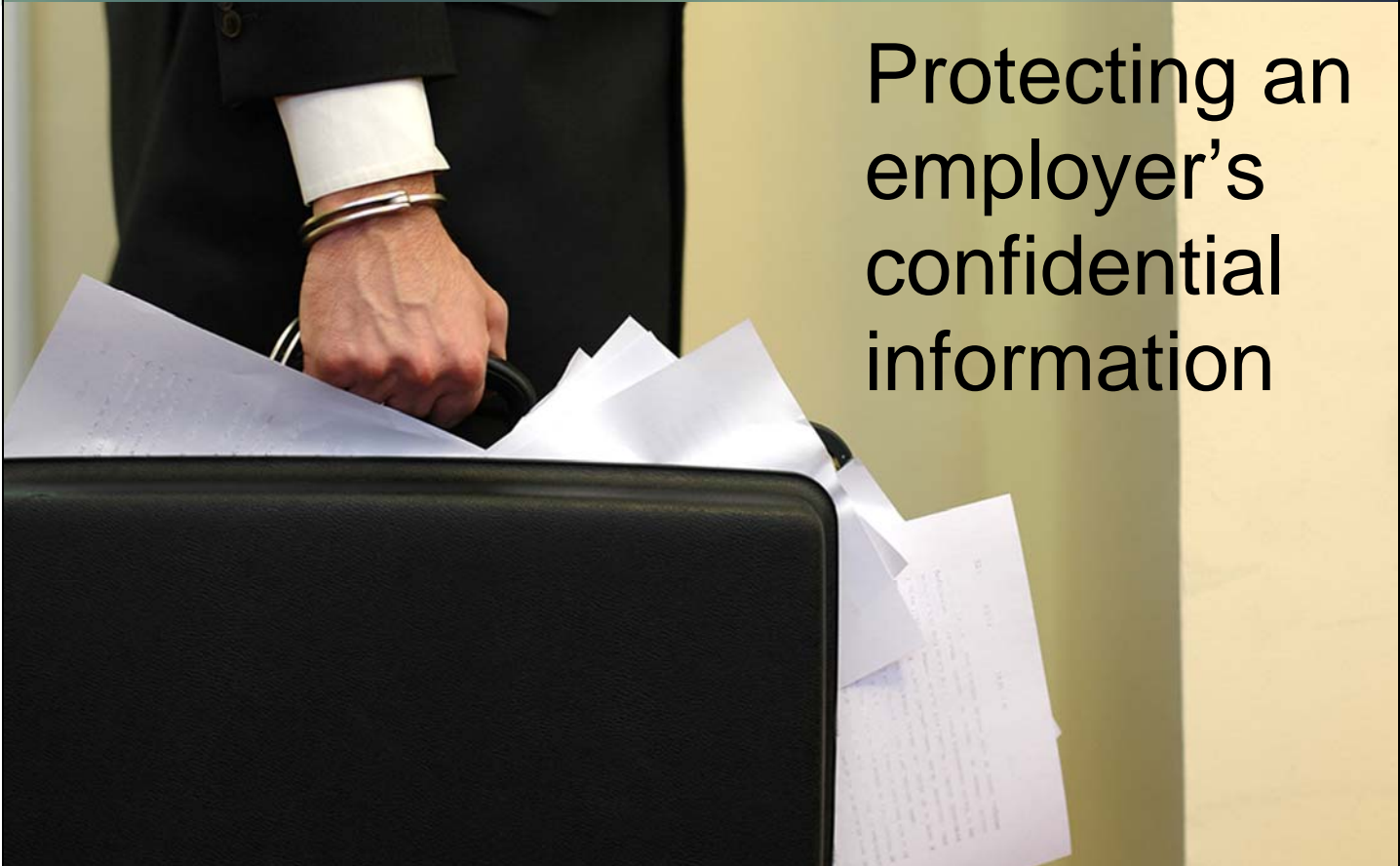


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Protecting an employer's confidential information

The case of *Digital Products Group v Opferkuch* [2008] NSWSC 575, decided in June 2008, is a timely reminder of the issue of confidential information of an employer and the protection of it when an employee moves on.

Facts

Mr Opferkuch worked for Digital Products Group (**DPG**) for almost 2½ years as an account manager. He left DPG and commenced work for a competitor of DPG.

It was brought to DPG's attention that Mr Opferkuch had and used information relating to the sales of DPG. DPG commenced proceedings for injunctive relief to protect the use of confidential information of DPG held by Mr Opferkuch.

Confidential information

This was not a case about restraint of trade. DPG accepted that the identity of the customers was not confidential nor did it seek to stop Mr Opferkuch from

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selling products of the new employer to the same customers in competition with DPG.

DPG did however seek to stop Mr Opferkuch from using confidential information he had received during his employment with respect to prices DPG charged and the volume of DPG's sales to retailers.

