## Deciphering the Labyrinthine Strictures of Employer and Employee Duties

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**Introduction:**

In the context of employment law, employers owe a variety of duties to employees and employees owe a variety of duties to their employer. The nature of these duties will often vary, depending upon the terms of the employment contract, but core duties and obligations will still exist. Some of these core duties originate in common law (and were established through decided cases) whereas others are based on statute. These statutory duties oblige the employer to provide minimum rights to employees – a contract can prescribe rights in excess of this minimum, but not below it[1]. This article's objective is to review some of these rights and outline their parameters.

**Part 1: Employer Duties**

A. **Duty to provide work:** Generally, there is no duty imposed upon an employer to provide work to an employee, provided the employer continues to pay the salary of the employee. In essence, if the employee is rostered to work certain hours and if there is no work available on these hours the employer is still obliged to pay the employee as they have made themselves available to work.

There are limited exceptions to this rule as follows: (1) where the employee is paid on a commission basis – in this situation failing to provide work deprives the employee of the right to earn the commission and this action may amount to a breach of the employer's duties[2], (2) where the employee is being trained as part of their job and the non-provision of work deprives them of the requisite training[3], and (3) where the employee's reputation and ability to generate future employment is impacted by the non-provision of work. The latter exception was applied in *William Hill Organisation Ltd v Tucker (1998)*[4]. In this case William Hill attempted to place Tucker on a period of 'garden leave' for six months, despite the absence of such a contractual term, when he notified them of his intention to terminate his employment contract. When Tucker refused the 'garden leave' they applied for an injunction restraining him taking up employment with another company. In refusing to grant the injunction Lord Justice Morritt (on appeal) stated that: "*an employer might not capriciously deny to an employee work which was reasonably available"* and that *"'the right to work is one of construction of the particular contract*

[1] For example, under the terms of the Maternity Protection Acts 1994-2004 (as amended by S.I. No. 51/2006 - Maternity Protection Act 1994 (Extension of Periods of Leave) Order 2006) the minimum period of maternity leave that an employer can provide an employee is 26 weeks – a term providing for a shorter period is null and void.

[2] As per Sir John Donaldson in *Langston v AUEW (No.2) [1974] IRLR 182 at 187*: *"the consideration in a commission or piece work contract of employment is the express obligation to pay an agreed rate for work done plus the implied obligation to provide a reasonable amount of work"*. However, liability will not be imposed upon the employer where the failure to provide work is as a result of economic factors, outside of their control

[3] Save where this arises as a consequence of extraneous factors.

[4] IRLR 313.

*in the light of its surrounding circumstances"* [5]. In the context of Tucker's employment, he concluded that: *"the skills necessary to the proper discharge of such duties did require their frequent exercise … [and] that frequent and continuing experience … is necessary to the enhancement and preservation of the skills of those who work in it"*[6].

In certain instances, an intentional failure to provide work may constitute bullying and harassment of an employee. In *Byrne v RHM Foods (Ireland) Ltd (1979)*[7] the claimant was isolated in her role and given no work to do and as a consequence the Employment Appeals Tribunal (EAT) ruled that her employer had breached its duty by undermining the trust and confidence that is an integral part of the employer/employee relationship.

B. **Duties regarding pay**: Except where an employee is employed on a voluntary basis, an employer has a duty to pay an employee for performance of the work. Therefore, where an employee is absent from work there is no automatic duty imposed upon the employer to pay their salary. Absences arising from industrial action do not require payment, whereas absences arising from illness will only require payment where there is an express contract term or where it can be implied based on custom and practice[8].

When paying the employee the rate of pay must be in compliance with the terms of the National Minimum Wage Act 2000. As of 2017, the minimum rate of pay for all adult employees[9] in Ireland (at the time of writing) is €9.25[10]. Sub-minimum rates apply to those aged under 18[11], and those over 18 years who have not completed two years employment[12], as well to those workers employed on training contracts[13]. In the case of *Anna and Geraldine Hughes v Linda Argule (2007)*[14], Argule was awarded back pay of almost €4,000 arising from breach of the National Minimum Wage Act. Her employer claimed that the payments were in compliance with the legislation as Argule was a trainee and has received extensive training as a florist during her employment. Nonetheless, the Labour Court found in Argule's favour stating that her employment could not be classified as a training contract, as defined by the legislation.

Breach of the National Minimum Wage Act 2000 is a criminal offence that can result in the imposition of a fine not exceeding IR£1,500 (€1,900 approx.) and/or a term of imprisonment not exceeding 6 months, where prosecuted summarily. Upon indictment a maximum fine of

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[5] At p. 316.
[6] At p. 317.
[7] UD 1979/69. Following the dismissal of her direct manager, and although she was assured that her job was safe, her working conditions deteriorated resulting in her filing cabinet being removed, times for her breaks were altered, her telephone was disconnected and she was given very little and often no work to do. The behaviour of her employer resulted in Byrne being diagnosed as suffering from severe nervous strain.
[8] In *Rooney v O.J. Kilkenny [2001]* 3 JIC 0901 Justice Kinlen in the High Court ruled that there was an obligation to pay the claimant sick leave as: (1) another employee had been absent for a longer period and was paid in full, and (2) the absence of the claimant and her consequent illness was caused by bullying within her employment.
[9] These are defined as employees with two years' experience over the age of 18 years.
[10] S.I. 516/2016.
[11] These workers are entitled to 70% of the minimum rate of pay.
[12] These workers are entitled to 80% of the minimum rate of pay in their first year from date of first employment aged over 18, and 90% in their second year.
[13] These contracts are divided into thirds (which must be at least one month and no more than one year) and 75% is payable during the first third of training, 80% during the second third and 90% during the final third.
[14] Labour Court Determination No. MWD0710.

