

Employee's breach of a confidentiality clause in a COT3 agreement did not release employer from obligation to pay further settlement monies

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Employee's breach of a confidentiality clause in a COT3 agreement did not release employer from obligation to pay further settlement monies

If an employee breaches a confidentiality clause contained in a COT3 agreement or, more commonly, a Settlement Agreement, what are the employer's options? The answer is that it will depend on the importance of the clause or the severity of the employee's breach. A recent High Court decision offers a salutary lesson on the need to draft settlement documents carefully to ensure the employer has the best possible protection.

What does the law say?

If the confidentiality clause is of vital importance, such that it is regarded as a "condition" of the contract, then the employee's breach entitles an employer to treat the contract as "repudiated" (thereby releasing it from any future obligations under the contract, such as the payment of further settlement monies). Additionally, the employer could sue for damages for breach of contract.

However, if the confidentiality clause is not of vital importance, such that it is regarded as an "intermediate" term of the contract, then the employer's remedy depends on the nature of the employee's breach. If the employee's breach is serious enough to deprive the employer of the whole of the benefit of the contract then it will be regarded as a "repudiatory breach", which would allow the employer to treat the contract as repudiated and also claim damages for loss. If the breach is not a repudiatory breach, the employer will remain bound by contract and its only remedy would be to sue for damages for breach of contract.

What happened in this case?

The employee, Mr Steels, settled an employment dispute with his former employer, Duchy Farms Kennels Ltd (DFK), in

exchange for a settlement payment of £15,500 to be paid in 47 weekly instalments. The dispute was settled by way of a COT3 agreement which contained a boilerplate confidentiality clause. That clause required Mr Steels to keep the fact and terms of the settlement confidential. Later, DFK discovered that Mr Steels had disclosed the fact and amount of the settlement to one of DFK's former employees.

DFK stopped paying the weekly settlement payments on the grounds that Mr Steels had breached the COT3 and it was, therefore, released from its side of the bargain. Mr Steels applied to the County Court to enforce the COT3. DFK responded by seeking a declaration that the breach of the confidentiality clause meant that the remaining settlement monies were no longer payable.

The County Court held that the confidentiality clause was not a condition of the COT3 agreement, but was, instead, an intermediate term. As it could not be said that Mr Steels had committed a repudiatory breach, this meant that DFK remained bound by the contract and had to continue paying the weekly settlement payments. DFK appealed to the High Court.

What was decided?

The High Court agreed with the County Court and dismissed DFK's appeal. The High Court said the confidentiality clause was a boilerplate clause. It had not been expressed to be a condition of the agreement and nor was there any indication that confidentiality was of vital importance to the employer. Importantly, the Court reached this conclusion despite the fact that the COT3 had been drafted by lawyers and referred to keeping the agreement "strictly confidential" and not just "confidential".

Having decided the confidentiality clause was as an intermediate term, the Court turned to whether Mr Steels' actions amounted to a repudiatory breach. The Court said the

test was whether a reasonable person would have regarded Mr Steels as having “clearly shown an intention to abandon and altogether refuse to perform the contract”. This was not the case here. The breach did not, and was not likely to, cause commercial harm to DFK and the risk of unmeritorious copycat claims was remote. In any event, anyone who had known that Mr Steels and DFK had been in a dispute would have been able to deduce that there has been a settlement even without a breach of the confidentiality clause.

What are the learning points for employers?

When drafting settlements, it would be wise for employers to:

- expressly state that the confidentiality clause is a condition of the agreement;
- state the importance of the confidentiality obligation to the employer;
- stipulate that payment of any monies (and performance of any other of the employer’s obligations) is conditional upon the employee’s strict compliance with the clause; and
- make specific provision about what happens if there is a breach (e.g. repayment of any monies paid to date and that no further payments will be payable).

In this way, the confidentiality clause is more likely to be regarded as a condition of the agreement entitling the employer to repudiate the contract in the event of a breach, should it wish to do so.

[Duchy Farms Kennels Ltd v Steels](#)

If you would like to discuss any of the issues raised in this article or how BDBF can help to review your template Settlement Agreement, then please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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