**'Clear, concise and eminently readable.
This text is both authoritative and reliable.'**

Roger M. Walden, Manchester Business School, University of Manchester

Employment Law

Seventh Edition

Malcolm Sargeant and David Lewis

ALWAYS LEARNING

PEARSON

Employment Law

engaging in any business in the same industry, rather than from any business competing with the ex-employer, was wider than necessary to protect the legitimate interests of that employer. It should also be noted that it is only possible to remove an offending part of a covenant if it is a separate obligation to that which can be enforced.[179]

In *Rock Refrigeration*[180] a restrictive covenant which took effect upon the ending of the contract of employment 'howsoever arising' was not necessarily unreasonable. Nevertheless, in the event of the termination resulting from the employer's repudiatory breach of the contract, the employee would be released from their obligations under the contract. Similarly, a covenant which 'restricts individuals from competing in any aspect of a company's business being carried on at the date of the termination in which the employees were actually involved during their employment' was held to be reasonable.[181] A non-solicitation clause which prevented an ex-employee from dealing even with potential clients who were negotiating with the employer at the time the individual left employment was also held not to be too vague to be relied upon. This was the situation in *International Consulting Services (UK) Ltd* v *Hart*,[182] where an ex-employee approached a potential customer who had held some preliminary discussions about the provision of services. In this context, the discussions were held to be negotiations and were caught by the non-solicitation clause.

3.5.2.3 Confidential information

In *Faccenda Chicken*[183] employees set up a business delivering chickens to butchers, supermarkets and catering operations and competed directly with their previous employer who had an identical operation. None of the employees had a restrictive covenant in their previous contracts. The Court of Appeal addressed the apparent conflict between the duty of an employee not to disclose confidential information which had been obtained in the course of employment with the prima facie right of any person to exploit the experience and knowledge which they have acquired for the purpose of earning a living. Neil LJ set out the following legal principles:

1. Where the parties were, or had been, linked by a contract of employment, then the obligations of the employee are to be determined by that contract.
2. In the absence of express terms, the obligations of the employee with respect to the use of information are the subject of implied terms.
3. Whilst the employee remains in the employment of the employer, these obligations are included in the implied term of good faith or fidelity.[184]

[179] *Scully UK Ltd* v *Lee* [1998] IRLR 259 CA; see also *Hollis & Co* v *Stock* [2000] IRLR 712 CA, where a restriction on an employee not to work within ten miles of the ex-employer's office (a firm of solicitors) was interpreted as a restriction on working as a solicitor, rather than any employment, and was therefore not an unreasonable restraint of trade.

[180] *Rock Refrigeration Ltd* v *Jones and Seward Refrigeration Ltd* [1996] IRLR 675 CA.

[181] *Turner* v *Commonwealth & British Minerals Ltd* [2000] IRLR 114 – the fact that the employees were paid extra in return for agreeing to the restrictive covenant is not decisive, but is a legitimate factor to be taken into account.

[182] [2000] IRLR 227.

[183] *Faccenda Chicken Ltd* v *Fowler* [1986] IRLR 69 CA.

[184] The duty of good faith will be broken if the employee makes, copies or memorises a list of the employer's customers for use after the end of employment.

4. The implied term which places an obligation on the individual as to conduct after the ending of the employment is more restricted in its application than that which imposes a general duty of good faith.[185]
5. In order to decide whether a particular item of information falls within an implied term to prevent its use or disclosure after employment has ceased, it is necessary to consider all the circumstances of the case.

In considering all the circumstances, a number of issues will be taken into account. First, the nature of the employment: if it is one that habitually uses confidential information there may be a higher standard of confidentiality required. Secondly, the nature of the information itself: only information that can be regarded as a 'trade secret' can be protected, rather than looking at the 'status' of the information. Thirdly, the steps that the employer had taken to impress upon the employee the confidentiality of the information. Finally, whether the relevant information can be isolated from other information which the employee is free to disclose or use.

