

Protecting confidential information

What are an employer's options for protecting confidential information if an employee has a personal relationship with somebody who works for a competitor? Luke Bowery and Kate Redshaw of Burges Salmon look at how best to manage such situations and minimise the risks of "pillow talk".

As the familiar adage goes, "never mix business with pleasure" – in which there is doubtless much wisdom. However, life doesn't always follow the rules. Ask a person where they met their partner, and a response that they met at work or trained together or perhaps met at a conference would cause little surprise.

Given this, it is inevitable that, from time to time, an employer will need to address the delicate scenario presented where an employee's personal relationships give rise to a potential conflict of interest.

While the most obvious risks arise where couples work in competing businesses, the potential for damage where two people work for the same employer should not be ignored. Even junior personnel in HR, say, can have access to sensitive data – rates of pay, medical information, and disciplinary records – which, if leaked, could have explosive effects.

Prevention: contractual and policy protections

One of the main practical difficulties is identifying that an employee is in a relationship or has connections which might present cause for concern.

Privacy rights and the fight for talent have made the somewhat draconian step of banning in-work relationships less commonplace.

One approach employers can take is to request that employees in relationships where the potential for conflict of interest arises disclose this confidentially to HR. However, this can be difficult for an organisation to police and may cause resentment.

A less intrusive approach to protecting confidential information in the workplace is to ensure that employees understand and are regularly reminded of what is expected of them in terms of confidentiality and their obligation to uphold the interests of the business should a conflict of interest occur, whether internally or as a result of an outside connection.

It is important that employees understand (and that you have explained to them) what the business views as confidential information. This message can be addressed during the induction process (where identification of confidential information can be tailored to the role) and then periodically, as a general message, through normal, business-wide channels of communication.

Of key importance, of course, is that employers make sure that, alongside these more general measures, there is adequate contractual protection in place. An audit of employment contracts may be necessary to ensure that confidentiality clauses are clear, robust and offer sufficient deterrence and protection from breach.

Prevention: managing individual instances

If a relationship is identified, the potential for it to cause damage to the business needs to be reviewed carefully. In many cases all that will be required is for the relevant people within the organisation – for example, line managers or HR – to be made aware of the situation in case this has implications for future projects. Initial considerations, as reflected in the relevant case law, should include:

- The character and behaviour, to date, of the employee(s) in question. Consider their past performance (and evaluate the likelihood of them leaking information), and their role and importance within the business. Also consider if they have given undertakings not to disclose confidential information.

- The nature of the relationship – are they partners, is it a family relationship or simply a friendship? How long has the relationship been going on – if you have only discovered it recently but the couple has been together for years without issue, the risk of breach is lower.

- The nature of the information to which the employee(s) has access. Evaluate how sensitive the information is and how genuinely useful it would be to a competitor (particularly if divulged in isolation without context, substance or interpretive data).

- The character (to the extent that you know it) and status of the employee's partner. Consider their level of seniority in the competing business and the ability that they have to use confidential information once in their possession.

Once you have assessed the risk, you can then identify what, if anything, you might need to do. There can be a temptation, particularly for line managers, to overreact. It is important – not only in terms of minimising employment claims but also in doing what's right for the business – not to throw the baby out with the bath water.

It would be irrational, for example, to discipline or dismiss a high-performing and dedicated employee with an impeccable track record because their partner takes up a non-influential role at a competitor.

If the analysis identifies a tangible risk, consider holding a meeting with the employee to discuss the issue. Explain the inherent risk that a conflict of interest might arise given their circumstances and underline the importance of confidentiality.

Make it clear that they are expected to alert their line manager if they are put in situations where they feel they may be conflicted so that alternative arrangements may be made. You might also ask the employee to sign a non-disclosure agreement restating the confidentiality obligations set out in their contract of employment.



on in the workplace



In many instances, it may be that this will suffice. However, if the commercial risk justifies more tangible action, consider the least disruptive solutions in the first instance and work up, avoiding knee-jerk reactions or, worse still, on-the-spot sackings (never a good idea in any circumstances).

Consider, for example, restricting the individual's access to certain information, making sure they don't work on particular projects, a change in line report, alterations to duties or responsibilities, or even redeployment elsewhere in the business. However, be aware of the risks associated with significant changes to the employee's role – redeployment and/or fundamentally changing an employee's duties or status may give rise to potential claims for constructive unfair dismissal.

Cure: a last resort

Taking more combative action should be a last resort for an employer. However, should you find yourself in a position where, after careful analysis, the information in question is so sensitive in nature and/or the risk of that information being leaked is deemed too great, such an approach may be necessary.

If a leak of (genuinely) confidential information has occurred, the situation is more straightforward – provided fair and reasonable investigatory and disciplinary

procedures have been properly carried out, then a dismissal for gross misconduct is likely to be justifiable (and this will be the case regardless of whether the confidential information was leaked to the employee's partner or to any other third party).

The more difficult scenario arises where a leak has not yet occurred but the employer's irresolvable concerns persist. Can the employer dismiss? A review of the (limited) case law confirms that while much will rest on the various factual considerations (see previous bullet points and, in particular, the closeness of the relationship and the sensitivity of the material to which each employee has access), dismissal may be a legitimate step to take.

In *Weal v Insulpak*, an employee was found to be unfairly dismissed after her father left the same employer to join a competitor. The employment tribunal held that it was less likely that a father and daughter would be discussing confidential matters than a husband and wife. The business risks were also deemed minimal as the daughter was a junior employee with limited access to commercially sensitive information.

The Employment Appeal Tribunal (EAT) in *Skyrail Oceanic Ltd t/a Goodmos Tours v Coleman* ultimately found the dismissal of a booking clerk unfair, after she married a man working for a competitor travel company. However, the reason for dismissal was regarded as potentially fair, under the Employment Rights Act 1996 for "some other substantial reason" (SOSR).

The EAT held that the fact the employee had access to almost all of the business' confidential information, combined with the nature of her relationship to someone within a competitor, meant that there was the risk of "industrial espionage". This view was upheld in the case of *Chandlers (Farm Equipment) v Rainthorpe*, where it was held that the fear of confidential information being passed on could amount to a fair SOSR dismissal depending on the relevant facts and circumstances.

Conclusion

It is not surprising that conflicts emanating from employees' relationships can cause emotions to run high; the issues raised are highly personal, potentially intrusive and centre on calling an employee's integrity into question.

Ultimately, a decision as to whether or not to continue to employ the person is likely to boil down to a commercial, rather than a legal, decision. If an apparently trustworthy employee is valuable to a business, then dismissing them as a precaution may not ultimately serve in the employer's best interests, particularly if less extreme measures can be put in place to minimise the risks.

However, if an employer does have strong and genuine grounds for believing the business is best served without the employee then, provided proper consideration is given to the relevant factors and a fair and robust procedure is followed (including considering alternatives to dismissal), a fair dismissal, protecting the business from employment claims, may be achievable.

THE AUTHORS

■ Luke Bowery is a partner at Burges Salmon LLP.
Email: luke.bowery@burges-salmon.com. Tel: 0117 902 2716.
Kate Redshaw is a senior associate (PSL) at Burges Salmon LLP.
Email: kate.redshaw@burges-salmon.com. Tel: 0117 902 6610.