

Principles of Conflict of Interest

| by Shariffullah bin Abdul Majeed |

An employee owes a fiduciary duty to the company, and must not place himself in a position where the employee's personal interests conflict with that of the company.¹

The fiduciary relationship demands that the employee cannot derive any secret profit or advantage from a transaction made through him by the company.²

Fiduciary relationship means that the employee and the company must act with the utmost good faith and must not abuse the confidence reposed in him.³ The employee is a fiduciary whenever:⁴

- (a) The company entrusts him with property, tangible or intangible (e.g. confidential information) and relies upon him to deal with such property for the benefit of the company, or for purposes authorised by the company, and not otherwise.
- (b) The company entrusts him with a task to be performed, e.g. the negotiation of a contract, and relies on him to procure the best terms available.

Employees must avoid situations where their personal interests could inappropriately influence, or appear to influence, their business judgment.⁵

Where conflicts arise

Circumstances where a conflict of interest or a potential conflict of interest may arise in the following categories:⁶

- (a) Setting up a competing business. While in the employment of the company, an employee must not run any business of his own similar to that of the company. It has been said that employees ought to be aware that competing with the company is wrong even if there is no specific rule to that effect.⁷
- (b) Conducting private business within the company. An employee ought not to conduct and/or be involved in any other activity, during working hours, specifically those that may cause a conflict of interest with the company. Nor should he use the office facilities to conduct his private business.

Conducting private business dealings in the company's premises during working hours even if the activities did not directly or indirectly compete with the company's business, is plainly unacceptable and in breach of his fiduciary relationship with the company.⁸

- (c) Betrayal of trust and confidence. There are situations where an employee's conduct is clearly inconsistent with the interest of the company and in breach of fiduciary relationship with the company. For example, an employee

1 *Ang Bee Hong v HSBC Bank Malaysia Berhad* [2017] 1 ILR 537 at 566

2 *Ibid*

3 *B R Ghaiye's Misconduct in Employment* (Eastern Book Company, 3rd Ed, 2015) at p 630

4 *Ibid* at p 634

5 3M's Conflict of Interest Principle <http://solutions.3m.com/wps/portal/3M/en_US/businessconduct/bcmain/policy/principles/beloyal/conflictinterest/>

6 Ashgar Ali Ali Mohamed & Farheen Baig Sardar Baig, *Employment Misconduct* (LexisNexis, 2016)

7 In *Leong Peng Yoong & Ors v Venuganan Muniandy* [20017] 1 ILR 30, it was held that:

"Running a company which has concurrent business with the employer entails clear conflict of interest which a faithful employee should avoid at all costs."

8 In *Federal Auto Cars Sdn Bhd v Roslan Zahari Effendi* [2000] 1 ILR 636, the employee was hired as a probationary manager. The company, in dismissing the employee, alleged that he had set up a business without informing or obtaining prior approval from the management, and that he took advantage by using office facilities and conducted the business during office hours. The court held that what the employee had done was plainly unacceptable and wrong as an employee and in breach of his fiduciary relationship.

deliberately lies in a declaration that he did not have any outside business when in fact he had one.⁹

- (d) Non-disclosure of personal interest. A conflict of interest can also arise when the commitments and obligations owed by an employee to the company is likely to be compromised or may appear to be compromised by his personal gain or gain to his immediate family.

For example, when an employee failed to disclose the interest of his family member in a company which is in a contract of service to his employer, whom the employee had extensive official dealings.¹⁰

Obligatory disclosure

Employees may take part in legitimate financial, business, charitable and other activities outside their jobs, but any real, potential or perceived conflict of interest raised by those activities must be promptly disclosed to management and updated on a periodic basis.¹¹

The disclosure must be made as soon as the employee knows of the conflict, and then annually thereafter for as

long as the conflict continues to exist.¹² Disclosures may be to a supervisor, manager or the relevant department, and will vary depending on the job or role of the employee making the disclosure.

Remedies

An employee may owe contractual duties as well as the common law duty of fidelity to the company.¹³ At common law, the company has the following remedies in the event of breach of duty of fidelity to the employer:

- (a) The company may sue the employee for damages for his breach of the contract of employment. Damages is an exclusive remedy of the common law courts and is the monetary award of a court of law to the plaintiff for the injury suffered as a result of a breach of contract or for tort.¹⁴
- (b) Dismissal of the employee for his misconduct.¹⁵ Actual losses need not to be proved conclusively by way of evidence in conflict of interest situation, but possible detriment or loss to the employer is sufficient,¹⁶ and
- (c) The company may decide to other disciplinary sanctions.¹⁷

9 In *Norhayati Abd Ghafar v Goldplum Sdn Bhd* [2009] 2 ILR 324, the employee was dismissed after he was found guilty of purchasing the company's merchandise directly from the company's vendors at the company's cost price without the knowledge or consent of the company. The company contended that the employee had deprived it of its legitimate revenue and thus, had committed a serious breach of an expressed and or implied duty so as to amount to gross misconduct which would justify her dismissal.

