Conflict of interest clause fails to protect employer

**Summary**

A recent decision by the Australian Fair Work Commission (FWC)\(^1\) has shone new light on the circumstances in which an employer can prevent an employee having a second job with a competitor. This case makes it abundantly clear that employers should be conscious of the terms of their conflict of interest clauses before dismissing an employee for breach of such a clause. Whilst the decision in this case appears to be a blow for employers, we set out below some strategies to reduce such risks.

**Facts**

The Body Shop dismissed an employee from her position as a Consultant Support Advisor because of an alleged conflict of interest. The terms and conditions of the employee’s contract with the Body Shop included a conflict of interest clause prohibiting the employee from “working” simultaneously for any other enterprise that the Body Shop felt was a market competitor.

The conflict arose as the employee took up a consultancy with PartyLite, a company that sold candles and related items. The Body Shop viewed this as a conflict of interest and requested on a number of occasions that the employee resign from PartyLite or terminate her employment at the Body Shop. The employee refused to terminate her consultancy with PartyLite and was dismissed by the Body Shop. The employee then successfully sued the Body Shop for unfair dismissal and was awarded five months pay as compensation.

**The proceedings**

These proceedings were an appeal against the unfair dismissal and compensation decisions with the Body Shop claiming that there was a valid reason for dismissal and that the employee should not have been awarded as much compensation. The appeal was unsuccessful on both grounds.

The FWC found that the employee was not working for PartyLite for the purposes of the conflict of interest clause on the basis that the employee was engaged by PartyLite as a consultant and effectively running her own business. Therefore, the employee did not infringe the conflict of interest clause.

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\(^1\) Adidem Pty Ltd T/A The Body Shop v Nicole Suckling (C2014/3142) [2014] FWCFT 3611
clause and thus the request by the Body Shop to terminate her other employment was unreasonable.

The FWC considered the implied duties in the employee’s contract of employment, including the implied duty of fidelity, and found that the Body Shop would need to show evidence of “actual repugnance” between the acts of the employee and her implied duty, and not just mere apprehension of a conflict. Evidence that the employee had access to the Body Shop’s confidential information that might be useful in her other role was insufficient, and accordingly the employee was held not to have breached her implied duties.

Lessons for employers

Restricting the appropriate conduct

Employers should consider drafting conflict of interest clauses more broadly to cover consultancy arrangements and running a personal business. Had the conflict of interest clause restricted the employee from “being employed, engaged or otherwise concerned” in a competitor of the Body Shop, there may have been a different conclusion. As it was drafted, the clause permitted the employee to be engaged in any capacity other than that of employee with a direct competitor of the Body Shop.

Take care when relying on the implied duty of fidelity

Employers should be aware that there is a high standard necessary to prove a breach of an employee’s implied duty of fidelity. Employers will need to show that the employee was guilty of engaging in conduct that was incompatible with his or her duty and not just a mere apprehension of breach.

Apprehended conflict

Employers may wish to consider drafting a conflict of interest clause so that the apprehension of a conflict will be a conflict of interest for the purposes of the clause.