Duties of an employee and the contract of employment

The duties of an employee are usually set out in the contract of employment. DPG claimed that use of this confidential information would amount to a breach of:

Express term of contract

The written offer of employment contained a provision in relation to confidential information.

However, Mr Opferkuch did not sign the acceptance clause (but was nonetheless employed). This brought into question as to whether the clause was a term of his employment and enforceable by DPG.

Implied term of contract

An employee owes certain obligations to the employer outside that expressly contained in the contract of employment.

Generally, an employee may not be prevented from using the know-how that they have acquired during the course of their employment. However, where documents that contain information in relation to the employer's business are retained by the employee, the

use of the information in those documents may be considered to be outside of the employee's acquired knowledge.

The use of this information may be regarded as a breach of the implied contract and of the duties of fidelity, good faith and confidence.

Outcome

Mr Opferkuch was restrained from using sales reports and like documents that he may have kept after his employment with DPG ended.

Lessons to be learnt

There are some useful lessons to be learnt from this case:

1. A confidentiality clause in the contract of employment is a useful reminder to the employee of their obligations to the employer.
2. To ensure that the confidentiality clause is enforceable, the employer should arrange for the employee to sign the contract.
3. Documents that may contain information confidential to the employer, which the employee obtained during the course of their employment, should be returned to the employer upon termination so as to remove the risk of the information being used by the former employee.

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NSW Court determines that safety judgments cannot be delegated to subcontractors

An employer has been fined \$275,000 in the NSW Industrial Relations Commission over the death of a worker after it deferred its obligation to make a safety judgment to a subcontractor.

In 2003, Whyco Crane Services Pty Limited was subcontracted by a principal contractor, Rail Infrastructure Corporation (**RIC**) through a plant hire and associated management service to install a steel reinforcement cage near some railway lines. Two employees of Whyco placed the cage into position which was being lifted by the crane. The dogman was still holding either the chain or the hook when he signalled the crane driver to slowly winch them up causing the jib of the crane to come into contact with overhead powerlines.

Justice Backman was told that RIC was aware of the risk of coming into contact with the overhead powerlines before the incident. In its pre-work briefing document, signed by the subcontractors, was a handwritten notation identifying high voltage wires as a hazard and

the words “*stay clear*” as the suggested control. RIC expressly drew the attention of the potential hazard to the subcontractors, to which the crane driver said there was “*a mile of room*”. RIC submitted that despite its recognition of the hazard, it deferred to the crane driver’s advice because he was a specialist crane operator.

Justice Bachman held that this was a flaw in RIC’s system of work. The judge found that RIC required its employees to make a judgment as to whether the crane might come within the safe approach distance of the overhead powerlines. She said “*Insofar as the system contemplated its employees exercising their own judgment and deferring to the views of the crane operator, the system was deficient; RIC’s employees were aware of the risk posed by operating the crane underneath the live powerlines and despite this no adequate measures were implemented to control this risk.*”

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Justice Bachman said that RIC's system was defective in that it failed to arrange for a person to act as a "spotter" to ensure that the crane remained at a safe working distance from overhead powerlines; and contrary to RIC's safety management plan, no safe work method statement was obtained from the work crew prior to allowing them to operate at the site.

Justice Bachman considered the offence to be extremely serious because the risk was not only obvious but also foreseen. The judge took into account the company's cooperation with WorkCover during the investigations but nevertheless found the company guilty of breaching section 8 of the *Occupational Health and Safety Act* and fined the company \$275,000.

Lessons to be learnt

The following key points emerge from the case:

1. Employers must make their own safety judgments concerning systems and places of work and can not delegate that assessment to subcontractors.
2. The penalties for breaches of the OH&S Act are severe – in this case the company was fined \$275,000.

OHS service provider and director fined for safety failures



A company providing construction management and OHS services to a principal contractor has been fined in the NSW Industrial Court after being found to be responsible for all work conducted on the site. Its director was also separately fined.

In 2004, an apprentice plumber employed by a subcontractor fell 4 metres

to a concrete floor when he lost his balance after stepping on a mesh cover. He and another employee were attempting to move a Colorbond roof sheet when the mesh cover slipped. The apprentice plumber suffered a broken arm and nerve injury in the fall.

The principal contractor was found guilty for breaching section 8(2) of the NSW *Occupational Health and Safety Act* in an earlier hearing. The principal had contracted a construction manager who was responsible for OHS on the worksite. The company and the construction manager (as the director) were charged with breaching section 8(2) of the OHS Act.

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The director told Justice Kavanagh that he believed that he was not the construction manager for the principal on the day of the accident and that another person had been appointed to take over the position. However, he conceded that he was still on the site, held the title of construction manager and answered inquiries from contractors on the site. He said that no contractors had been informed of any change to his position and the person who was taking over his position was on leave.

