LHAG Insights

Employment & Industrial Relations

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Right to Discovery *vs* Protection of Employers' Confidential Information

In a legal suit, discovery applications are typically made when a party seeks to obtain documents which may be useful to their case, but which are in the possession of the opposing party. The purpose of discovery is to provide the parties with all the relevant documentary evidence in each party's possession and to avoid trial by ambush or the element of surprise.

However, the process could also be used as a mechanism to delay, harass or drive the other party into either financial exhaustion or early settlement. Recently, we successfully opposed an application for discovery of an employer's documents which were not only confidential in nature, but also irrelevant to the dispute at hand.[1]

The employee, prior to the substantive hearing of her claim for unfair dismissal, had applied to court seeking an order for production of commercially sensitive and highly confidential documents from the employer. Those documents would purportedly exonerate her from the misconduct of insubordination, where she had disobeyed the employer's instructions to attend work at the office and important company events, which formed her grounds of dismissal.

In opposing the application, the company, being a 100% government-owned company, had a duty to keep the private and confidential legal documents such as intergovernmental negotiations and agreements sought by the employee from being disclosed and potentially misused. In doing so, the company was

[1] http://www.mp.gov.my/eicpp/MainServlet?action=downloadAward&awardIndex=2947&awardCategory=1

ultimately able to show the Industrial Court that the commercially sensitive documents were not relevant nor necessary to advance the employee's case to show whether she had acted in an insubordinate manner or otherwise.

Further, given that the employee had been dismissed from the company, the burden of proving the employee's dismissal was with just cause and excuse had been on the employer and thus it was the employer's duty to put forward cogent and convincing evidence to support its case. The company had duly filed all the relevant documents leading to the employee's dismissal and thus, the employee could not complain.

What is considered confidential information?

Every employer has its own confidential information, also known as trade secrets, that it may want to protect from being disclosed to the public. Confidential information can include the company's ideas, designs, customer and supplier lists, business plans, agreements and internal communications which are meant to be kept private. Unauthorised disclosure of trade secrets is a concern to any employer, especially when the employee moves to another employer operating in the same field or when the employee sets up his own business in competition with a previous employer.

Therefore, it is common practice for employers to include an express confidentiality clause in their employment contracts to prohibit the employee from making any unauthorised disclosure of the company's confidential information.

In the case of *Schmidt Scientific*[2] and the UK case of *Faccenda Chicken*,[3] it was confirmed by the courts that a confidentiality clause will nevertheless be implied in an employee's contract. Thus, even in the absence of an express confidentiality clause, the employee is nevertheless restricted from making any disclosure of the company's confidential information without prior consent from the company as it is part and parcel of the duty of fidelity and good faith, and this extends to even after the employee has left the company.[4]

Striking a balance

The right to discovery is designed to do real justice between opposing parties but it is necessary for the courts to balance between ensuring a fair trial and protecting the confidentiality of documents which may involve serious invasion of privacy and business repercussions. Thus, to strike this balance, it ought to only be in cases where it would be absolutely necessary that the courts should be inclined to allow for discovery in the name of

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2 *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1998] 1 CLJ 685
3 *Faccenda Chicken Ltd v Fowler & Ors* [1986] 1 All ER 617
4 *Schmidt Scientific, supra* n 2 at p 691

achievement of justice between the parties.[5] Per Menzies J in *Mulley*:[6]

> "Discovery is a procedure directed towards obtaining a proper examination and determination of these issues — not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to train of inquiry which would, either advance a party's own case or damage that of his adversary."

Thus, it is clear that the courts have consistently emphasised that there shall be no fishing expedition disguised as a discovery application. Discovery should be conducted on relevant documents only and with the intention to determine certain issues.

The company was represented by Shariffullah Majeed and Nurul Aisyah Hassan from the firm's Employment & Industrial Relations Practice.

Shariffullah Majeed, Nurul Aisyah Hassan and Toh Kerryn (Pupil-in-Chambers)

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5 *Davies v Eli Lilly & Co & Others* [1987] 1 WLR 428
6 *Mulley v Manifold* (1959) 103 CLR 341