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EMPLOYEE CONFIDENTIALITY AGREEMENTS - CAN THEY PROTECT YOU AND YOUR CUSTOMERS?

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Social media and the internet enable the quick spread of information that a business may be trying to protect - including information about a customer. The decision in *Simard Westlink Inc. v. Wallace*, 2013 BCSC 2218 demonstrates that, in the right circumstances, an employee confidentiality agreement can assist a business when information about its customers is posted publicly by an employee.

Facts

Simard Westlink Inc. (the "Employer") operates a Warehouse and provides warehousing and distribution management services to its customers. In 2012 part of the Employer's guarantee to its customers was that storage of their goods would be confidential. Specialized storage and handling was also guaranteed. In 2013 the Employer learned through a customer that a YouTube video revealed the contents of items the customer had provided for storage by the Employer. Following an investigation, the Employer identified 93 audio and video recordings related to the Employer's business contained on a website. The recordings disclosed a variety of information including: customer names and/or products; negative comments about the Employer; and unprofessional handling of customer goods. The Employer was unable to remove the recordings from the website and YouTube refused the Employer's request to remove the recordings. One employee was identified by the Employer as making at least some of the recordings and being in control of the website postings. The employee had signed an agreement that contained a clause confirming he would not, directly or indirectly "use, spread, transfer, communicate, disclose, reproduce or publish" any of the Employer's "confidential information". A broad definition of "confidential information" was also contained in the agreement.

The Issues

The Employer turned to the courts for a variety of remedies including an injunction based on the employee's breach of the confidentiality agreement and his breach of the implied duty of loyalty and good faith that



exists in an employer/employee relationship. The employee did not specifically deny making the recordings or posting them but did allege the Employer had not proven the employee did so. Furthermore, the employee consented to an order to remove the recordings but would not agree to an order that prevented re-publishing the same or other recordings in the future.

The Decision

A number of issues were addressed by the court. The court was able to conclude that the employee was in control of the recordings being posted to the internet. This did not necessarily mean that the employee made all the recordings or had personally posted them on the internet, however, the employee had enough control that recordings could be removed from the website (either by him or at his direction).

Two important points for employers arise from the decision. First the provisions of the confidentiality agreement were found to have been breached by the employee and the court concluded injunctive relief was the appropriate remedy. Second, the court noted that protecting an employer's confidential information is part of an employee's duty of good faith and loyalty, however, there can be difficulties in deciding what specific information is protected by this implied duty. The good news for the Employer was that, given the express confidentiality agreement and the broad definition of "confidential information", the court did not need to consider whether the implied duty was sufficient to entitle the Employer to a remedy.

Summary

Written employment agreements can help remove ambiguity from the employment relationship by defining terms of employment that may otherwise be vague or have a wider scope if left to general legal principles. When a business makes promises to its customers, employment agreements may also assist that business in obtaining a remedy through the courts when other options are unavailable.