For information to be classified as a trade secret, and therefore not to be disclosed, it is not incumbent upon an employer to point out to an employee the precise limits of what is sought to be made confidential. However, the closer an employee is to the 'inner circles' of decision making, the more likely they are to know that information is confidential.[186] This issue presents particular problems for employees who wish to work elsewhere. There is a distinction between knowledge which an employer can show to be a trade secret, and therefore the employer's property, and information which is the result of the skill, experience and know-how accumulated by an individual in the course of their employment.[187] To be protected the information needs to be precise and specific enough for a separate body of objective knowledge to be identified, rather than a general claim to an accumulated body of knowledge which an employer claims to be confidential.[188]

It is clear that an employer may be able to enforce an obligation of confidentiality against an individual who has made an unauthorised disclosure and used documents acquired in the course of employment. In *Camelot* v *Centaur Publications Ltd*[189] a copy of the draft accounts of the company which ran the National Lottery was sent by an unknown employee to an interested journalist. The information revealed, amongst other matters, increases in remuneration for some of the company's directors. The company asked the court to ensure that the leaked documents were returned, so that they could identify the individual who caused the leak. The Court of Appeal accepted that the case was not a whistleblowing one and held that it was in the public interest to enable the employer to discover a disloyal employee in their midst. More recently, the High Court ruled that a head of research and development was in breach of contract when she emailed confidential documents to her private address.[190]

[185] The court relied upon the judgments in *Printers & Finishers Ltd* v *Holloway* [1965] RPC 253 and *E Worsley & Co Ltd* v *Cooper* [1939] 1 All ER 290 to distinguish between those secrets which are really trade secrets and not to be revealed and those matters which are confidential whilst the employment subsists.

[186] As in *Lancashire Fires Ltd* v *SA Lyons & Co Ltd* [1997] IRLR 113 CA.

[187] See *Crowson Fabrics Ltd* v *Rider* [2008] IRLR 288.

[188] See *FSS Travel and Leisure Systems Ltd* v *Johnson* [1998] IRLR 382 CA and *Brooks* v *Olyslager OMS (UK) Ltd* [1998] IRLR 590 CA. On springboard relief until trial see *UBS Ltd* v *Vestra* LLP [2008] IRLR 965.

[189] [1998] IRLR 80 CA.

[190] *Brandeaux Advisers Ltd* v *Chadwick* [2011] IRLR 224.

3.5.2.4 Public Interest Disclosure Act 1998

The Public Interest Disclosure Act 1998 amended ERA 1996 to provide some protection for workers who disclose information about certain matters. Section 43J ERA 1996 makes void any provision in an agreement, including a contract of employment, which attempts to stop the worker from making a protected disclosure. Section 43A ERA 1996 provides that a 'protected disclosure' is a 'qualifying disclosure', as defined in s. 43B, which is made in accordance with ss. 43C–43H. According to s. 43B, there is a qualifying disclosure if a worker reasonably believes that the information is in the public interest[191] and tends to show one or more of the following: a criminal offence, a failure to comply with any legal obligation,[192] a miscarriage of justice, a danger to health and safety and damage to the environment. A likelihood of any of these events occurring is also a qualifying disclosure, as well as any information about concealment, or attempts to conceal, such information.

The disclosure needs to be made to an individual's employer or to some other person who has responsibility for the matter disclosed, to a legal adviser or to a prescribed person[193] and ss. 43G and 43H ERA 1996 impose strict rules about making disclosures in other circumstances. For example, the worker must reasonably believe that the information is true and not make disclosures for private gain. It must also be reasonable for the worker to make the disclosure.

Protection is given to a wide group of workers as defined in s. 43K ERA 1996.[194] Those who make a protected disclosure have the right not to be subject to detriment by any act, or failure to act, on the part of the employer or a co-worker by reason of the individual making the disclosure.[195] Section 47B ERA 1996 imposes vicarious liability if a worker suffers a detriment at the hands of a co-worker and the employer did not take all reasonable steps to prevent this happening. A dismissal for the same reason will be automatically unfair[196] as will selection for redundancy.[197] One of the problems for workers seeking to rely on this legislation is that there are a number of hurdles which have to be overcome, including showing that they were acting in the public interest[198] and had a reasonable belief in the existence of wrongdoing.[199] Good faith is no longer a requirement for making a protected disclosure but an award can be reduced by up to 25 per cent if it appears to an employment tribunal that a disclosure was not in good faith.[200]

[191] The public interest test was inserted by s. 17 Enterprise and Regulatory Reform Act 2013.

[192] See *Parkins* v *Sodexho Ltd* [2002] IRLR 109, *Babula* v *Waltham Forest College* [2007] IRLR 346 and *Hibbins* v *Hesters Way Project* [2009] IRLR 198.

[193] See ss. 43C–43F ERA 1996 and the Public Interest Disclosure (Prescribed Persons) Order 1999, SI1999/1549.

[194] See *Croke* v *Hydro Aluminium* [2007] ICR 1303.

[195] Section 47B ERA 1996. On compensation for injury to feelings see *Virgo Fidelis School* v *Boyle* [2004] IRLR 268.