IR£10,000 (€12,700 approx.) can be imposed and/or a term of imprisonment not exceeding 3 years[15].

When paying an employee the Payment of Wages Act 1991 places a duty on the employer to furnish the employee with a statement of wages, outlining their gross pay and any deductions made from their salary[16]. This statement should be provided either before or at the time of payment[17]. Regarding deductions, an employer is authorised to make a deduction required by: (1) statute (such as income tax, social insurance, levies or charges), (2) where it is ordered by the Court[18], (3) where it arises as a consequence of an overpayment of wages or expenses[19], (4) arising from a disciplinary action, or (5) where authorised by a statutory provision to deduct and pay to a public authority. They are also authorised to make deductions as stipulated in the employment contract or with the consent of the employee[20]. Deductions in respect of omissions by an employee or necessary goods or services, required by the employment, cannot be deducted unless agreed between the parties and where the deduction is fair and reasonable in the circumstances. In this situation, the employee must be provided with one week's notice of the deduction and it cannot exceed the cost or damage incurred by the employer in the circumstances. Furthermore, the statute of limitations in this regard is that the deduction[21] must be made within six months after the act or omission becomes known to the employer or, as the case may be, after the provision of the goods or services.

In *Przemyslaw Ozga v MBCC Foods (Ireland) Limited (2009)*[22] a deduction from an employee's salary arising from stock errors was determined to be in breach of the Act as the employer failed to provide notice of the deduction to the employee or provide the calculations used to determine the amount of the deduction. Moreover, the deduction made exceeded the loss suffered by the employer.

Breach of this Act can result in an award of compensation equivalent to either:

(1) the net wage, after all lawful deductions, that would have been paid to the employee in respect of the week immediately preceding the unlawful deduction (or if the complaint related to a payment, the net wages that were paid to the employee in respect of the week immediately preceding the date of the payment), or
(2) if the amount of the deduction (or payment) is greater than the wage specified at (1), twice the amount of the deduction (or payment).

C. **Duty to provide a safe working environment**: In accordance with the provisions of the Health and Safety Act 2005 an employer is required to provide an employee with: (1) a safe place of

[15] Section 37.
[16] Section 4.
[17] Contravention can result in summary prosecution and liability to a fine not exceeding €1,270.
[18] This could include a maintenance order or an order for the payment of a debt.
[19] As per *Lifestyle Photography Limited v Anne Marie Myles (2009)*, PW155/2009.
[20] This could include pension contributions, sports and social subscriptions, trade union fees, insurance payments (life or medical), payments under the travel to work scheme or repayment of cash advances. In *Five Complainants v Hannon's Poultry Export Ltd (2006)* DEC-E2006-050 the Labour Court ordered the employer (Hannon's Poultry) to pay a compensation bill of €25,000 as a consequence of an unlawful salary deduction of €5,000 in respect of each of the five complainants. The deduction was made as a consequence of accommodation expenses, although the written permission of the workers was not sought.
[21] Or the first deduction, where the deductions are agreed on an instalment basis.
[22] PW79/2009.

work, including safe access to and from work[23], (2) a safe system of system[24], (3) proper training and proper equipment[25], and (4) competent co-workers[26].

In the context of a safe place of work and the duty to provide safe entrances and exits, the limits of this obligation were reviewed in *Kielthy v Ascon Ireland (1970)*[27]. In this case, the employee was working on a building site when he fell from the top of an unfinished wall with a 3.5 foot drop on one side and a longer drop on the other side, suffering fatal injuries, while going to the site office. Although this route was not the safest route to the office it was the route that was invariably used by the workmen when going to the office, and had become recognised by the defendants as a recognisable route. According to Chief Justice O'Dalaigh[28]:

> *"…[i]f an employer offers without distinction a number of modes of access to the company's office of which all, except one, are safe, he cannot be relieved of his liability because a workman happens to choose to use the one which turns out to be unsafe. His duty is not to see that some modes of access which he offers are safe but to see that all of them are safe."*

Regarding a safe place of work, this is not limited to a safe structure but also applies to proper lighting, heating, ventilation, and control of noise, as well as an environment in which an employee is not the subject of bullying, harassment or sexual harassment, or exposed to unreasonable levels of occupational stress. In *Ms C v A Multi-National Grocery retailer (2015)* the Labour Court awarded €33,000 to the claimant arising from the employers breach of duty by failing to take reasonable and practicable steps to prevent her sexual harassment[29]. Furthermore, the duty also extends to any place that the employer sends the employee in order to perform their employment duties[30].

