

Fired Employees Who Take Company Documents Risk Serious Legal Woes



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In employment law, the line between right and wrong is occasionally blurred, especially when it comes to possession of confidential documents. For employees, the temptation to take company documents is exceptionally high [when termination is near](#) – an act riddled with pitfalls and the risk of serious legal consequences.

Whether driven by a sense of entitlement, a desire for protection from a witch-hunt investigation or leverage in a wrongful dismissal claim, employees do not have *carte blanche* to take what they please. In fact, courts have made it clear that employees facing termination would be wise to take only their personal belongings.

Documents created in the course of employment are the employer's property. This typically includes strategic plans, memos, client lists, pricing information and even emails. Removing these confidential documents without permission is not only contrary to an employee's duty of confidentiality and good faith, but also potentially illegal. Doing so can be grounds for termination for cause, punitive damages and injunctive relief.

Consider the case of *Joe Rae v. Ecolab Co.*, 2023 ONSC 5995, in which Rae's contract stipulated that he would return and not use Ecolab's confidential or proprietary information for personal gain before or after his employment. Rae was Ecolab's financial controller. He admitted to taking copies of documents containing confidential financial information over his 10-month working notice period. He claimed he required the documents for the sole purpose of proving Ecolab's alleged bad faith in his wrongful dismissal lawsuit. He intended to file them in the public record if Ecolab did not concede certain facts. After learning that Rae took the documents, Ecolab amended its defence to include "after acquired cause," which is the legal term for not paying severance to an employee who was dismissed without cause, but later found to have engaged in misconduct prior to their dismissal. Ecolab also counterclaimed for breach of confidence and fiduciary duty and sought an injunction for the return and destruction of its documents, leaving the issue of after-acquired cause and damages for trial (which has yet to occur).

Justice Merritt granted the injunction, ordering Rae to return and destroy the documents he took. She found that Rae "circumvented proper court procedures" and his "self-help remedy" could not be condoned. The proper approach, according to the

court, was for Rae to request copies of the documents through the lawsuit and, if necessary, bring a motion to compel production.

What happens when off-limits confidential documents would be helpful to an employee's claim but her less-than-trustworthy employer denies they exist or can't locate them? Short of an expensive court-ordered forensic audit, very little – but that scenario assumes the documents are electronically stored and have not been destroyed.

Perhaps this concept of blind trust influenced Justice MacLeod's decision in *ORBCOMM INC. v. Randy Taylor Professional Corporation*, 2017 ONSC 2308, when he refused to order the previous CEO, Pui-Ling Chan, to destroy copies of the data he took. He noted that while the CEO had contractually agreed to not divulge or misuse the confidential information, the contract did not require him to return it (unlike in Rae). He found many legitimate reasons why the CEO may need to consult his records to defend himself or answer questions. "An order requiring return of confidential information where the employer already has a copy or will be provided with a copy should not be made lightly," the court wrote. Had there been a term in his contract mandating the return of confidential information, the result may have been different. For that reason, we include such a clause in the contracts we draft for employers.

Courts cannot, of course, be seen as encouraging or condoning an employee's misappropriation of company documents because on its face, it is wrong. But, in the right circumstances, courts have afforded some latitude to employees.

Take, for example, the recent case of *Birgit Ratz-Cheung v. BMO Nesbitt Burns Inc.*, 2024 ONSC 161. Ratz-Cheung worked as an investment advisor for nearly 24 years. The year leading up to her dismissal had been personally difficult due to deaths in her family. The bank chastised her for cursing and using an inappropriate tone with staff and in emails. She received a disciplinary letter and defended those allegations herself in writing. The bank fired her without cause a few months later.

Prior to her termination, Ratz-Cheung copied 4,000 emails and documents to a USB key, which she kept at home. Some of the emails included personal information of clients, including social insurance numbers. She never disclosed what she had done to anyone at the bank until she was questioned by the bank's lawyer as part of her wrongful dismissal lawsuit. Subsequently, she returned the USB key. The bank amended its defence to allege after acquired cause.

According to Justice Vermette, the judge overseeing the case, Ratz-Cheung's misconduct, albeit a breach of policy, was a one-time lapse in judgment in the context of a personally difficult year in which she believed she was not being treated fairly. The court awarded 24 months of severance, citing such mitigating factors as Ratz-Cheung having legitimate access to the information she took and not disclosing or using the information before litigation.

Without compelling justification, most cases of document misappropriation will not yield the same fortunate outcome. Employees considering this path must know that sophisticated employers are able to track document access and transfers, making it virtually impossible to go undetected. In the vast majority of cases, the risks far outweigh any perceived benefits. And, even if successful at court, the indelible public record of taking confidential records may stain a professional reputation, which once tarnished, is very hard to rebuild.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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