

Are whistleblowers entitled to keep their employer's confidential documents?

In *Nissan v Passi*, the High Court recently considered the issue of an employee retaining confidential documents belonging to his former employer in the context of the employer's application for an injunction seeking the return of such documents from the employee.

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In *Nissan v Passi* [2021] EWHC 3642 (Ch) the High Court recently considered the issue of an employee retaining confidential documents belonging to his former employer in the context of the employer's application for an injunction seeking the return of such documents from the employee.

Nissan pursued an application against its former employee, Mr Passi, for the return of confidential and sensitive documents which Mr Passi had retained following the termination of his employment. The fact that Mr Passi had retained such documentation came out in the course of disclosure in legal proceedings pursued by Mr Passi in connection with claims of unfair dismissal and whistleblowing detriment.

In response to the application for the return of documents (and/or the destruction of copies, particularly electronic files), Mr Passi said that he had retained the documents in order to take legal advice and because he was concerned that Nissan would not have otherwise disclosed the documents in the course of the subsequent litigation.

The court granted the injunction and ordered the return/destruction of the documents by Mr Passi.

The reasons for granting the injunction included the court finding that Mr Passi had no right of ownership in the documents (whereas Nissan did) and so had no entitlement to possess them. Mr Passi's claim for any entitlement to possess the documents did not appear to be assisted by the fact that he had previously told Nissan he had "returned everything he had" when his employment ended which was patently untrue.

The court was further not persuaded by Mr Passi's argument that he had to retain the documents given his lack of trust in Nissan later disclosing the documents in line with its disclosure obligations in the course of the subsequent litigation. The court was clear in its finding that a party is not permitted to unilaterally determine the extent of another party's obligations in respect of disclosure to justify retaining documents they have no right to possess.

This judgment confirms previous decisions dealing with similar issues where departing/former employees who later decide to retain documents on the mistaken belief that they are entitled to do so because of their need to rely on the documents in support of their claims.

Employers will no doubt welcome the confirmation that they can expect courts to uphold their right of ownership in documents, particularly against a former employee seeking to pursue proceedings against them.

Employers may want to review their internal procedures with regard to how confidential and sensitive documentation is identified, stored and handled by employees, particularly when it comes to tracking which employees have access to such documents. Prevention is better than cure when it comes to the handling of confidential documentation but if the worst happens, it will likely assist when taking enforcement action if an employer can identify confidential documentation in order to establish its right of ownership.



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