10 In *Kelab Diraja Selangor v Lim Heng Keow* [1994] 2 ILR 25, a food and beverage manager was dismissed for non-disclosure of family members' interest in a catering company with which he had extensive official dealings. The Industrial Court was faced with the issue of whether failure to disclose the interest was a misconduct that justified the employee's dismissal. The court held, inter alia, that the employee was under an implied duty of fidelity to act in a faithful manner and not to place himself in a position where his interest was in conflict with his duties.

11 *Supra* n 6, at p 312

12 *Supra* n 5

13 Rob Batty, "Examining the Incidence of Fiduciary Duties in Employment" [2012] *CanterLawRw* 10; (2012) 18 *Canterbury Law Review* 187 <<http://www.nzlii.org/nz/journals/CanterLawRw/2012/10.pdf>>

14 Teck H Ong, "Equitable Damages: A Powerful But Often Forgotten Remedy" (2000) 4 (2) *Deakin Law Review* 61 <<http://www.austlii.edu.au/au/journals/DeakinLawRw/1999/3.pdf>>

15 *Supra* n 3

16 *Jebesen & Jessen Eng (M) Sdn Bhd v Lian Man Hoong* [2001] 1 ILR 771

17 Thavalingam C Thavarajah & Raymond T C Low, *Employment & Industrial Relations Law Malaysia* (CCH Limited, 2014) at p 187. Other disciplinary sanctions may include warning, transfer, demotion, suspension or withholding of bonus/increment.

Equitable remedies available to the company include:

- (d) Tracing:¹⁸ The existence of fiduciary relationship has often been said to be a prerequisite to tracing in equity.¹⁹ Tracing is the process by which the company is able to identify and recover property held by the employee. Tracing is not strictly a remedy as such, although it sometimes referred to as a remedy. Rather, it has been characterised as primarily a means of determining the rights of property.²⁰
- (e) Account of profit:²¹ There are a variety of circumstances in which equity will require an employee to account to the company for profits he has gained through his misconducts. Relief given by way of an account of profits is measured by the gain made by the employee irrespective of whether the company has suffered a corresponding loss.²²

A fiduciary who gains unauthorised profits within the scope of his engagement will generally be obliged to account for those profits to his beneficiary or principal.²³ On the taking of the account, the object is to determine as accurately as possible the measure of the profit or benefit obtained.²⁴ The purpose of the account of profits

is to strip the fiduciary of the profits made as a result of his breached of fiduciary duty.²⁵

- (f) Equitable compensation: If an employee acts in breach of fiduciary duty, he can be required to pay equitable compensation in respect of loss which is proved to have been caused, calculated on a common sense basis and with the benefit of hindsight.²⁶

Equitable compensation is different from common law damages for breach of contract or tort because it attempts, with money, to make restitution to the injured party and is not fettered by the common law doctrines of foreseeability and remoteness.²⁷

Equitable compensation can be often be more substantial than common law damages because equity aims not only to compensate the plaintiff but to enforce the trust which is at the heart of the fiduciary relationship.²⁸

Remedies against third parties

Remedies may be available against a third party for his participation in an employee's breach of fiduciary duty, for example:

18 In *Foskett v McKeown* [2001] 1 AC 102 (HL), Lord Millet described the process of tracing as follows:

"Tracing is thus neither a claim nor a remedy, it is merely the process by which a Claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property."

19 Tsun Hang, Tey, *Trusts, Trustees and Equitable Remedies — Text & Materials* (LexisNexis, 2010) at p 918

20 *Remedies in Equity — The Laws of Australia* (David Wright and Samantha Hepburn, eds) (Thomson Reuters, 2010) at p 281

21 As the name suggests, the purpose of an account of profits is to identify the net profits made by the fiduciary, as opposed to the gross receipts: *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134 at 154, per Lord Wright)

22 *Snell's Equity* (Sweet & Maxwell, 32nd Ed, 2010) at p 602

23 *Ibid*, at pp 602-603

24 *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 14th Ed, 2015) at p 574

25 Andre Stafford QC & Stuart Ritchie QC, *Fiduciary Duties: Directors and Employees* (Jordan Publishing, 2nd Ed, 2013) at p 429

26 *Ibid*, at pp 459-460

27 *Supra* n 14

28 *Ibid*

- (a) Rescission of contract:²⁹ Where a company enters into a contract with a third party in which the employee is personally interested and in breach of fiduciary duty, the contract may be rescinded at the instance of the company providing that the third party had knowledge or notice of the employee's personal interest.³⁰

Rescission in equity may be available even where the contract has been fully executed.³¹

Where a fiduciary has been bribed by a third party to procure the company's entry into a contract with the third party, the principal can rescind the contract.³²

- (b) Inducement of breach of contract: Where an employee is persuaded by a third party to breach the contract with his employer, the third party may be liable for damages under tort.

To establish that the tort of inducing breach of contract³³ has been committed by the third party, the company must show:³⁴

- i. That there was a persuasion or procurement or inducement by the third party — merely advising someone to breach the contract is not enough. The third party must be shown

to have created the reason for breaking the contract, not just to have pointed out existing reasons to break the contract.

