



A-Z OF EMPLOYING

Fidelity

Our guide for Employers and Managers

**SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS**

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Contents

This is only a guide. It should not be a substitute for professional advice.

Please seek advice from our AdviceLine Team if you require specific assistance.

Overview	3
Introduction	3
Elements of fidelity	3
Examples of the duty of fidelity	3
Disclosure	3
Secondary employment	4
Secret gains or kickbacks	4
Failing to account for employer's property	4
Undermining an employer's business relationships	4
An example in the Authority	4
Limits on the duty of fidelity	5
Preparing for a new business	5
Receipt of information relevant to the employer	5
Whether the duty extends beyond termination of employment	5
Trade secrets and confidential information	5
Use of information from employment	6
Relief for a breach of confidentiality	7

Fidelity

Our guide for Employers and Managers

Overview

- ▶ Fidelity is an implied term of every employment agreement.
- ▶ Fidelity means adhering to implied terms of an employment agreement such as trust, confidence, honesty and good faith.
- ▶ Injunctive relief is available where a breach of fidelity has occurred.

Introduction

The word “fidelity” in its ordinary dictionary meaning means simply, “the quality or state of being faithful or loyal to obligations, duties, or observances”. If an employee breaches the duty of fidelity while they are employed this should be addressed through the disciplinary process. Refer to the **A-Z Guide on Discipline** for further information. If the duty of fidelity is breached after the employment has terminated an employer can seek remedies from the Employment Relations Authority.

Elements of Fidelity

One of the foremost duties residing between employers and employees are their mutual obligations to act towards one another in good faith. This duty underlines a variety of particular duties, in particular the duty of fidelity. The duty of fidelity comprises several facets, such as an employee’s duty not to misrepresent their background or experience, including the employer’s position with regards to secondary employment, kickbacks, copyright, confidential information and trade secrets. Post-employment may also be affected by way of a restraint of trade clause in an employment agreement. Put simply an employer and employee must avoid any conduct which a person of ordinary honesty would look on as dishonest, whilst the boundaries of such depend upon the facts of each case.

Examples of the Duty of Fidelity

Disclosure

Deliberate misstatements about one’s experience and background at the recruitment stage destroys good faith from the outset, therefore there is a general obligation on an employee during recruitment to be honest and truthful. However it is not the responsibility of the employee to volunteer negative information about their past nor is it their responsibility to volunteer information that is likely to harm their chances for employment. This right to non-disclosure does not extend to providing false information when asked.

A person to whom the Criminal Records (Clean Slate) Act 2004 applies has the right, once seven years has passed since they received a non-custodial sentence, to have that criminal record concealed by Government agencies (please refer to the **A-Z Guide on the Criminal Records (Clean Slate) Act 2004**) for further information. Employees who qualify have the right to deny having a criminal record, without breaching their duty of fidelity, when asked to make a declaration about it.

Fidelity

Our guide for Employers and Managers

Secondary employment

Generally an employee is entitled to have secondary employment or self-employment outside their hours of work. An employer may restrict or prohibit secondary employment where there is express term in the employment agreement and the employer has genuine reasons based on reasonable grounds to prohibit or restrict an employee from working for another employer. A genuine reason to restrict or prohibit secondary employment is where there is a need to protect the employer's commercially sensitive information, intellectual property, commercial reputation, or to prevent a real conflict of interest that cannot be managed. Secondary employment is also prohibited from interfering with the employee's duty to be fit and able to do their job, as such excessive hours of work that interfere with sleep or cause excessive stress, or strenuous physical secondary jobs may breach the employee's obligations.

Secret gains or kickbacks

It is a violation of the employee's duty to their employer to accept a secret commission or kickback for arranging or diverting the employer's business to a particular supplier or seller.

Failing to account for employer's property

Many employment contracts expressly provide that an employee must return all of the employer's property at the end of employment. Even if this is not expressly stated, it is a common law duty and must be adhered to by an employee otherwise the employee is in breach of their employment obligations. In addition, if at any time during employment, an employee fails to account for any of the employer's property, this may also be a breach of the duty of fidelity.

Undermining an employer's business relationships

Undermining the employer's relationships with its clients, shareholders or customers with a view to future transfer of custom to the employee is an example of a breach of fidelity. For example an employee who did not inform the employer of a client's concerns; or the employee who did not provide reports on future business plans to their employer but did provide them to clients; or the employee who prior to giving notice sought and obtained for themselves exclusive agency of a client; or the employee that competed with their employer in normal working hours; or the employee who used to their personal advantage business opportunities that came to the employee in the course of employment.