Regarding the provision of a safe system of work, this imposes a duty upon an employer to ensure that work practices are designed in such a way that hazards are eliminated or risks minimised. In *The People (Director of Public Prosecutions) v. B.I.S. Willich Industrial Services Limited (2014)*[31] the defence pleaded guilty to failing to provide a safe system of work, which resulted in an employee falling whilst removing sheeting from a roof and suffering fatal injuries. The company was fined €100,000 as a consequence of this breach.

Regarding equipment, the general requirement is that an employer must provide and maintain suitable equipment to enable an employee to perform their duties. This can include items such as protective clothing, headgear, footwear, eyewear and gloves. In *Barrett v Anglo Irish Beef*

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[23] Section 8(2)(c).
[24] Section 8(2)(e) requires an employer to ensure that systems of work are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to the health of employees.
[25] Section 8(2)(c)(ii) and (g).
[26] Section 8(2)(l).
[27] 1 I.R. 122.
[28] At p. 129.
[29] DEC-E2015-079.

[30] In *Dunne v Honeywell Control Systems Ltd [1993]* 7 JIC 0101 the Court awarded compensation to the plaintiff, who was employed as an electrical technician by Honeywell, arising from serious injuries sustained when he fell from a ladder on Virginia's premises, where Honeywell had sent him to undertake a repair job.
[31] Unreported, Naas Circuit Court, 15th July, 2014.

*Producers Limited and Europa Forklift Hire Ltd (1989)*[32] the claimant was injured while operating a forklift. While lifting a skip the forklift toppled over. Factors contributing to this incident included the fact that the skip was not fitted with fork pockets and grooves on the underside, which made it less secure when being raised. In addition, the forklift pins were missing (a fact that had been reported to the foreman), and Barrett had neglected to tie the forks to the frame of the forklift to prevent them moving, as was the practice in the absence of the missing pins. In holding *Anglo Irish Beef Producers Limited* liable in negligence for failing to provide safe equipment the Court awarded Barrett IR£28,350[33].

In relation to the duty to provide competent co-workers, an employer has a duty to exercise reasonable care in providing competent staff, and a duty to monitor employees to ensure that they do not engage in improper conduct or other behaviour that is likely to endanger their own health and safety, or that of other persons. In *Hudson v Ridge Manufacturing Ltd (1957)*[34] an employer was deemed to be in breach of their duty by failing to reprimand or invoke disciplinary procedures against an employee who persistently engaged in horseplay behaviour in the workplace that culminated in another employee (the plaintiff) being tripped up and injured. According to Justice Streatfeild[35]:

> *"…[t]he injury was sustained as a result of the defendant's failure to take proper steps to put an end to that conduct, to see that it would not happen again and, if it did happen again, to remove the source of it."*

The penalties for breach of the legislation are criminal in nature and consist of the imposition of a fine on summary conviction up to €3,000 and/or a term of imprisonment not exceeding six months, and the imposition of a fine of up to €3,000,000, imprisonment of up to two years or both on indictment. In addition, where an employer is convicted of a breach of duties pursuant to this legislation they may be ordered to pay the Health and Safety Authority's costs and expenses.

D. **Duty to provide an employee with annual leave and public holiday entitlements**: In accordance with the terms of the Organisation of Working Time Act 1997 all employees in Ireland are entitled to annual leave, irrespective of whether they are employed under temporary, permanent, full-time, part-time, fixed term or specific purpose contracts. The duration of the leave is specified in Section 19 of the Act as:

(a) 4 working weeks in a leave year in which the employee works at least 1,365 hours (unless it is a leave year in which he or she changes employment),
(b) one-third of a working week for each month in the leave year in which the employee works at least 117 hours, or
(c) 8 per cent of the hours the employee works in a leave year (but subject to a maximum of 4 working weeks).

The rules regarding this leave require the employee to provide 4 weeks' notice in writing to the employer of their intention to take the leave. The actual dates and times are at the discretion of

[32] IEHC 27.
[33] The original award of IR£37,800 was reduced by 25% taking into account the contributory negligence of Barrett.
[34] 2 Q.B. 348.
[35] At p. 351.

the employer and they are entitled to refuse the leave in certain circumstances[36]. Where the employee works more than 8 months in the year they are entitled to take an unbroken period of two weeks[37]. In addition, payment for the leave must be paid to the employee in advance of taking the leave and must be at the normal weekly rate[38].

