied employee might cause at work and where, given the payment of salary, there is little or no restriction on the employee's rights. Yet we should remember that the scope of each legal restriction should be laid down by the employment contract to avoid the risk of litigation after evaluating the need and rationale for the restriction. Neither statute law nor case law dealing with employment matters in Latvia has any legal obstacles to prohibit the principle of garden leave from being included in an employment contract.