A-Z Guide

Confidentiality

Contents

Overview

There is a duty of confidence during the term of employment and endures beyond the termination of employment.

- A breach of the duty of confidence is often associated with breaches of other duties.
- Employees must not disclose or misuse confidential information gained in their employment during and after that employment.
- Employers may seek redress for a breach of confidence in the Employment Relations Authority.

Introduction

The duty of fidelity restrains an employee from competing with the interests of his or her employer for the life of the; employees may not compete with their employers and should not assist anyone else to do so. However, once the employment relationship has ended it is the duty of confidence that takes over and prevents an employee from being unjustly enriched at the expense of his or her former employer. This **A-Z Guide** deals with the duty of confidentiality that is owed by employees to their employers.

Please also refer to the following **A-Z Guides** for information about employers' obligations in respect of their employees as it relates to maintaining the confidentiality of personal information:

- Privacy
- References
- Termination of Employment

The Duty

The duty of confidentiality is an implied term of all employment agreements, and more often than not is an express term of employment agreements.

The duty has been long recognised by the common law which stems from two English cases, *Robb v Green[1985]* 2 QB 315 and *Merry weather v Moore[1892]* 2 Ch 518, which held that an employee cannot use confidential information to advance some personal business to the injury of his or her employer's interests, and that to use materials obtained from one's employment to promote the interests of a later employer is contrary to good faith.

Where the duty is contained in an express term which specifies the confidential information that the employer wants to protect then a dispute over whether or not the information is confidential is less likely to arise. In these situations, the issue will be the extent to which an employer can restrain an employee from doing, or continuing to do, something that the employer believes offends against the express term.

Where the duty is not contained in an express term, the first issue will be the scope of the implied term. It is at this point that the case law comes to bear; it is less likely to impose a restriction on the use of confidential information after the employment has ended, unless the information itself can be categorised as being intrinsically confidential, involving a high degree of confidentiality and proprietary rights.

Confidential Information

It is important to keep these comments in mind when trying to determine what is and is not confidential information.

Not all information obtained during the employment is confidential information. There are two tests approved and accepted by the Employment Court.

The first was formulated by *Megarry VC in Thomas Marshall (Exports) Ltd v Guinle*[1979] Ch 227:

"First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, ie, that is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in light of the usage and practices of the particular industry or trade concerned. It may be that the information which does not satisfy all of these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection."

The Employment Court has often cited the judgment of the English Court of Appeal in *Faccenda Chicken Ltd v Fowler & Ors*[1986] 1 All ER 617 (CA). In this decision the English Court outlined a number of factors relevant to the question of whether any particular item of information falls within the ambit of confidential information. These (paraphrased) are:

- The nature of the employment – does it impose a high obligation of confidentiality or not
- The nature of the information itself – is it highly confidential in itself
- Whether the employer impressed on the employee the confidentiality of the information thus affecting the employee's attitude to it
- Whether the information was specific and can be easily isolated from other information which the employee is free to use or disclose'

The following examples illustrate what has been held to be confidential information in New Zealand:

- A formula for the development of a building trade product constituted a trade secret. in All co *Agencies Auckland Ltd v Naidoo*(1988) 2 NZELC 95,923;
- Extensive photocopies of detailed records of business contacts, work-related diaries, client contact books and buyer response forms showing profit margins and other financial information relating to contracts with clients, in *Peninsular Real Estate v Harris*[1992] 2 NZLR 216;
- Information about computer based facilities to run essential security, fire, and other services for customers such as banks and supermarkets which are so confidential that they are not detailed in a manual, in *Guardall Alarms v Paul*[1994] 1 ERNZ 259;
- Unregistered designs and boat patterns in the nature of trade secrets together with matters covered by patents and registered designs, manufacturing techniques in the nature of trade secrets, and information about costings, pricings, and protection levels, in *ForceFour v Curtling[1994]* 1 ERNZ 542;
- Copies of extensive email correspondence, critical records of client relationships, proposals and business dealings, in A.C. *Nielsen (NZ) Limited v Pappafloratos AND Colmar & Brunton Research Limited* AND *Milnes* (Unreported) WC 17A/03; 14 July 2003; Shaw J;
- A computer disc containing details of 10,000 customers, in *Performance Health Ltd v Triggs*(Unreported) AA 230/03; 29 July 2003; RA Monaghan;
- Draft briefs of evidence for the employer in a forthcoming personal grievance case, in *Auckland Provincial District Local Authorities Officers IUOW v Northland Area Health Board[1991]* 2 ERNZ 215;
- Market expansion strategies in returnable plastic crates and the knowledge of the needs and prices of customers, in *Dillon v Chep Handling Systems Ltd[1995]* 2 ERNZ 282;
- Knowledge of the fragility of a relationship between the employer and its customers, in *Medic Corp Ltd v Barrett[1992] 2 ERNZ 1048.*