Moreover, an employer is prohibited from side-stepping an employee's right to annual leave by purporting to pay an employee a rate of pay inclusive of annual leave entitlements[39]. In *Kvaerner Cementation (Ireland) Limited v Martin Treacy (2001)*[40] a payment inclusive of all annual leave and public holiday entitlements was prescribed in the contract of employment. The Labour Court determined that this was in contravention of the Act as: (1) the primary obligation on an employer is to ensure that employees receive the requisite period of paid leave, (2) that obligation cannot be offset by payment of an allowance in lieu of such leave, and (3) the obligation is imposed for the protection of the health and safety of workers. According to Kevin Duffy (deputy chairperson) of the Labour Court:

> *"The main purpose of providing annual leave is to allow employees to reconcile work and family responsibilities and to provide opportunities for rest and recreation. Thus, it is of significant benefit to employees and their families. This is only the case, however, if they have an income on which to live during the leave. There is no reality in the proposition that the average worker, particularly those on low pay, would have the frugality to faithfully put aside a designated portion of their weekly pay, to be drawn down up to 18 months later, so as to cover up to four weeks without an income. The strong probability is that workers would not take leave in such situations through economic necessity, or if forced to do so, would seek alternative work during the leave. This would defeat the central health and safety imperatives of the Act and the Directive on which it is based. Given the disparity in the bargaining position of those seeking employment and those offering it, a facility to designate an element of basic pay as being in respect of holidays would be inherently open to abuse. This would set at nought the protection which the legislation is intended to afford employees."*[41]

Similarly, in *Roddy Mooney McCarthy v Ellen Whelan (2012)*[42] the Labour Court reiterated that obligations in relation to annual leave cannot be circumvented through agreements with employees as any agreement that contravenes the legislation is not legally binding[43].

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[36] In determining whether or not to grant the leave the employer must take cognisance of the need for the employee to reconcile work and any family responsibilities, and the opportunities for rest and recreation available to the employee. Furthermore, the organisational needs of the employer can also be taken into consideration. In *An Post v Christopher Burke (2006)*, DWT066, the Tribunal stated that an employer was entitled to decide that an operational reason is a reasonable ground for refusing annual leave, provided that the employer has met the other requirements of the Act.

[37] Section 19(3).

[38] Or at a rate which is proportionate to the normal weekly rate – as per Section 20(2).

[39] As per *John Hetherton v Jaininne O'Reilly (2010)*, DWT10108. In this case the respondent employed the complainant from 20th July 2008 until 27th March 2009 as a shop assistant on a rate of €8.50 per hour. During that period she took one week's leave for which she was not paid any holiday pay contrary to the provisions of Section 18 of the Act. The Labour Court determined that the purported inclusion of an element in the employee's pay to cover holidays, which may or may or may not be taken at some point in the future, is inconsistent with the rights envisaged by the Organisation of Working Time Act 1997.

[40] DWT017.

[41] http://www.lrc.ie/en/Cases/2001/January/DWT017.html.

[42] WTC/12/103.

[43] This case concerned a part-time employee who never received annual leave, annual leave pay or public holiday pay during the course of her employment. Her employer contended that the complainant had entered

Furthermore, where it is approaching the end of a leave period and an employee has not taken their full annual leave entitlements, both *R&M Quarries Ltd v Ronan Galvin (2012)*[44] and *Wicklow County Council v William Winters (2012)*[45] have confirmed that an employer must afford an employee a minimum of one month's notice they can compel that employee to take annual leave on specific dates or in specific ways.

Whether an employee is entitled to carry over untaken annual leave from one leave period to another will depend upon their contract of employment, and what is normal custom and practice within the particular employment. Section 20(1)(c) allows for the carry-over of the leave for a period of 6 months, but this right is subject to the permission of the employer. There is no prohibition on an employer precluding this right or limiting this right to a specified number of days. However, if an employer refuses a request for annual leave within the leave period or creates a situation where the employee is not in a position to take the leave, then refusing to allow them to carry it over to the next leave period is likely to constitute a breach of the employees' employment rights.

Regarding public holidays[46] Section 21 states that all employees[47] who are normally rostered to work on the day on which the public holiday falls, are entitled to either: (1) a paid day off, (2) a paid day off within one month of the public holiday, (3) an additional day of annual leave or (4) an additional day's pay. This is an exhaustive list from which the employer may decide. There is no provision of the Act which allows these entitlements to be offset where the requirements to work public holidays is otherwise taken into account in determining the employees pay[48].

Regarding these options the employee may request which option will be used 21 days in advance of the public holiday, although the employer retains the discretion as to which of the options will be exercised. In *Sunday World v John Kenny (2003)*[49] an agreement was negotiated between the management and the staff regarding the working of public holidays. The Union agreed that in return for working five public holidays, staff would be paid in excess of an extra day's pay per public holiday worked, and that this would be incorporated into staff holidays. In return staff agreed not to take time-in-lieu. However, the claimant disagreed with the deal and sought to exercise his right to other options. The Labour Court ruled that the company was not in breach of its obligations under the legislation. The Court, having studied the provisions of Section 21 of the Act, found that it is for the employer to choose which of the four options it proposes to exercise and, in choosing the option of an extra day's pay, the Sunday World has acted in accordance with the rights prescribed under the legislation.

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into a verbal contract whereby she agreed that no holiday pay would be provided to her, and therefore the employer's view was that, due to this agreement, the complainant was not entitled to payment during annual leave. The Court rejected this argument and recommended that the complainant be paid in full in respect of all of the outstanding annual leave and public holiday pay owed to her.

[44] DWT1224.

[45] Determination Number FTD166.

[46] There are nine public holidays in Ireland, as follows: New Year's Day, St Patrick's Day, Easter Monday, the first Monday in May, June and August, the last Monday in October, Christmas Day and St Stephen's Day.

