


Employer obliged to pay settlement despite employees confidentiality breach

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The High Court stated that the employer could potentially establish that the breach of confidentiality relieved it of its obligation to continue paying the settlement sum via two routes:

1. the confidentiality clause being regarded as a condition of the contract; or
2. the breach of the confidentiality clause being repudiatory.

Neither of these were established. Firstly, the confidentiality clause was not a condition but was an intermediate term. Confidentiality was not at the core of the agreement: this was a generic confidentiality clause and its existence in the settlement agreement did not indicate that confidentiality was of any importance to the parties. Secondly, it was not a repudiatory breach. The employee had not shown “an intention to abandon and altogether refuse to perform the contract”.

Where employers wish to withhold payment where confidentiality is breached, they should not rely on the existence of a generic confidentiality clause in settlement agreements. An employee's breach of such a clause does not automatically end the employer's obligation to pay a settlement sum. In these circumstances, the employer would need to ensure that the confidentiality clause was drafted in such a way so as to make it a condition of the contract.

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