Confidential information is not:

- Something which is public property and public knowledge, in *AB Consolidated v Europe Strength Food Pty Ltd[1978]* 2 NZLR 5151 (CA);
- Information which an able employee might have acquired in the course of his experience within the trade, in *NZ Needle Manufacturers Ltd v Taylor[1975]* 2 NZLR 33;
- Information as to the identities and whereabouts of clients and merchandisers, or, in the case of clients, the identities of key persons within those organisations, in *Korbond Industries v Jenkins[1992]* 1 ERNZ 1141;
- Skills or experience picked up by the employee through working in the employer's business, including business contacts made in the process, in *Walden v Barrance[1996]* 2 ERNZ 598;
- Genuinely unaided memory, in *Peninsular Real Estate v Harris[1992]* 2 NZLR 216;
- Reliance upon familiarity with the names of persons with whom the employee had dealt with in order to identify former customers from a much larger public record of telephone subscribers for the purpose of targeting those former customers, in ITP *The Income Tax Professionals Ltd v Maurice t/a Taxation Accounting Services (Unreported)* AC 60/01; 4 September 2001; Colgan J.

Remedies

During employment

Dismissal

The common law duty of fidelity, good faith, and honesty is multifaceted. The duties of confidence and fidelity are subsets of the general duty. In respect of the employees' part, the general duty underlies the mutual duty of trust and confidence.

The Court of Appeal held in *Schilling v Kidd Garrett Ltd[1977]* 1 NZLR 243 (CA) that the implied duty coexists with the term of employment but does not outlive it, and, that the content of the duty is not susceptible to a fixed test. It will be a question in each case, whether the conduct involved will be looked on by a person of ordinary honesty as dishonest conduct towards his or her employer.

The duty of trust and confidence now applies broadly to encompass many different types of conduct. A breach of this duty will substantively justify a decision to dismiss an employee for either a serious breach of the employment agreement or serious misconduct.

Whistleblowers

The Protected Disclosures Act 2000 provides safeguards for employees who disclose confidential information relating to their employment ostensibly in breach of the duty of confidence.

Refer to the **A-Z Guide** on the **Protected Disclosures Act 2000** for more information.

Post-employment

Action for breach of confidence

This action may be pursued in contract, for breach of an expressed or implied term of an employment agreement, in the Employment Relations Authority or Employment Court.

Alternatively, it may be pursued in tort (civil wrong) in the District and High Courts. The Authority does not have the jurisdiction to make determinations in any matter founded on tort.

The Court of Appeal has repeatedly relied on the analysis of *Megarry J inCoco v A N Clark (Engineers) Ltd*[1969] RPC 41 which sets out the three elements which must be established in order to succeed in an action for breach of confidence:

- The information which the employer is seeking to protect must have the necessary quality of confidence; and
- The information in question must be communicated in circumstances importing an obligation of confidence; and
- There must have been an unauthorised use of that information to the detriment of the person communicating it.

The objective of this action is the recovery of damages for loss arising out of the breach of the duty of confidence.

The ability of a former employee to make use of confidential information obtained in the course of employment is subject to restraint; the employee's intentions in respect of the confidential information will, in most circumstances, dictate the legal principles that are applied to the application of restraint sought.

In some instances an employee will breach the duty of confidentiality in malice, with the intention of causing economic harm to the employer. In other instances the employee will breach the duty of confidentiality with the intention of competing directly, or indirectly, with the employer. In other instances, the employee will breach the duty of confidentiality in the attempt to lure other employees away from their employment with the employer to a new employer.

