

Review

Litigation



PROTECTING THE TRANSFER OF CONFIDENTIAL INFORMATION

Introduction

The High Court recently considered in *Brandeaux Advisers (UK) Limited & Ors v Chadwick* [2010] EWHC 3241 (QB) whether an employee's conduct, in sending confidential information belonging to her employer to a private email address, was sufficiently serious to justify termination of her employment contract. In addition, the Court was asked to determine whether return of the confidential information should be ordered and whether damages, by way of return of salary paid, should be awarded.

The Facts

Mrs Chadwick ("Chadwick") was employed as Head of Research & Business Development in one of the Brandeaux group companies ("Brandeaux"). In addition, Chadwick held several directorships within the group and was given overall responsibility for compliance.

Following a perceived breakdown in relations, Chadwick suspected that an employment dispute would arise between her and Brandeaux. In preparation for defending herself in any such dispute, or indeed with the financial services regulator, Chadwick sent circa 5,000 company files to her personal email address over the course of two days. Many of those files contained confidential information, including:

- Details of company bank accounts;
- Details of company banking arrangements;
- Names of shareholders and investors;
- The medical records of one employee;
- The employment tribunal records for another employee;
- Notes of company board meetings, papers and confidential notes.

Brandeaux only discovered that these transfers had been made after Chadwick was made redundant and given three months' notice in May 2010. Brandeaux attempted to agree an exit package with Chadwick but when this failed, she was placed on garden leave. During this period, Brandeaux's IT team examined her computer which revealed the misconduct. A disciplinary hearing was held and Chadwick was subsequently dismissed without notice on 22 June 2010.

The Claim

Brandeaux applied to the Court for urgent protection seeking return of the documents and £59,916 in damages, equivalent to the salary paid to Chadwick between the date on which she would have been dismissed had she reported her wrongdoing and the date of dismissal. Brandeaux's case for damages rested on the premise that, as a director, Chadwick was under a duty to notify her employer of her wrongdoing. Had she reported such wrongdoing she would have been dismissed earlier and as such Brandeaux would not have paid her salary between February 2010 and the date of her actual dismissal in June 2010.

“The Court doubted that, in the absence of a specific issue, possible anticipated litigation with an employer could ever justify an employee transferring potentially confidential information to a private email address and to do so would be a sufficiently serious breach allowing the employer to terminate the contract”.

“It is clear that where an employer has received the benefit of the employee’s performance of duties and cannot demonstrate it has suffered any loss, it cannot retrospectively seek to claw back salary and bonuses because it later learns that it could have made an earlier summary dismissal”.

Chadwick argued that it was an implied contract term that she could use confidential information where:

- It was fairly required either to protect her legitimate interests; or
- To defend herself in threatened or actual legal or disciplinary proceedings; or
- Where it was in the public interest.

In addition Chadwick claimed damages for wrongful dismissal.

The Decision

The High Court held that Brandeaux was entitled to the return of the confidential information and that it had been entitled to dismiss Chadwick thereby rejecting her claim for wrongful dismissal. The Court however declined to order her to return the salary paid.

In coming to his conclusion, Jack J ruled that there had been no “nefarious purpose” to Chadwick’s conduct, and that her purpose had been to “arm herself for the future in any disputes with Brandeaux or with the regulators”. However, the Court doubted that, in the absence of a specific issue, possible anticipated litigation with an employer could ever justify an employee transferring potentially confidential information. The High Court concluded that Brandeaux was entitled to the return of the confidential information and Chadwick (should a dispute arise) would be required, like any other litigant, to request inspection of any relevant documents during the usual disclosure process.

In the circumstances, the Court found that there was no justification for the exercise that Chadwick had carried out. The Judge considered that Chadwick had breached both the express terms of her employment contract and the implied duty of fidelity to her employer and that those breaches were sufficiently serious to justify summary dismissal. Chadwick claimed that Brandeaux had already committed a fundamental breach of contract and therefore was prevented from terminating the contract. Following the recent decision in *Tullett Prebon Plc v BGC Brokers LLP* [2010] EWHC 484 (QB) (“Tullett Prebon”) the Court held that, in circumstances where Chadwick had not accepted the repudiatory breach by resigning and therefore the employment relationship was ongoing, an employer is not prevented from summarily dismissing an employee by reason of an earlier breach.

Notwithstanding the above, Brandeaux’s claim for damages was ultimately unsuccessful. Whilst the Court accepted that, as a director, Chadwick was under an obligation to inform the company of her breach, the judge considered that no loss had actually been suffered by Brandeaux. In return for salary paid between February and June 2010, Brandeaux received the benefit of Chadwick’s work.

Comment

In summary the case confirms the position on three key points:

1. The transfer of confidential documents by an employee in contemplation of litigation will rarely, if ever, be lawful;
2. Notwithstanding the gravity of any such breach, employers will struggle to recover salary paid to an employee in circumstances where the employer has received the benefit of the employee’s performance and not suffered any loss; and
3. In circumstances where the employment relationship is continuing, the prior repudiatory breach by either the employer or employee does not prevent the other from terminating the contract on a later breach.

This is a welcome decision for employers who often face issues with departing employees transferring confidential information with the intention of using that information in anticipated legal proceedings.

However the case highlights the difficulties an employer will face in any action to recover salary paid to an employee in the intervening period prior to termination no matter how grave the employee's misconduct. It is clear that where an employer has received the benefit of the employee's performance of duties and cannot demonstrate it has suffered any loss, it cannot retrospectively seek to claw back salary and bonuses because it later learns that it could have made an earlier summary dismissal. Importantly, the Courts approach in dealing with this case appears to be influenced by Chadwick's motives in obtaining the confidential information. However, if an employee has used the confidential information to obtain a competitive advantage in a competing business, other remedies, including damages, may be available.

Finally, following a number of conflicting views taken by the High Court on the effect of both parties being in repudiatory breach of contract, the Court affirmed the suggestion in *Tullet Prebon* that even if the employer was already in repudiatory breach, where the employment relationship was continuing, this did not prevent the employer dismissing the employee for good cause.

Clearly prevention is better than cure. Confidential information should be protected in the first instance by limiting those who have access to it as well as expressly defining its scope and employees duties in relation to the handling of it within contracts of employment and staff handbooks. Email and IT policies should also set out sanctions for unauthorised electronic transfer of confidential information and systems should be put in place to monitor compliance. Notwithstanding this, where directors and/or employees breach their express contractual duties of confidentiality, employers should know their rights and be prepared to act quickly to protect the business and the information, which is often a key asset.

FURTHER INFORMATION

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