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Feature

Keep it Clear to Keep it Confidential

Breach of confidentiality even with policy in place may not justify termination

Tommy Leung
J.D.
Associate, Borden Ladner Gervais LLP

Patricia McGauley
J.D.
Associate, Borden Ladner Gervais LLP

Employees often have access to many types of company and personal information that employers do not want to be disclosed outside of or even within the workplace. If an employee discloses such sensitive information without authorization, an employer may feel compelled to terminate the employee's employment for cause. While the law may have supported this reaction in the past, the analysis today is a bit more complicated.

This issue was recently explored in *Klassen v. Rosenort Cooperative Limited*, 2020 MBQB 116. In *Klassen*, the employee had been the general manager of the Rosenort for ten years. The employer found out that the employee emailed an internal price list to a local manufacturer. The employee was terminated for cause alleging that the employee breached confidentiality.

However, the employer had no written confidentiality policy and the court found that the internal price list was not "confidential information" under the common law. As a result, the employer did not have just cause to terminate the employee's employment.

Contextual Approach

Since the Supreme Court of Canada's decision in *McKinley v. BC Tel*, 2001 SCC 38, termination for cause has been assessed using a contextual approach, where the sole issue for the trial judge to consider is whether the conduct caused a breakdown in the employment relationship. In making this decision, the Supreme Court of Canada proposed an approach based on proportionality to strike an effective balance between the severity of an employee's misconduct and the sanction imposed. As such, a trial judge may determine whether the length or quality of service is a relevant factor that mitigates the effect of the misconduct on the employment relationship based on the specific facts and circumstances of a particular case.

Policy or No Policy

Under the McKinley contextual approach, having a clear policy is an important factor. In *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, the court found that the trial judge did not err in principle in applying the *McKinley* analysis, because the trial judge was aware of the length of the employee's service, and the seriousness of the transgression, all of which she considered in the circumstances of the employment relationship and the employer's clear policy on privacy-related matters. Ultimately, it was open to the trial judge to find that, in these circumstances, breach of the confidentiality policy and failure to follow Helpdesk protocols resulted in a fundamental breakdown of the employment relationship.

Not having a clear policy significantly increases the likelihood that cause will not be justified even if the employee breaches confidentiality. For example, in an Alberta arbitration decision, *TISI Canada Inc. v. Quality Control Council of Canada*, 2007 CarswellAlta 1841, an employee's gossiping led to the identification of the complainant to a sexual harassment complaint. However, the arbitrator found that while it was clear the employer wanted to keep the matter confidential, the employer failed to give a specific and direct order to the employee to do so, there was no warning that failing to keep the information confidential would lead to termination and there was no progressive discipline. Having had a good employment history, termination was found to be excessive. A solid confidentiality policy clearly setting out the employer's work rule regarding confidentiality and potential disciplinary actions for a breach will likely help clear some of the defects mentioned by the arbitrator.

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However, noting the principle of proportionality discussed above, it is important to be cautious in light of the *McKinley* contextual approach that having a clear policy is not on its own always determinative in deciding whether a breach of a confidentiality policy is sufficient in justifying termination for cause. For example, in *Vorgias v. Madawaska Doors Inc.*, 2005 CarswellOnt 9371, a new employee was alleged to have breached a confidentiality and non-disclosure policy that specified potential disciplinary actions including dismissal. However, the court found that the employee's misconduct did not justify cause because he did not purposefully act in breach of his duties towards the company, and because he was new, some mistakes were inevitable.

Takeaways

Although it is not always foolproof, employers should establish a clear confidentiality policy to communicate what the reasonable work rules are when it comes to confidential information and the potential consequences (such as termination) in the event the policy is breached. Failing which, it may be difficult to terminate an employee's employment for cause unless it is highly egregious. Employers must keep in mind the importance of considering the context of the breach, even with a clear confidentiality policy, before deciding whether termination for cause is proportional to the breach. Due to these nuances, employers should seek legal advice before making such a decision.

Tommy Leung is an Associate with Borden Ladner Gervais LLP and can be reached at toleung@blg.com.

Patricia McGauley is an Associate with Borden Ladner Gervais LLP and can be reached at pmcgauley@blg.com.