Justice Kavanagh was satisfied that the director's duties concerned all work conducted at the worksite and that he was responsible for the method chosen to cover the penetrations which led to the risk. The director also submitted that it was not reasonable for the mesh penetrations to be welded down because there was potential for methane gas to be present in the chamber below. However, Justice Kavanagh held that both the director and the company failed to ensure safety on the site by not properly securing the penetrations, not properly inspecting the covers to identify the ongoing

risk posed by the penetrations, and the failure to warn of these risks. Justice Kavanagh allowed a 10% discount for both parties for their guilty plea and fined the company and its director \$50,000 and \$20,000 respectively.

In a separate hearing, the employer was also fined under section 8(1) of the OHS Act for failing to ensure the health and safety of its workers. Justice Kavanagh held that the company was a responsible employer and that the site inspections conducted before work proceeded were thorough in the circumstances. However, the risks from the penetrations were well known and the employer's failure to warn its employees of the risks contributed to its offence of failing to provide a safe system of work. After the incident, the employer spent significant amounts of money on further training of all apprentices and employees, made changes to its work systems and placed greater emphasis on the identification of hazards. Justice Kavanagh fined the employer \$60,000.

Lessons to be learnt

The following key points emerge from the case:

1. The Industrial Courts take seriously obligations on directors for breaches of their individual obligations under the OHS Act.
2. Fines against directors for breaches of the Act can be just as severe as fines against the employer company.

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Surfing while on sick leave

The Australian Industrial Relations Commission recently held that an employee who took part in a surfing competition while on sick leave was validly dismissed for doing so.

The employee was Mr Shane Bevan. He was employed as a baggage handler with Oceania Aviation Services Pty Ltd (**Oceania**). This work required him to lift heavy bags.

He injured his back during the course of performing work duties. Mr Bevan consulted an osteopath who gave him a medical certificate certifying that he would be unable to attend work for six days.

Oceania accepted the certificate. Four days after the injury, Mr Bevan again consulted the osteopath. She advised him that she was happy with his progress. On this basis, Mr Bevan decided to participate in a professional surfing competition the following day, being a Saturday. Mr Bevan had not been rostered to work on the Saturday but had been rostered to work on that Sunday. However, Oceania allowed Mr Bevan to swap his Sunday shift with another employee on the basis that he needed to have six days off.

Oceania learned on the following Monday that Mr Bevan had participated in the surfing competition on the Saturday. After a brief investigation of the matter,



Oceania summarily dismissed Mr Bevan from his employment.

Mr Bevan commenced proceedings in the Australian Industrial Relations Commission complaining that his

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dismissal had been harsh, unjust or unreasonable. He sought reinstatement and monetary compensation.

In support of his claim, Mr Bevan argued that surfing exercised completely different muscles than lifting of heavy bags. He alleged that his participation in the surfing competition was consistent with the medical certificate his osteopath had given him. He relied on the osteopath's assessment that his condition was improving and argued that it was not inconsistent that he be able to participate in a surfing competition on the Saturday but not attend work on the Friday or the Sunday. Further, he argued that he was never rostered to work on the Saturday and that, in order to compete in the surf carnival, he had to take painkillers.

On the other hand, Oceania argued that sick leave had been granted to Mr Bevan on the basis that he would be resting at home over the six days that he had off. Further, Oceania had offered Mr Bevan lighter duties over the six day period but Mr Bevan had refused them, stating that he needed complete rest for that period. Moreover, Oceania argued that when Mr Bevan returned to work on the Monday, he was not candid about his participation in the surf competition on the Saturday. Indeed, Mr Bevan had not initially admitted that he had participated in the surf competition. It was only when he was specifically asked to make that admission that he did so.

The Commission held that by engaging in the surf competition whilst on sick leave, Mr Bevan misled his

employer in relation to his actual physical capabilities. In addition, Mr Bevan had failed to advise Oceania that his physical capabilities had improved by virtue of him being able to surf and that he was able to attend work.

Under these circumstances, the Commission held that Oceania had a valid reason to dismiss Mr Bevan. However, the Commission held that Oceania had not been entitled to dismiss Mr Bevan summarily because of deficiencies in the investigation process and not giving Mr Bevan an opportunity to properly respond to the allegations made against him. Instead, the Commission held that Mr Bevan was entitled to be paid for a notice period which it said should have been given to him.

Lessons to be learnt

The following key points emerge from the case:

1. Employees owe a duty of honesty and good faith to employers, whether in the context of dealing with sick leave entitlements or otherwise.
2. In order to summarily dismiss an employee, there must be a clear situation of gross and wilful misconduct.
3. Misleading an employer is not necessarily sufficient grounds for summary dismissal although they are generally grounds for dismissal on notice.

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Duty of care owed by the landlord to tenant

The NSW Court of Appeal recently had occasion to revisit the nature and extent of the duty owed by a landlord to a tenant in respect of residential premises.

