

'I never promised you that' – The hidden duties of employers

By Craig Rothwell

In a previous article, the hidden duties of employees were discussed. Now it is the turn to look at some of the duties an employer will owe to their employees even if they are not set out in the written employment contract. The law 'implies' these terms into everyone's contract as it assumes the reason for missing them out was because both employee and employer considered them so obvious they did not need to be included. However, as the last article indicated, some are perhaps not so obvious. It is therefore useful for both employee and employer to know these duties. Some of the main ones are as follows:

1. Duty to pay an employee their wage. This is an obvious one and covers not only paying wages but reinforces the need for employers now to abide by the Employment Act 2000 pay controls i.e. the entitlement of employees to sick, holiday and maternity pay amongst others.
2. Duty to provide work? Perhaps surprisingly – no! An employer has only a very limited duty to provide work to employees. So if an employer chooses to pay an employee to do nothing, the employee can, even if he wanted to, do nothing about it. There are only two exceptions.

First, when not providing work effectively causes a reduction in wages. This occurs if an employee's pay is related to commission or 'piece-work' (where an employee is only paid for actual tasks carried out and so receives no regular wage if given no tasks). The only other situation is when preventing an employee from working has a damaging effect on their reputation. Actors or television personalities can be affected in this way - even if we as the audience might be grateful that a particular actor or personality is paid to stop appearing on our screens!

3. Duty to re-imburse an employee their expenses. These are expenses necessarily incurred in the course of employment. Hence this duty would include travel, hotel and entertainment expenses incurred as part of an employee's job. Travel would not normally, however, include the expenses coming to and from work.
4. Not to damage the relationship of mutual trust and confidence. This is an incredibly wide-ranging and important duty which applies to both employee and employer (as discussed in a previous article on constructive dismissal). It is worth re-iterating that it may not simply mean that an employer (or employee) has to behave reasonably at all times. Instead, the key question is whether the actions of the employer/employee make continuing the relationship of trust and confidence impossible.
5. Duty of care in the giving of references. In providing a reference, an employer must exercise reasonable care and skill in giving a fair overall impression of that employee. A reference need not go into great detail, but whatever is written, particularly if summarised or selective, must not be misleading. For an employer to do otherwise can be an expensive mistake. As if an unfair reference is provided and the employee is turned down for a job as a result, the former employer may be held liable for the losses subsequently suffered by the employee in being out of work.

Before the Employment Act 2000, most employers could avoid the potential pitfalls and simply choose not to provide a reference. However, the Act now requires employers to provide a 'certificate of termination' if requested by a former employee. This certificate must set out the basic details of the employee's employment including length of employment, capacity employed and wages paid.

Under the Act, the employee can also choose whether or not to ask their former employer for the reasons for termination to be included. Most employees 'leaving under a cloud' will probably not wish to ask for the reason to be provided but for those that do, it is in these circumstances that employers need to ensure that they are accurate and fair in their response.

Overall then, implied terms can serve a useful purpose in dealing with areas employer and employee forget to consider on agreeing contracts. More importantly, they can also help protect employer and employee from each other's poor behaviour by setting some common standards across all employment contracts.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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