In the *Peninsula Real Estate* case, the High Court set out the general principles relating to the use of confidential information and the extent of the ability of the employee to compete:

- In the absence of a valid restraint of trade clause, a former employer cannot prevent a former employee from competing.
- A former employer cannot normally prevent a former employee from contacting or even soliciting clients or customers of the former employer.
- An employee after ceasing his employment may not use truly confidential information obtained in the course of that employment for the purpose of competing with his former employer, or indeed in any other way detrimental to his former employer's interests.
- What amounts to confidential information for this purpose is not susceptible to abstract definition. It will depend on the facts of each case.
- There is now a clear trend of authority to the effect that whether one classifies the following information as confidential or not, a departing employee may not take with him customer or client lists for the purpose of using them in a competing role.
- A departing employee may not deliberately memorize such information for the purpose of using them in a competing role.
- Whether the departing employee takes customer lists or not, generally he may not solicit or approach a client of his former employer in respect of a transaction that was current at the time of his departure.
- The obligation not to compete is an element of the duty of fidelity, as is the obligation not to induce a breach of contract.

Interim injunctions

In an action for breach of confidence, an interim injunction may be obtained to restrain the former employee from disclosing confidential information in breach of an express or implied term. It may be sought in the Employment Relations Authority.

The granting of an interim injunction is at the discretion of the Authority and that discretion must be exercised in accordance with the case law; the discretion whether or not to grant the injunction is based on the test formulated in *Klissers Farmhouse Bakeries Ltd v Harvest Bakers Ltd* [1985] 2 NZLR 129 (HC & CA):

- Is there a serious question to be tried?
- If so, is there an adequate alternative remedy available to the plaintiffs?
- If not, where does the balance of convenience lie?
- What is the overall justice of the case?

In *Baker v Armourguard Security[1998]* 1 ERNZ 424, Goddard CJ affirmed this test in the employment context and advised that an undertaking as to damages given by the party seeking the injunction, and the public interest, are always important factors for the purposes of weighing the balance of convenience. He also said that that party should, in all cases, be prepared to explain to the Court why such relief should be granted in preference to any other mechanism that would bring about a prompt hearing of the substantive case.

Compliance orders

The Employment Relations Authority has described compliance orders as a "form of injunction": *La Grouw Corporation v Millar* (Unreported) AA 259/03; 25 August 2003; A Dumbleton.

A compliance order may be sought where any person has not observed or complied with any provision of an employment agreement; this includes implied terms.

In the *La Grouw* case, the Corporation sought interim injunctions restraining Mr Millar, the Corporation's former general manager, from continuing to disclose allegedly confidential information and to surrender up the confidential information in his possession. Mr Millar had obtained that information about his former employer during his employment. The Authority issued a compliance order (it did not state why this form of relief was preferable) instead; in doing so it did not apply the tests applied to the granting of an injunction.

Restraint of trade covenants

An enforceable restraint of trade prevents a former employee setting up in competition with his or her former employer. This covenant is based on the duty of fidelity.

There are several factors going to the reasonableness and enforceability of such covenants but where such is enforced, it may restrain the former employee from the prohibited employment, or from doing something within that employment.

Restraint of trade covenants are usually enforced by injunction as an interim measure in an action for breach.

They may also be enforced by a compliance order. Refer to the **A-Z Guide** on **Restraints of Trade** for more information.

Non-solicitation covenants

A non-solicitation covenant may be a feature of a restraint of trade provision, or, it may be an independent provision, in an employment agreement.

It is a promise given by the departing employee not to solicit, which has been held to arguably include involvement in interviews and negotiations by employees of the former employer for employment with the new employer.

Non-solicitation covenants are usually enforced by an injunction as an interim measure but may also be enforced by a compliance order.

Conclusion

The question about whether or not information belonging to an employer is confidential information is most often answered in the context of the circumstances and determined on a case by case basis.

When an employee departs to work for another employer and takes a client or customer list in order to compete with the former employer, it does not matter whether or not the information is properly categorized as confidential information; the departed employee has breached his or her duty of fidelity.

When the employee departs for another employer and takes specialist skills learned during the employment with the former employer, but does not take any trade secrets, then it is unlikely that the employee has breached the duty of confidence.

This area of employment involves some complex considerations. You should seek specialist advice about the options available to you if you are faced with a potential breach of confidence.

Remember

- **Always call AdviceLine to check you have the latest guide**
- **Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.**
- **Use our AdviceLine employment advisors as a sounding board to test your views.**
- **Get one of our consultants to draft an agreement template that's tailor-made for your business.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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