[47] Subject to the requirement that if the employee is a part-time worker, they must have worked for at least 40 hours for their employer in the 5 weeks before the public holiday, in order to be eligible for this entitlement – as per Section 21(4).

[48] See: http://www.lrc.ie/en/Cases/2003/December/DWT0362.html.

[49] DWT0362.

Furthermore, where an employee is not normally rostered to work on the day on which a public holiday falls, they still have an entitlement under the Act. In this situation, the employee is entitled to an additional payment equivalent to one fifth of their normal weekly rate of pay[50].

Breaches of the Act are actionable before the Workplace Relations Commission, with a right of appeal to the Labour Court. Breach of the Act is also a criminal offence which can be prosecuted summarily and result in the imposition of a fine not exceeding IR£1500 (€1900 approx.)[51].

E. **Duty to provide a reference**: Although references are part of the currency of modern employment law, there has been much debate as to whether an employer is legally obligated to provide an employment reference to an employee. Historically the consensus appeared to be that there was no general legal obligation to provide a reference – although the existence of a moral obligation has never been doubted. However, since the mid-1990's UK case law has indicated that there may be an implied duty to provide a reference in certain circumstances. According to Lord Woolf in *Spring v Guardian Assurance Plc and Others (1995)*[52] these circumstances arise where: (1) there is a contract of employment (a contract of service), (2) the contract relates to the engagement of employees where it is normal to require a reference from a previous employer before future employment is offered, and (3) the employee is prevented or restricted from entering into future employment unless his former employer provides a full and frank reference[53],[54].

At a minimum, an employer should provide a reference to an employee that encompasses a statement of employment. In effect, an employer should state that: (1) the person has been in their employment, highlighting the date of commencement and cessation (where appropriate), and (2) the job title and description of that worker. If an employer chooses to comment on the performance of an employee they owe a duty of care to that employee in the preparation of that reference. This duty arises as the employer has access to the information regarding the performance of the employee and therefore they must exercise due care and skill in drawing on that information for the purpose of communicating it to another person[55]. An employee can sue a former employer for a breach of this duty of care and, if successful, could include a claim for damages for foreseeable losses, such as the loss of a particular job opportunity or the impact on the employee's future carer prospects.

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[50] Where an employee does not have a normally weekly rate of pay, their pay should be calculated over a period of 13 weeks prior to the public holiday, as per S.I. 475/1997.

[51] Criminal proceedings must be instituted within 12 months of the commission of the alleged offence, as per Section 34.

[52] 2 A.C. 296. This case concerned a reference that was provided by the respondent, in relation to the claimant, to a prospective employer and two other companies that were considering his appointment, stating that he was *"a man of little or no integrity and could not be regarded as honest"*. The claimant sued in respect of his reference on the basis that it was inaccurate and constituted negligence, malicious falsehood and a breach of an implied contract term. His counsel argued that this reference constituted the kiss of death to the claimant's career within the insurance sector. Following the appeals process the ruling was in favour of the claimant on the basis that the actions of his former employer did in fact amount to negligence and a breach of an implied contract term.

[53] Ibid, at p. 393-394.

[54] Legal commentators have postulated that should this issue come before the Irish Courts – it is likely that the same conclusion will be reached.

[55] As per Lord Goff of Chieveley in *Spring v Guardian Assurance*, at p. 318.

However, a reference does not have to be full and comprehensive, in that an employer is not obliged to warrant absolutely the accuracy of the facts or the incontrovertible validity of the opinions expressed, rather they are required to take reasonable care in compiling and giving the reference and to verifying the information upon which it is based. This means that an employer is entitled to set clear parameters within which the reference is given, such as stating their limited acquaintance with the individual as to time or as to situation[56].

In exercising this duty of care the reference should be true, fair and accurate[57]. Consequently, an employer must ensure that any statements made regarding the conduct or performance of an employee are truthful, objective and can be verified or corroborated by independent evidence. Subjective commentary or opinion should be avoided. For example, an employer cannot state that an employee is lazy, as this is a subjective value judgement, dependent upon a person's interpretation of the word lazy. Whereas an employer can say that an employee has a history of tardiness or levels of absenteeism above the sector norm, as these statements are factual and capable of substantiation. According to Lord Justice Walker in *Bartholomew v London Borough of Hackney* (1999), in determining fairness, it is necessary to have regard to the whole of the reference and the surrounding context as:

> *"a number of discrete statements may be factually accurate, but nevertheless may in the round give an unfair or potentially unfair impression to the reader [of the employee]."*[58]

This case concerned a reference, which stated that Bartholomew had received a voluntary severance whilst suspended for alleged gross misconduct arising from financial irregularities. Following receipt of the reference, a job-offer made provisionally to Bartholomew by Richmond-upon-Thames Social Services was withdrawn. This led to Bartholomew issuing legal proceedings against the Council (his ex-employer) for negligence. He lost the case, as although the reference failed to mention the fact that allegations of financial irregularities by Bartholomew were settled and he was allowed to take voluntary severance, nonetheless the statements were held to be true and taken as a whole, were neither inaccurate or misleading.