[196] In *Miklaszewicz* v *Stolt Offshore Ltd* [2002] IRLR 344 an individual was dismissed, after the legislation came into effect, for making a disclosure some six years before. He was still held to be protected as the court held that it was the date of dismissal that triggered the employee's entitlement to protection, not the date of the disclosure. A protected disclosure may occur after the employment has terminated, see: *Onyango* v *Berkeley* [2013] IRLR 338. On the burden of proof see *Kuzel* v *Roche Ltd* [2008] IRLR 530 and *Fecitt* v *NHS Manchester* [2012] IRLR 64 CA.

[197] See ss. 103A and 105(6A) ERA 1996; Public Interest Disclosure (Compensation) Regulations 1999, SI 1999/1548 on the level of awards that may be given; there is no maximum figure set for compensation in such cases.

[198] See *Street* v *Derbyshire Unemployed Workers Centre* [2004] IRLR 687.

[199] See *Bolton School* v *Evans* [2007] IRLR 140.

[200] Section 123 (6A) ERA 1996.

3.6 Other sources of terms

3.6.1 Custom and practice

It is possible for terms to become incorporated into the contract of employment as a result of custom and practice. In *Sagar* v *Ridehalgh & Sons Ltd*[201] a weaver challenged a long-accepted practice in the textile industry of deducting pay for poor work. The weaver failed in the complaint because the court held that the practice had prevailed at the place of work for over 30 years. The practice was judged to be 'reasonable, certain and notorious' and, therefore, to have legal effect. There was a question about whether the practice could have effect if the individual was unaware of its existence. In *Sagar*, the court found it difficult to believe that the complainant did not know of its existence.

In *Duke* v *Reliance Systems Ltd*[202] it was held that a management policy could not become incorporated into a contract of employment on the grounds of custom and practice unless it had been shown that the policy has been drawn to the employees' attention and had been followed without exception for a 'substantial period'. These factors were later referred to as 'to be among the most important circumstances to be taken into account', but that all the other circumstances needed to be looked at. These included whether the 'substantial' period should be looked at in relation to these other circumstances to justify the inference that the policy had achieved the status of a contractual term. Additionally the issue of communication with the employees was one of the factors which supported the inference that the employers intended to become contractually bound by it.[203]

The need for the custom and practice to be reasonable, certain and notorious was further illustrated in *Henry* v *London General Transport Services*.[204] In this case the trade union came to an agreement with the employers about changes to terms and conditions of employment in preparation for a management buy-out. These changes resulted in reductions in pay and other less advantageous terms and conditions. There had been a tradition of at least annual negotiations between the employer and the trade union where changes were agreed. However, there was no express agreement that changes would automatically be incorporated into employees' individual contracts of employment. A number of employees, unhappy at the reductions, claimed unlawful deductions from their wages. The EAT held that, once the reasonableness, certainty and notoriety of the custom and practice was established, it was to be presumed that the term represented the wishes and intentions of the parties concerned. This was not undermined by the fact that some individuals did not know of the practice or did not support it. Thus, in this case, the agreement was held to have become incorporated into the employees' individual contracts of employment.

3.6.2 Collective and workforce agreements

Collective agreements are defined in s. 178(1) TULRCA 1992 as 'any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or

[201] [1931] 1 Ch 310 CA.
[202] [1982] IRLR 347.
[203] *Quinn* v *Calder Industrial Materials Ltd* [1996] IRLR 126.
[204] [2002] IRLR 472.

employers' associations' concerning matters listed in s. 178(2) TULRCA 1992 (see Chapter 11). The first item listed in s. 178(2)(a) includes terms and conditions of employment. Collective agreements are presumed not to be legally enforceable contracts unless the agreement is in writing and contains a provision to that effect.[205] The result is that the vast majority of such agreements are not legally binding in themselves (see Chapter 11). However, they achieve legal effect if they become incorporated into the contract of employment. If the contract states, for example, that:

> The basic terms and conditions of your employment by this company are in accordance with and subject to the provisions of relevant agreements made between and on behalf of the Engineering Employers' Federation and the trade unions . . .[206]

then this is likely to be interpreted as an express provision incorporating the collective agreements negotiated between the employers and the trade unions (this issue is further considered in Chapter 11).[207]

Workforce agreements are an alternative mechanism for consulting and negotiating with employees when there is no trade union recognised for collective bargaining purposes (see Chapter 11). The specific requirements for reaching such agreements are contained in the Working Time Regulations 1998[208] and the Maternity and Parental Leave etc. Regulations 1999.[209] In both cases they are aimed at creating an opportunity for the parties to agree a more flexible approach to the implementation of the requirements of the Regulations. A workforce agreement[210] must apply to all the relevant members of a workforce or group and the agreement needs to be signed by all the individual members of the workforce or the group, or their representatives. The exception being in the case of smaller employers with 20 or fewer employees. In this case the agreement can be signed either by the appropriate representatives or by the majority of the workforce.

