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What happened

What can constitute confidential information?

LinkedIn group contacts

Legal and Regulatory Update

LinkedIn-junction

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Topic: Data and privacy

Who: Whitmar Publications Limited v. David Gamage and others

Where: The High Court, London

When: 4 July 2013

Law stated as at: 1 August 2013

A fundamental issue that every business must tackle is to ensure that its confidential information is properly protected. This is of particular importance in circumstances where a former employee either resigns to work for a competitor or determines to set up in competition himself.

In recent years, the protection of confidential information has become increasingly challenging as employees are often actively encouraged to use social media sources to maintain their contacts during the course of their employment. As a consequence, the boundary between what constitutes 'confidential information' capable of protection and what is in the personal or in the public domain has become unclear.

The UK courts have previously recognised that business contacts uploaded from a confidential database onto an employee's personal LinkedIn account may amount to a breach of confidentiality (*Hays Specialist Recruitment (Holdings) Limited and Another v. Ions and Another*). Similarly, courts in the United States allowed PhoneDog to pursue a claim against its former employee Mr Kravitz who, when his employment terminated, changed his Twitter handle but continued to use the same Twitter account, effectively taking all 17,000 followers with him (*PhoneDog v. Noah Kravitz*). Also in the United States, the courts have found that it was unlawful for a company to have blocked a former employee's access to her LinkedIn account when her employment terminated and amend her details to reflect that of her replacement (*Eagle v. Morgan*).

Now, in a new development, the High Court in London has granted an injunction over use of LinkedIn group contacts that were created in the course of an employee's employment. David Gamage, Susan Wright and Steve Crawley were all employees of Whitmar Publications Limited (Whitmar) until their employment terminated at the end of January 2013 following their resignations. Subsequently, they all commenced employment with Earth Island Publishing Limited (Earth Island), which is a company they had established four months before they resigned from their employment with Whitmar and which, Whitmar alleges, was a direct competitor.

Whitmar brought proceedings against its former employees and Earth Island including for an injunction to protect the disclosure of its confidential information. The relief sought extended to the prevention of use of the LinkedIn groups that Susan Wright was responsible for dealing with in the course of her employment.

Whitmar says that it used those LinkedIn groups to promote its business interests and that they were maintained using its computers. However, the contacts retained within those groups appeared to have been used as the source for an Earth Island press release that was sent in early February 2013 to invite people to ‘an informal event’ at a bar. In addition, Whitmar alleges that Susan Wright refused to hand over the relevant LinkedIn account access details on the basis that they were personal connections.

The conclusion of the judgment does not address the issue of the ownership of the LinkedIn contacts directly. However, on the evidence before him, the judge granted the injunction sought by Whitmar, which will restrain the defendants from using the LinkedIn group contacts.

Why this matters

The issues addressed in the Whitmar case extend beyond simply the ownership of LinkedIn group contacts. For example, there are numerous other allegations that the defendants took impermissible steps to compete while still employed by Whitmar, such as registering an internet domain name or soliciting business from Whitmar’s clients. Moreover, the allegations relating to misuse of confidential information also extend beyond the use of LinkedIn to the retention of business cards and a customer database to the production by Earth Island of products that are similar to those of Whitmar.

However, what is strikingly apparent from both the Whitmar case and other recent developments both in the United States and the United Kingdom is that companies need to ensure they have in place robust contracts and policies to govern both the protection of confidential information and the use of social media. It is advisable for social media policies to clearly set out the company’s stance. Where possible, in order to protect contacts, employers should set up new accounts in relation to websites such as Twitter or LinkedIn. This should be combined with a policy that makes it clear that such accounts are:

- for business purposes only;
- the property of the company (including specifically the access details to such accounts); and
- not permitted for use after employment has terminated.

The social media policy should also highlight the potential risk of disciplinary sanctions and, ultimately, dismissal for non-compliance with the terms of use.

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