In addition, in the context of fairness, any allegations of misconduct levied against an employee must be brought to their attention so that they can defend themselves against these allegations. Where this does not occur, but the allegations are later mentioned in an employment reference, the actions of the employer will constitute a breach of their duty of care. This arose in the case of *TSB v Harris (2000)*[59] and both the Employment Appeals Tribunals and the Justice John Altman on appeal to the Court, reiterated that such actions represent a breach of an implied term of trust and confidence. Similarly, in exercising reasonable care to ensure that a reference is fair and accurate, Lord Justice Rix in *Cox v Sun Alliance Life (2001)*[60] stated that an employer should:

> *"… [confine] unfavourable statements … to those matters into which they had made reasonable investigation and had reasonable grounds for believing to be true."*[61]

Where an employer fails to exercise due care and skill they can be exposed to potential litigation for breach of contract, discrimination under the equality legislation, defamation of character,

[56] As per Lord Slynn of Hadley in *Spring v Guardian Assurance*, at p. 336.
[57] *Bartholomew v London Borough of Hackney* [1999] IRLR 246, as per Lord Justice Robert Walker at p. 247.
[58] Ibid at p. 248.
[59] IRLR 157 at p. 162.
[60] IRLR 448.
[61] At p. 459.

deceit or negligent misrepresentation – and in some instances this may result in an award of punitive damages being imposed upon them.

It is also noteworthy that under the Data Protection Acts 1988-2003 an employee is entitled to see a copy of any employment reference written about them.

**Part 2: Employee Duties**

A. **Duty to perform work personally, and not delegate duties:** The employment relationship can be summarised by the Latin maxim *delegatus non potest delegare*. In essence this means *one to whom power is delegated cannot himself further delegate that power*. As the employment relationship is a personal one, the employee is required to perform their duties personally and cannot delegate those duties to another person. Therefore, when an employee does not want to work they are not entitled to send another person into their employment to do their work for them[62].

The most important duty of an employee is to work and perform their duties as outlined in their employment contract, and on the dates and times specified. However, certain absences are allowable and do not amount to a breach of duties. Such absences include lawful industrial action[63], absences arising from exerting a right to protective leave or sick leave. However, continuous absence on sick leave, even where it is medically certified, may result in termination of the employment contract on the grounds that the incapacity[64] of the employee is a frustrating event. In *TMC Dairy Products v Connolly (1988)*[65] the dismissal of the claimant who had an atrocious attendance record over the 12-year period he had been employed, and following a fair system of warnings, was classified as fair.

B. **Duty to obey all lawful and reasonable orders or instructions of the employer**: An employee is required to comply with the instructions or orders of their employer unless they: (1) are manifestly unreasonable, (2) are wholly unconnected to the employee's duties, (3) are likely to endanger the health and safety of an employee, or (4) require an employee to do something illegal.

In determining reasonableness the request must be within the existing terms and conditions of the employment contract[66]. The issue of reasonableness recently arose in *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions(2017)*[67]. The case concerned an unwritten rule within G4S that prohibited employees from wearing visible signs of their political, philosophical or religious beliefs in the workplace. This rule was subsequently encompassed into G4S's workplace regulations. Despite these regulations the claimant continued to wear an Islamic headscarf during working hours, and she was subsequently dismissed for her failure to comply with these regulations and the express instructions of her

[62] Unless this has been agreed with their employer.
[63] In compliance with the provisions of the Industrial Relations Act 1990. This may include a strike, picket or a work-to-rule (as per *Secretary of State for Employment v ASLEF (No 2)[1972]* 2 All ER 949).
[64] Section 6(4)(a) Unfair Dismissals Act 1977.
[65] UD 50/1988.
[66] In *Pepper v Webb [1969]* 2 All ER 216, the refusal by a gardener to sow some plants for his employer and his comment to his employer that he *"... couldn't care less about your bloody greenhouse and your sodding garden"* amounted to a breach of duty, justifying his summary dismissal.
[67] Case C-157/15.

employer. The case was referred from the Belgium Court of Cassation to the European Court of Justice (ECJ) to determine whether the actions of G4S amounted to religious discrimination, in breach of EU law. The ECJ ruled that the ban on the visible wearing of signs of political, philosophical or religious beliefs did not amount to direct discrimination based on religion, where it was a term of the employment contract and was appropriate for the purpose of ensuring that a policy of neutrality was properly applied[68]. Consequently, Ms Achbita's dismissal for failure to follow instructions would amount to a fair dismissal.

