

## **Do employees owe a duty of fidelity to their employer?**

In the recent case of *Ranson v Customer Systems Plc* the Court of Appeal overturned a High Court decision concerning a senior employee's breach of his duty of fidelity towards his former employer.

Mr Ranson joined Customer Systems Plc ("CS") in 2001 and was promoted to Divisional Manager in 2008. His contract contained no post-termination restrictive covenants but did require him to keep confidential "information of a confidential nature belonging to CS, its customers and its business partners" that he was exposed to during his employment and not to undertake any other employment while employed by CS without its prior written consent.

In 2007 Mr Ranson set up his own company and resigned in January 2009 agreeing to work additional notice to the end of February 2009 in order to complete work securing a contract for CS. During his notice period he was in discussion with a former CS contact who was now employed by Diageo and on 25 February 2009 Diageo signed an order giving Mr Ranson's company 10 days' work on a proposed upgrade of the company's IT system. Also on 25 February Mr Ranson took a client contact from AstraZeneca out to dinner. No specific work was discussed and no promises were made but the client offered to help Mr Ranson find work from AstraZeneca.

CS brought claims arguing that Mr Ranson's position meant that he had breached the fiduciary duty that he owed by setting up his company whilst employed and seeking business in competition with CS in his discussions with Diageo and the AstraZeneca employee. They claimed that he was also in breach of these duties by failing to inform CS of what he was doing.

A number of implied terms are incorporated into every contract of employment including the duty of trust and confidence and the duty of fidelity. The High Court had found that Mr Ranson's discussions with CS's clients concerning his new company during his notice period breached those duties.

The Court of Appeal held that both the existence of and content of a fiduciary duty had to be determined by reference to the employee's contract of employment and could only be implied to the extent that they were consistent with that contract. Not every contract of employment gives rise to a fiduciary duty and the duty of trust and confidence cannot be relied on, by itself, to give rise to a fiduciary obligation.

The court held that if there was no express duty of fidelity in the contract, the implied duty meant only that during the continuance of his employment he would act in his employer's interests and not use his time for which he was paid by the employer in furthering his own interests.

In the light of the fairly limited interpretation of this duty and in the absence of an automatic fiduciary duty even for senior staff it is important for organisations to ensure that contracts of employment contain appropriate restrictions to outlaw competition in relation to:-

- work undertaken outside the employment contract;
- prohibiting competitive behaviour during employment;
- requiring employees to report their colleagues' as well as their own misconduct;
- requiring return of company property on termination; and
- appropriate restrictive covenants in relation to post termination activities.

In the absence of clear contractual terms, this case suggests that a court will provide a limited remedy to employers if breaches are discovered.

*Ranson v Customer Systems Plc (2012 EWCA Civ 841)*

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