



Conflicting Interests

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

The Employment Standards legislation that was passed earlier this year amended the Employment Relations Act to (among other things) restrict the application of Secondary Employment provisions in employment agreements. The legislation (s.67H of the Employment Relations Act) prevents employment agreements from restricting individuals from performing work for another person unless the restriction was there to protect the employer's:

- a) Commercially sensitive information.
- b) Intellectual property rights.
- c) Commercial reputation; or
- d) To prevent a reasonable conflict of interest.

Any secondary employment provisions must be included in employment agreements and must include reference to the genuine reasons for the inclusion of such a restriction.

This new addition to the restrictions that will apply to individual terms and conditions will have the effect of restricting the future application of these clauses.

A recent case looks at, among other things, the effect of such provisions before this new legislation was passed.

The case was **Sunair Aviation Limited v. Walters**; NZERA Auckland 198; February 2016. Mr Walters was an employee of Sunair Aviation Limited which held a number of contracts for Tauranga Airport, including a labour only contract to supply rescue fire services. Mr Walters' agreement included a term stating:

"18. Conflicts of interest: During the period of employment the Employee shall not engage in any employment with, or become involved in, any business which may compete with the Employer's business. The Employee shall not undertake any employment or activities that may impact on the Employee's attention or commitment to his/her duties under this agreement."

The contract between Sunair and the Airport had, since 1988, been on an informal, verbal basis. In January 2015 the Tauranga Council advised that they would put the contract out to tender. Sunair Aviation Limited advised their staff of this request, that they intended to put in a tender and that if they lost the contract their positions would become redundant.

In early February 2015 Mr Walters, as a partner in a firm Advanced Aviation Services, tendered for the contract, as did Sunair Aviation Limited.

Advanced Aviation Services were successful and on 23 February Sunair advised their staff that they would be redundant from 1 April 2015.

In March 2015 Sunair Aviation Limited began an action claiming that Mr Walters had breached:

- a) The Employment Relations Act duty of good faith.
- b) His contractual obligations under clause 18.
- c) The common law obligations of fidelity; and
- d) The fiduciary obligations towards Sunair Aviation Limited.

They sought damages for all four breaches.

a) Breach of Contract

The employer argued that there were two elements of the obligations under clause 18. Firstly, prohibiting Mr Walters from being involved with any business that may compete with Sunair and secondly, from undertaking employment or other activities that may impact on his duties. Mr Walters argued that at the time that he put in the tender Advanced Aviation Services was a mere 'concept' and that the steps that he took after winning the tender were taken while he was under notice and were therefore in some way, exempt from this contractual obligation.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson,** or **Peter Zwart**.

Contact Details:

Ground Floor
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Neil McPhail

Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson

Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart

Email peter@mgz.co.nz
Mobile 0274 367 757

The Authority held that the process of putting in the tender fell within the definition of being *'involved in a business'* and that because his own winning tender had caused the redundancy, he could not subsequently *'shield himself under the blanket of notice of termination from the express obligation contained in clause 18 of his employment agreement'*.

The Authority determined that he had breached clause 18 and that remedies could therefore follow.

b) Fidelity

A breach of the common law duty of fidelity is *"conduct which, viewed objectively, undermines the relationship of trust and confidence between an employee and employer."*

The 1976 Court of Appeal decision **Schilling v. Kidd Garrett** determined that such a duty will be implied into all employment agreements.

Mr Walters argued that notwithstanding such a duty, *'an employee is free to plan for his future and his duty of fidelity and loyalty is simply to do the job that he is paid to do'*.

The Authority found that the duty was wider and that Mr Walters had breached his duty of fidelity and that *"concerns that Mr Walters had about his future employment cannot justify this conduct. Mr Walters could have resigned from Sunair - meaning he would not have been subject to cl 18 or the duty of fidelity, as neither term would have survived the end of the employment relationship - and then submitted his tender under the auspices of AAS (or any other entity). However, he chose, for whatever reason, not to take this course. Unfortunately, in making the decisions he did, Mr Walters breached his obligations to Sunair."*

d) Fiduciary Obligations

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances, which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. ..."

While an employment relationship may not of itself be a fiduciary one, the Authority accepted that it had the jurisdiction to determine a claim founded on a breach of this obligation where the essence of the claim related to the employment relationship.

Sunair Aviation argued that because Mr Walters operated as a sole employee when he was working as a rescue fire service operator, and because the airport treated him as a senior operator, Mr Walters was in effect operating effectively as *'Sunair'* during those times and therefore owed a fiduciary obligation to his employer. The Authority found that *"being 'sole charge' at the fire station was a function of labour deployment requirements of the RFS contract between Sunair and Council, rather than one giving rise to fiduciary obligations."* He was therefore not required by his position to provide *'single minded loyalty'*. There was no breach of this obligation.

No awards for the two breaches were quantified and the parties were left to resolve the matter between themselves.

The important issue for readers is whether or not the April amendments will change the contractual obligations relating to conflicts of interest. What is clear is the fact that the Sunair provision may not stand up under the new legislation. There is an argument that in the circumstances of the case clause 18 was not a secondary employment provision because it did not act to prohibit him from performing work for *'another person'*. It is however arguable that the definition of *'another person'* in s.67(H) may be wide enough to include a corporate entity. Putting that issue aside; to include such a provision in Mr Walters' agreement Sunair would have to have genuine reasons for doing so and must state those reasons in the agreement. Sunair could argue that the purpose of clause 18 would be to *'prevent a real conflict of interest that cannot be managed without including a secondary employment provision'*.

The clause as it stands would not be valid as a secondary employment provision because the reasons for the prohibition are not included in the clause. There is a further potential argument that the clause may not be valid because the conflict of interest can be managed without the inclusion of such a provision; by the use of the duty of fidelity.

In conclusion, this case is of interest in that it does provide for remedies where duties are breached by employees. There is the potential however that the recent amendments to the Employment Relations Act will make this a more problematic issue for employers.