In the South African case of *Motor Industry Staff Association and another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and others (2012)*[69] which concerned whether an instruction given to an employee was or was not within the scope of their employment duties, Justice Ndlovu stated that:

> *"It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross - in that it was persistent, deliberate and public - a sanction of dismissal would normally be justified."*[70]

This position has also been adopted in Ireland. In *Harrington v Irish Life and Permanent plc (2003)*[71], Justice Smyth J stated the law as follows:

> *" the employee impliedly contracts to obey the lawful and reasonable orders of his employer (or his employer's delegate) within the scope of the employment he contracted to undertake ... and it has long been part of our law that a person expudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his master. Such a refusal fully justifies an employer in dismissing him summarily."*[72]

The issue of lawfulness arose in *Morrish v Henleys (Folkstone) Ltd (1973)*[73] wherein an employee was ordered to falsify his employers accounts regarding fuel usage and was dismissed when he refused to comply. Justice Sir Hugh Griffiths held that this refusal was not unreasonable as to hold otherwise would involve the untenable proposition that an employee is obliged to obey an order to falsify his employers' records[74]. Similarly, in *Gregory v Ford and Others (1951)*[75] an employee's refusal not to drive a vehicle not covered by third party insurance did not amount to insubordination. According to Justice Byrne:

> *"... when a person is employed to drive a lorry, there must be an implied term in the contract of service that the servant shall not be required to do an unlawful act. If that be so, it appears to me to follow that it is an implied term of the contract that the employer will comply with the provisions of the statute."*[76]

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[68] http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170030en.pdf.
[69] ZALAC 42 (LAC).
[70] At point 31.
[71] Unreported, High Court, 18 June 2003.
[72] Citing Per Karminski U in *Pepper v Webb* [1969] 2 All ER 216 at 218, approval and adopted by Hamilton J, as he then was, in *Brewster v Burke and another* [1985] 4 JISLL 98 at p 100.
[73] 2 All ER 137.
[74] See: Unfair Dismissals: Disobedience; no contractual duty to obey order; no reduction in award; meaning of "caused or contributed" in section 116 (3), Paul Brodetsky, Ind Law J (1973) 2 (1): 167-168.
[75] 1 All ER 121.
[76] At p. 123.

Whether an instruction is likely to endanger the health and safety of an employee was reviewed in the case of *Ottoman Bank Ltd v Chakarian (1930)*[77]. In this case the employer ordered their employee, an Armenian national, to stay in Constantinople (where he was sent on temporary secondment by the bank). The respondent informed the appellants that his life was in danger in Constantinople from the Turkish authorities, and asked to be transferred to a branch outside Turkey. This request was refused by the appellant. Nonetheless the respondent disregarded this refusal and fled from Constantinople. He was subsequently dismissed without notice, and he brought an action for wrongful dismissal. According to Lord Thankerton:

> *" ... the order to remain in Constantinople was not a lawful order .... the dismissal of the respondent by the appellants was wrongful and ... the respondent is entitled to recover damages*."[78]

C. **Duty of an employee to act with due care and skill in the performance of their duties:** This duty requires an employee to not act in a negligent manner, while undertaking their employment. Whether an act amounts to negligence will be determined by ascertaining whether they have acted in accordance with the requisite standard of care required of a person in their position, taking into consideration their experience, seniority and qualifications. As per Justice Willes in *Harmer v Cornelius (1858)*[79]:

> *"[w]hen a person is employed to do work which requires skill, and he undertakes it without having skill to do it, he can be dismissed by the person who employs him ... when a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes .... if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts."*[80]
>
> *It seems, however, very unreasonable that an employer should be compelled to go on employing a man who, having represented himself as competent, turns out to be incompetent ... [m]isconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty, and, therefore, misconduct ..."*[81]

In *Jupiter General Insurance Co Ltd v Shroff*[82] the respondent, the manager of the life insurance department of an insurance company, was dismissed for misconduct arising from his negligence in recommending an endowment policy for a client, which the managing governor of the insurance company had a few days earlier refused to re-insure. According to Justice Maugham:

> *"... it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence."*[83]

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[77] A.C. 277.
[78] At p. 283.
[79] [1843-60] All ER Rep 624. This case involved the dismissal of an artist after two days, when his work proved to be incompetent.
[80] At p. 624.
[81] At p. 625-626.
[82] [1937] 3 All ER 67.
[83] At p.73-74.

The Court in determining that the respondent's dismissal was fair postulated that:

> *"... if a person in charge of the life assurance department, subject to the supervision of superior officers, shows by his conduct or his negligence that he can no longer command their confidence, and if, when an explanation is called for, he refuses apology or amendment, it seems to their Lordships that his immediate dismissal is justifiable."*[84]

In reviewing the strictures of the duty of care and skill owed by an employee to an employer, Viscount Simonds in *Lister v Romford Ice and Cold Storage Co (1957)*[85] stated that:

> *"... the appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the respondents thereby suffered damage and they are entitled to recover that damage from him ..."*[86]

In *Janata Bank v Ahmed (1981)*[87] the respondent was ordered to pay damages to the bank caused by his negligence, while employed as an assistant general manager in the bank's London branch. The negligence revolved around opening bank accounts without verifying the addresses of the account holders and advancing overdrafts without making enquiries as to the creditworthiness of the relevant customers.