In *Talbot-Price v Jacobs* [2008] NSWCA 189 (12 August 2008), the NSW Court of Appeal dealt with the situation where the landlord agreed to lease large residential premises near Byron Bay to the tenant for 12 months. The house was a large old wooden house consisting of two floors and a loft. An old ladder gave access to the loft. Prior to taking up the lease, the tenant and his girlfriend inspected the premises and climbed up the ladder to inspect the loft.

A few weeks later the tenant agreed to move into the premises, however no written lease was entered into between the parties. The tenant alleged that prior to taking possession of the premises, the landlord told him that he would be entitled to occupy the entire house, including the loft. On the other hand, the landlord gave evidence that she and the tenant agreed that the loft would be excluded from the leased premises. Indeed, she gave evidence that after the tenant's initial inspection of the house and at a time before the tenant moved in, she removed the ladder giving access to the loft and placed it on a rubbish heap in the rear garden. The landlord gave evidence that she intended to

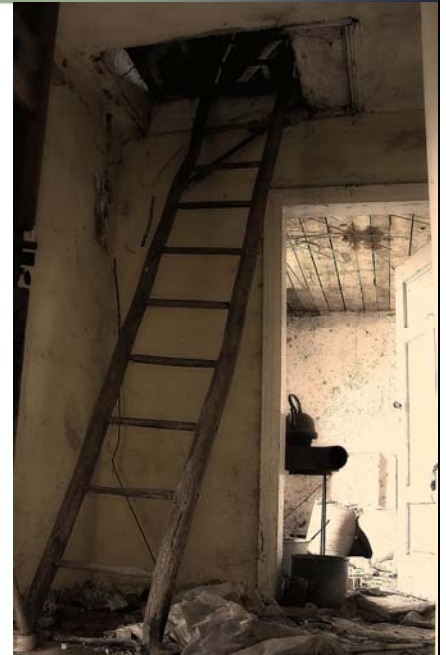
provide sturdier access to the loft and had removed it because she considered it unsafe.

About two months later the tenant used the ladder to climb into the loft and as he descended the ladder gave way causing him to fall and sustain personal injuries.

He sued the landlord alleging that she failed to maintain the premises in reasonably safe and suitable condition for residential use.

Although there was no written lease between the parties, the *Residential Tenancies Act 1987* (NSW) and the *Residential Tenancies (Residential Premises) Regulation 1995* provide that the landlord agrees to keep the premises in reasonable repair, considering the age of, the amount of rent paid for and the prospective life of the premises.

The tenant was unsuccessful in the District Court and appealed to the Court of Appeal. The first issue for



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determination in the Court of Appeal was whether the loft was part of the leased premises. Justices Basten and McColl found that the loft was probably part of the premises even though there was conflicting evidence on this point. Justice Ipp accepted the landlord's evidence that she made it clear to the tenant that the loft was not to be used by him and was therefore not part of the leased premises.

Nevertheless, the key issue in the case was whether or not the landlord breached her obligation to keep the premises in a reasonable state of repair having regard to their age and the rent she received for them. The Court of Appeal reiterated earlier sentiments expressed by the High Court in *Jones v Bartlett* [2000] HCA 56 when the High Court held that the duty of a landlord to take reasonable care to avoid a foreseeable risk of injury does not require the landlord to make the premises as safe as reasonable care could make them nor does it provide an absolute requirement for safety.

Rather, the Court of Appeal held that the obligation is no greater than an obligation to take reasonable care to avoid foreseeable risk of injury to the tenant. This duty must take into account a number of factors including common building practice at the time the premises were constructed; condition of the premises at the time the lease was entered into; the size and structure of the premises; the number of tenants occupying the premises; the age of the tenants; how the premises were to be used and what was the nature of the dangerous structure give rise to the injury.

All three Court of Appeal judges agreed that there was no breach of duty of care in this particular instance as it was found that the tenant had himself brought the ladder back into the house from the rubbish pile in the backyard and had attempted to fix the upper part of the ladder to the loft by means of nails to secure it. This proved not be secure at all and resulted in the tenant being unable to establish that the landlord had breached her duty of reasonable care towards him. Accordingly, the tenant was awarded no damages for the injuries he sustained when he fell from the ladder.

Lessons to be learnt

The following key points emerge from the case:

1. The desirability of having terms of a residential lease recorded in writing.
2. The need to clearly identify what parts of the premises are being leased in particular circumstances.
3. The duty owed by a landlord to a tenant is no greater than a duty to take reasonable care in the circumstances. It is not a duty to make the premises as safe as they can be made nor is it a duty to guarantee against the risk of harm.

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Assistance

If we are able to assist you in any of these areas, or other litigation or industrial matters, please contact one of our Dispute Resolution Practice Group Team:

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