

Employment

All in good faith

When does an employee owe fiduciary duties, asks **Felicia Epstein**

IN BRIEF

- Employees who are not fiduciaries need not pursue their employer's interests at the expense of their own.
- When hiring team members from a competitor, employers must recruit separately.

It has become common, in the employment context, to assert the existence of a duty of fidelity distinct from fiduciary duties. As Robert Flannigan pointed out in his article "The [Fiduciary] Duty of Fidelity" ((2008) 124 LQR 274), the duty of fidelity is an invention and "faith, good faith, fidelity and loyalty arguably are too closely associated with conventional fiduciary responsibility to serve usefully as sharp descriptors of other functions". Perhaps for this reason, it is difficult to distinguish between an employee's duty of fidelity and any fiduciary duties they may owe. It has been commonly stated that all employees are subject to a duty of fidelity but only those in a position with specific powers and responsibilities have fiduciary duties that would include reporting their own misconduct or that of fellow employees.

Global Risks

In *Lonmar Global Risks Ltd v West and others* [2011] IRLR 138 the claimant sued Tyser Limited, a competitor in the international intermediary brokering market, and three employees who had left Global Risks to join Tyser. Global Risks alleged these employees had solicited clients and employees to leave and join Tyser. The High Court considered whether the employees had a positive duty to disclose the fact that they had been approached by a competitor, whether under their implied duty of fidelity, under their contract of employment or as fiduciaries.

Hickinbottom J pointed out that "The legal basis of these two duties is entirely different, the duty of fidelity being implied

as a matter of contract, whilst a fiduciary obligation is imposed as a matter of equity by virtue of relationship", and cited with approval Elias J's view in *Nottingham University v Fishel* [2000] ICR 1462 that: "The essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place an employee in a position where he is obliged to pursue his employer's interests at the expense of his own."

In *Fishel* Elias J said that although fiduciary duties could arise out of an employment relationship itself, they arise not as a result of the mere fact that there is an employment relationship but from the fact that "within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations".

There is, Hickinbottom J held, no broad implied duty in the contract of employment requiring an employee who owes no fiduciary duties, and who is not acting in concert with others or otherwise unlawfully, to disclose to his employer that colleagues are being recruited by a competitor. To have any reporting obligation to an employer, the employee must be a fiduciary. On the facts of this case, he found the individuals did not owe fiduciary duties.

No loss; no damages

The judge found that two of the employees were lawfully dismissed as they had acted in repudiatory breach of both the express terms of their contracts of employment and

their implied duties of fidelity as employees. However, although they had breached their employment contracts Global Risks had suffered no loss as a result of these breaches of contract and accordingly was not awarded any damages.

Hickinbottom J found that despite the extent of their potential influence over clients, two of the individual employee defendants did not have any management responsibilities or board level involvement and therefore could not be held to have fiduciary duties. Their duties of fidelity as employees did not extend to their being obliged to disclose their own, or other employees', misconduct. He did not accept that the decision of Wyn Williams J in *Kynixa Limited v Hynes* [2008] EWHC 1495 (QB) established that there was a broad implied duty in a contract of employment requiring an employee who owes no fiduciary obligation and who is not acting in concert with others or otherwise unlawfully to disclose to an employer that fellow employees are being recruited by a competitor. Hickinbottom J distinguished *Global Risks* from *Kynixa* because the employee in the latter case had positively misled her employer about her and her fellow employees' intentions.

Comment

Although fact specific, *Global Risks* shows that even senior employees may not owe fiduciary duties and that employees who are not fiduciaries are not required to pursue their employer's interests at their own expense. Employers should be aware that it is best to recruit separately when hiring team members from a competitor. This may assist them if the previous employer sues for conspiracy or for inducement of employees to breach their contracts.

Claimant employers need to carry out a cost-benefit analysis when deciding whether to pursue former employees for soliciting their clients, because even if they can show breaches of contract, they must demonstrate that they suffered loss as a result of those breaches. This may be (as it was in *Global Risks*) difficult to prove. NLJ

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