D. **Duty to act in good faith and in the best interests of the employer:** An employee owes a duty of fidelity to their employer. As per Lord Millett in *Attorney-General v Blake (1998)*[88] the employment relationship is one of:

> *"... trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The core obligation of a fiduciary of this kind is the obligation of loyalty."*[89]

This duty of fidelity requires an employee to act honestly and responsibly in the performance of their duties and to avoid situations that amount to a conflict of interest. Where such a conflict arises the employee has a duty of disclosure to the employer. For example, where an employee is offered a gift from a client they must ensure that the gift is disclosed to their employer, unless such an obligation is precluded based on the employer's policy arising from the quantum value of the gift – otherwise such a gift may be seen as an inducement for that employee to offer favourable terms of business to that client. As per Justice Elias in *University of Nottingham v Fishel (2000)*[90]*:*

> *"... every employee is subject to the principle that he should not accept a bribe and he will have to account for it (and possibly any profits derived from it) to his employer."*[91]

Regarding honesty, in *Denco Ltd v Joinson (1991)*[92] Denco was a union representative who was employed as a sheet metal worker. He was dismissed for gross misconduct as a consequence of

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[84] At p. 74.
[85] AC 555.
[86] At p. 573.
[87] IRLR 457.
[88] Ch. 439.
[89] At p. 454.
[90] ICR 1462.
[91] At p. 1490-1491.

gaining unauthorised access to his employer's computer system. He had gained access to a part of the system that would normally be inaccessible to him by using another employee's password. Denco admitted that he had obtained access to unauthorised information but claimed that he had done so by accident. Nonetheless, the Court held that that if an employee deliberately used an unauthorised password in order to enter a computer known to contain information to which he was not entitled, that was of itself gross misconduct which *prima facie* would attract summary dismissal[93].

The scope of this duty is quite broad and includes an obligation on an employee not to establish a business in direct competition to their employer or simultaneously work for a direct competitor (without disclosure)[94], not to divert business opportunities from the employer[95], nor to disclose trade secrets or confidential information[96]. As per Lord Justice Morton in *Hivac Ltd v Park Royal Scientific Instruments Ltd (1946):*

> *"... the obligation of fidelity subsists so long as the contract of service subsists, and even in his spare time an employee does owe that obligation of fidelity."*[97]

In *University of Nottingham v Fishel (2000)*[98], the plaintiff university employed the defendant, a clinical embryologist, as full-time scientific director of its infertility clinic. The defendant undertook work at overseas private clinics for remuneration, without obtaining consent in accordance with procedures for "outside work" stipulated by the university and the terms of his contract of employment. The defendant also sent embryologists, employed by the university and under the defendant's supervision, to work at the overseas clinics, in breach of their contracts of employment, the defendant being paid directly by the clinics and making his own arrangements as to remuneration with the embryologists. The work did not prejudice the functioning of the university clinic and benefited it by contributing to the skills of the embryologists and the research and development at the clinic. The university brought an action against the defendant, seeking an account of profits, or damages, for alleged breaches of contract or fiduciary duty by the defendant in undertaking work at the overseas clinics without authorised consent, and for inducing breaches of contract by the embryologists under his supervision.

The Court ruled that Dr Fishel was not breach his fiduciary duty to Nottingham University in accepting working abroad without their consent, but that he was in breach by keeping the

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[92] ICR 172.

[93] At p. 178.

[94] See *Hivac Ltd v Park Royal Scientific Instruments Ltd (1946)* 1 All ER 350. In this case five employees of the appellant company undertook employment for the respondent company on their day off. The Court held that this action constituted a breach of the employees' obligation to serve them with good faith and fidelity, which was an implied term in the contract of service.

[95] See *Sanders v Pavey (1967)* 2 All ER 803. This case revolved around an assistant solicitor who left his employment and took an important client of the firm with him. The client had encouraged him to leave and told him that if he left to set up on his own account he would transfer his business to him.

[96] In *McKenna Breen Ltd v Kevin James (2002)* (Unreported, QBD (James Goudie QC) 14/6/2002) a permanent injunction was granted against an independent information technology consultant who worked for the plaintiff to restrain threatened breaches of confidence by using, publishing or disclosing confidential materials acquired by him in the course of working for the plaintiff and wrongfully retained by him after termination of his services.

[97] See footnote 87, at p. 357.

[98] See footnote 90.

profits of treatment carried out abroad using university embryologists under his supervision. According to Justice Elias:

> *"... [i]t was his duty to direct the other embryologists what to do and where to do it. By accepting work for them from which he was directly benefiting, he was in my view clearly putting himself where there was a potential conflict between his specific duty to the university to direct the embryologists to work in the interests of the university, and his own financial interest in directing them abroad. The fact that he did not in fact act contrary to the interests of the university is irrelevant: it is trite law that the potential conflict is enough."*[99]

**Conclusion:**

The extent of the duties owed between employers and employees are quite diverse[100]. Some employer breaches attract criminal sanctions, whereas others attract civil liability only. Breach of employee duties can in some instances constitute gross misconduct and justify a summary dismissal. Consequently, the significance of both employers and employees being aware of their respective duties is paramount, and if there is any doubt professional legal advice should be sought.

[99] At p. 1498.

[100] This Article only reviewed some of the respective employment duties – the duties discussed are not intended to provide an exhaustive list. A review of all duties owed between an employer and an employee is beyond the limits of this discussion – and readers seeking further information are advised to review academic source material dealing exclusively with employment law matters.