



Misuse of Confidential Information - Evidence relied upon after the fact

Date : February 14, 2017

In the recent decision of [Finemore v CMIB Insurance Services Pty Limited](#) [2016] FWC 8517, an employer successfully relied upon evidence of misuse of its confidential information discovered following the termination of employment, in order to defend itself from an unfair dismissal claim.

The Facts

The Applicant had been employed by the Respondent (a small business employer) for approximately six years, most recently in the role of Account Executive. The Applicant was employed under a written employment contract containing several post-employment obligations including an obligation to preserve the Respondent's confidential information

On 28 April 2016, the Applicant notified the Respondent that she was resigning her employment, and provided one month's notice of resignation. The Respondent accepted the Applicant's resignation and confirmed the Applicant's final day of employment would be 31 May 2016.

However, on 3 May 2016, the Respondent discovered that the Applicant had emailed to her personal email address a detailed Excel spreadsheet (along with other confidential files) shortly after submitting her resignation. The Respondent's directors directed the Applicant to attend a meeting, at which time the allegations were put to her. The Respondent considered the Applicant's responses to the allegations to be unsatisfactory, and summarily terminated her employment on the ground of serious misconduct.

On 5 May 2016, the Respondent sent a further letter to the Applicant reminding her of her continuing obligation to preserve and not misuse its confidential information.

The Applicant filed an Unfair Dismissal application in the Fair Work Commission on 12 May 2016, in which she alleged that the Excel spreadsheet was a 'working sheet' and did not contain confidential information. The Applicant also alleged that the Respondent failed to afford her procedural fairness before terminating her employment.

On 3 June 2016, the Respondent discovered a USB drive belonging to the Applicant containing more of the Respondent's confidential information. A review of these files' metadata indicated that the Applicant had transferred this information onto the USB drive shortly after sending the spreadsheet to her personal email address.

The Commission's Findings



In his decision, Commissioner Gregory disagreed with the Applicant's primary submission that the Excel spreadsheet was a 'working sheet'. The Commissioner found that the sheet clearly contained client details, and would have been useful to anyone working for a competitor of the Respondent.

The Commissioner found that the act of sending the spreadsheet to her personal email address shortly after tendering her resignation strongly suggested that she intended to retain and use the spreadsheet after her employment had concluded. It also suggested that the Applicant was concerned about the prospect of the Respondent providing her with pay in lieu of notice, meaning that she would lose access to the Respondent's systems and files.

The Commissioner concluded that the Applicant's actions constituted a breach of the confidentiality obligations contained within her employment contract. Although the Applicant had not disclosed the confidential information at that time, her actions created the potential for this to occur.

Furthermore, the Commissioner considered that the discovery of the USB drive raised further suspicion about the Applicant's actions and motives in retaining the information. The transfer and storage of confidential information onto the USB drive so shortly after giving notice strongly suggested that the Applicant intended to misuse the information following her resignation. The Commissioner accepted the Respondent's submission that if it had been aware of the USB drive prior to the Applicant's dismissal, it would have relied upon the Applicant's conduct as further evidence of the misconduct justifying the Applicant's summary dismissal.

Finally, the Commissioner determined that the Applicant's conduct justified a finding of serious misconduct justifying summary dismissal, on the basis that the Respondent's finding and procedure complied with the Small Business Fair Dismissal Code. In so doing, he dismissed the Applicant's unfair dismissal claim.

The decision confirms that an employer can rely upon evidence not known to an employer until after a dismissal in order to further justify that dismissal, as long as the evidence relates to matters in existence when the decision to dismiss was made. The decision also confirms that the mere retention of confidential information may provide a valid reason for dismissal, even where misuse of confidential information had not yet occurred.

Tips for Employers

- Ensure that employment contracts impose comprehensive confidentiality obligations on staff, and reinforce these obligations through company policies and workplace training;
- Notify employees that they will be subject to ongoing workplace surveillances (including



computer surveillance), so that any review of employee's computer usage will not contravene applicable workplace surveillance laws;

- Consider monitoring and/or restricting access to computer networks and systems following employee resignations, and remove employees' remote access to these systems;
- Consider whether non-essential staff should be provided with payment in lieu or garden leave, instead of being required to work out a notice period; and
- Remind departing employees of their continuing contractual obligations (including the obligation to preserve confidential information) during notice periods and at exit interviews.

More Information

Please call the leading employment lawyers in Parramatta, the **Matthews Folbigg Workplace Solutions** team on **9635-7966** to speak with one of our employment lawyers.