3.7 Variations in terms

Section 4 ERA 1996 provides rules for notifying changes in the s. 1 ERA 1996 statement of terms and conditions. The employer is required to give the employee a written statement of the changes at the earliest opportunity and, in any event, not later than one month after the change.[211] Section 4(3)(b) ERA 1996 provides for this to be done earlier if the person is required to work outside the United Kingdom for a period of more than one month. If the change relates to a change of employer and continuity of employment is not broken, then the new employer is not required to give a new statement, but merely to inform

[205] Section 179(1) TULRCA 1992.
[206] Quoted in *Alexander* v *Standard Telephones & Cables Ltd* [1991] IRLR 286.
[207] Collective agreements can be arrived at, and incorporated into the contract of employment, by individual employers or by employers' associations negotiating with individual trade unions or groups of unions; see, e.g., *Hamilton* v *Futura Floors Ltd* [1990] IRLR 478.
[208] SI 1998/1833.
[209] SI 1999/33J2.
[210] See Sch. 1 Maternity and Parental Leave etc. Regulations 1999.
[211] Section 4(3)(a) ERA 1996.

the employee of the change in circumstances,[212] specifying the date on which continuous employment began.[213]

There are a number of ways in which an employer may seek to change the terms of a contract of employment. The most straightforward would be to achieve mutual agreement to the changes with the employees and/or their representatives. If an employer is unable or unwilling to obtain this agreement, they may attempt to do so unilaterally. One way is to dismiss the employees and then offer them new contracts of employment containing the new terms. The employer will have satisfied their common law obligations if they give the contractually required period of notice of termination to their employees. The danger with this approach is that employers may leave themselves open to claims for unfair dismissal and redundancy and a lack of consultation concerning potential redundancies (see Chapter 9). In *GMB* v *Man Truck & Bus UK Ltd*[214] the respondent company had been formed by a merger of two other businesses. In order to harmonise terms and conditions the employees were given notice of dismissal and then offered immediate re-employment on new terms and conditions. The EAT held that the employer had failed to consult as required by s. 188 TULRCA 1992, which applies where there are collective dismissals.[215]

If the employer seeks to impose new terms then this may be interpreted as a repudiatory breach of contract, which the employee may decide to accept or not. One exception to this would be if the employer has a contractual right to make unilateral changes.[216] In *Farrant* v *The Woodroffe School*,[217] the employer tried to alter the job description of an employee on the mistaken advice that they were entitled to do so under the terms of the contract of employment. Even though the advice from the local authority was incorrect, the subsequent dismissal of the employee was held to be fair because it was reasonable for the employer to act on the advice received.[218] A second exception might be if the courts were willing to imply a term into the contract which permitted the employer to make a change. In *Jones* v *Associated Tunnelling Co Ltd*[219] the EAT concluded that there was an implied term to the effect that the employer had the right to change the employee's place of work to another location within reasonable daily commuting distance. The nature of the work required this change and the term was implied in order to give the contract business efficacy.

In *Jones*,[220] the employer also unsuccessfully claimed that the employee had assented to the change in the contract by continuing to work for another 12 months and not objecting. This argument was also used in *Aparau* v *Iceland Frozen Foods plc*,[221] where the EAT adopted the same approach. There was a need for

> great caution in reaching the conclusion that an employee has, by merely continuing an employment without any overt change or overt acceptance of terms which the employer is seeking to impose, truly accepted those terms so as to vary the contract.

[212] Section 4(6) ERA 1996.
[213] Section 4(8) ERA 1996.
[214] [2000] IRLR 636.
[215] See Chapter 9.
[216] See *Airlie* v *City of Edinburgh District Council* [1996] IRLR 516.
[217] [1998] IRLR 176.
[218] See also *Port of Sheerness Ltd and Medway Ports Ltd* v *Brachers* [1997] IRLR 214, where the employer's legal advisers were held liable for giving negligent advice on handling redundancies.
[219] [1981] IRLR 477.
[220] Ibid.
[221] [1996] IRLR 119 EAT; see also [2000] IRLR 196 CA on a separate point.