- ii. That the third party had an intention to bring about a breach of contract — it is not enough that the third party knew that a breach of contract would be a natural or probable consequence of its actions.

Conflict of interest in public institutions

In many countries there are increasing expectations from ordinary citizens, business leaders and civil society that governments should deliver higher standards of integrity in the civil service, public institutions, public services, government-controlled corporations, and government itself. In this context, conflict of interest in its various forms should become a significant consideration in the day to day work of those who occupy any position of trust.³⁵

Any conflict of interest, therefore, involves a conflict between officials' personal interests (what they could gain) and their duty as a civil servant is to be avoided as far as is reasonably possible.³⁶

In Malaysia, rules governing the conduct of civil servants³⁷ emphasise that a civil servant must at every time provide undivided attention in performing his duties.³⁸ On the other hand, the regulations also provided an exception where

29 Contracts Act 1950 [Act 136], s 65

30 *Supra* n 25, at p 427

31 *O'Sullivan v Management Agency* [1985] 1 QB 428

32 Hayton and Mitchell, *supra* n 24, at p 559

33 Herbert Smith Freehills LLP Employment law e-bulletin, "Tort of inducement to breach of contract requires actual knowledge and an intention to interfere" (23 May 2007) <<http://www.lexology.com/library/detail.aspx?g=f0e1e1ff-bc35-4251-9935-31ef03e808d7>> (subscription required)

34 *Qantas Airways v Transport Workers' Union of Australia* (2011) 280 ALR 503

35 Howard Whitton, *Managing Conflict of Interest in the Public Sector — A Toolkit* (OECD Publishing, 2005) at p 7

36 *Ibid*, at p 8

37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 [Public Officers (Conduct and Discipline) Regulations 1993]

38 *Ibid*, reg 4(1)

it is permissible for a civil servant to be involved in any commercial activity while carrying out his duties, subject to him obtaining written permission from his Head of Department.³⁹

In December 2015, the Deputy Minister of International Trade and Industry⁴⁰ made the following statement:⁴¹

“I think it’s not wrong (to have two jobs) in Malaysia, though we have regulations but it is still one way to address the rising cost of living.

“They can work during office hours (from 8am to 5pm) and still run their online business ... as long they have enough sleep and come to work.”

There are dangers in taking such a simplistic approach, as working hours may not be a sufficient basis to draw boundaries even if there are no apparent conflicts between a civil servant’s day job and his online business because:

- (a) His mind may be preoccupied with his online business while performing his public duties.
- (b) It is likely to form part of his conversation with colleagues, which would naturally lead him to promote his business to them in the workplace.

For reasons such as these, it is virtually impossible to eliminate the appearance of a conflict of interest. The appearance of a conflict of interest will minimise the risk to the organisation’s reputation (and officials’ personal reputation) for integrity.⁴² Public confidence in the integrity of public institutions can also be seriously damaged even by appearance of such a conflict.

It is not surprising that the statement by the Deputy Minister has been heavily criticised, for example, by the Malaysian Trades Union Congress.⁴³

Conclusion

One way of avoiding conflict of interest within an organisation is to establish a code of ethics⁴⁴ and other mechanisms to minimise potential conflicts of interest. By implementing these or other methods, a company will greatly reduce the detrimental consequences associated with conflicts of interest.⁴⁵

It is necessary to have all employees avoid the following circumstances:⁴⁶

- (a) Accepting outside employment that is inconsistent with the company’s interests, such as working for a competitor or starting his own business that competes with the company.

39 *Id.*, reg 5(1) & (2)

40 Datuk Haji Ahmad Haji Maslan

41 Shahrul Hassan, “#2Kerja: ‘Government encourages working two jobs’ — Ahmad Maslan”, *Astro Awani* (26 December 2015) <<http://english.astroawani.com/malaysia-news/2kerja-government-encourages-working-two-jobs-ahmad-maslan-86789>>

42 *Supra* n 36

43 FMT Reporters, “#2Kerja: Saranan Ahmad Maslan bahayakan pekerja”, *Free Malaysia Today* (28 December 2015) <<http://www.freemalaysiatoday.com/category/bahasa/2015/12/28/2kerja-saranan-ahmad-maslan-bahayakan-kehidupan-pekerja/>>

44 Organisation for Economic Co-operation and Development website <<http://www.oecd.org/>>

45 Douglas Kelly, “Why Avoiding Workplace Conflicts of Interests is Important” (30 March 2017) <<http://blog.lawroom.com/ethical-conduct/conflicts-of-interest/why-avoiding-workplace-conflicts-of-interest-important/>>

46 *Supra* n 5

- (b) Mixing personal relationships and business. For example, hiring a family member as an employee or vendor; buying goods or services from a family business on the company's behalf.
- (c) Accepting gifts, meals or entertainment that could appear to affect the employee's objectivity and judgment.
- (d) Personal relationships with other employees, where being in that relationship may result in one of the persons receiving or giving unfair advantage, or preferential treatment, because of the relationship. **LH-AG**

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