An example in the Authority

In *Bradford Trust Ltd v Roebeck and Pakieto* [AA 60/08; 26/02/2008; L Robinson] the Employment Relations Authority found that two Bradford Trust employees had colluded together to breach their duties of fidelity, good faith and honesty. The employees set up a company which put tenders in for some of the same contracts as Bradford Trust. The employees gave a verbal quote on behalf of Bradford Trust then submitted a written quote on behalf of their own company to secure the contract. When queried by their employer, the employees misled their employer as to the nature of their relationship with the company they had created. The Authority found that they had

Fidelity

Our guide for Employers and Managers

blatantly and deliberately breached their duties of fidelity, good faith and honesty owed to their employer. The employees were fined \$5,000 each for the breach of good faith and were ordered to pay Bradford Trust \$223,500 for the damage caused by their breach of fidelity.

Limits on the Duty of Fidelity

Preparing for a new business

The duty of fidelity does not prevent an employee from preparing for a new business provided they do not fraudulently undermine their current employer or breach the employment agreement or duty not to disclose confidential information. Furthermore it does not prevent an employee preparing and submitting a tender in competition with the employer while still employed, providing this is not a breach of an express term in the employment agreement.

Receipt of information relevant to the employer

An employee who receives valuable information relating to the employer's business in the course of employment is obliged to disclose that information to the employer. Essentially the duty of fidelity imposes an obligation to act at all times in the interests of the employer. However it may not be a breach of the duty for an employee not to tell their employer of an opportunity that arose for an employee but which by its nature would clearly not be available to the employer.

Whether the duty extends beyond termination of employment

This essentially works as a restraint of trade where the employer has an appropriate opportunity to pursue and conclude the business opportunities that arose during employment and that the former employee is wrongfully pursuing themselves by taking advantage of that which rightfully belongs to the employer. There is common law to suggest that three months is the maximum time in the circumstances which could be argued that any duty not to pursue business opportunities continued after the termination of employment, any more would be unduly restrictive on the former employee.

Furthermore an account for profits may be available in exceptional circumstances for breach of the employment agreement after it has ended. A useful guideline here is whether the claimant had a legitimate interest in preventing the profit making activity, and in depriving the former employee of their profit. The closer the contractual obligation is to a fiduciary one, the more likely it is that an account would be ordered. A good example here is the case where a former SIS agent who had signed a confidentiality clause published a book about their service with the SIS. The SIS had a legitimate interest in keeping such information out of the public domain.

Trade secrets and confidential information

An implied term about the non-disclosure to competitors of a trade secret or confidential information persists after the contract of employment has ended. A breach will arise in the employment context where information is communicated which has the necessary quality of confidence (not information which is public property and public knowledge) and/or the requirement that disclosure should be made in circumstances importing an obligation of confidence.

Fidelity

Our guide for Employers and Managers

The first test for determining the confidentiality of information considers first that the information must be information which the owner believes would be injurious to them or of advantage to their rivals if released. Second the owner must believe that the information is confidential and secret, namely information not in the public domain. It might be that some of their rivals already have the information however the importance is placed on the owner's belief that the information is confidential. Third the owner's belief under the previous two points must be reasonable. Fourth the information must be judged in the light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection; but any information that does satisfy them must be of a type entitled to protection.

The second test considers firstly the nature of the employment. Is the employee employed in the capacity where confidential material is habitually handled which may impose a high obligation because the employee reasonably should realise the information's sensitive nature. Secondly, the information is able to be classified as a trade secret (information not in the public domain); or the information is of such a highly confidential nature that it requires the same protection as a trade secret. Thirdly, the employer impressed upon the employee the confidentiality of the information. However the employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer toward the information is also a consideration. Lastly, the information can be easily isolated from other information which the employee is free to use or disclose.

Certain material has been held to become public knowledge where for example, it has been patented or by other wide-spread publication. Information is not restricted to the traditional trade secret such as a formula or process. In the market place, information such as customer lists, pricing strategies and proposed advertising campaigns are of equal, if not greater value. And even where individual suppliers or customers are matters of public knowledge, confidentiality may attach to such factors of knowledge as the fragility of a relationship between an employer and its customers.

Use of information from employment

Several points to note:

- ▶ In the absence of a valid restraint of trade clause, the former employer cannot prevent a former employee from simply competing.
- ▶ A former employer cannot normally prevent a former employee from contacting or even soliciting clients or customers of the former employer.
- ▶ After ceasing employment, an employee may not use truly confidential information obtained in the course of that employment for the purpose of competing with the former employer or in any other way detrimental to the former employer's interest.
- ▶ What amounts to confidential information depends upon the nature of each case.
- ▶ There is a clear trend of authority to the effect that departing employees may not take with them customer or client lists taken (memorised or otherwise recorded) for the purpose of using them in a competing role.
- ▶ Generally a departing employee may not solicit or approach a client of the employer in respect of the transaction current at the time of their departure.

Fidelity

Our guide for Employers and Managers

Relief for a breach of confidentiality

If it is proved that there was unauthorised use of confidential information by an employee or former employee there may be injunctive relief available against the employee, former employee or third party to whom the information was communicated. Please contact BC Legal or one of our Consultants if you suspect such use has occurred or is likely to occur.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to BC Learning courses and conferences designed for those who manage employees.

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