



Brachers Bitesize  
Is employee wellbeing a legal  
compliance issue?  
Thursday 22 July 2021

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Presented by:  
Colin Smith

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Welcome

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## Interacting with us

- Hands Up



- Questions



- Polls



## Today's Session

- 30 minutes
- Including Q&A

*Do you feel employees increasingly expect employers to make them happy as a legal right?*



*Do you feel the  
current balance  
between employers  
rights and employees  
rights is correct?*



# Employer Duties

- Implied terms in employment contracts
- Duties in tort of negligence
- Statutory Duties e.g. Health and Safety at Work etc. Act 1974

Implied Duties  
Employment  
Relationships

Tortious Duties  
at Common  
Law

Statutory Duties

# Implied Employment Relationship Duties

- Pre Mutual Trust and Confidence
- Post Mutual Trust and Confidence
- “Super implied term”

## Employee

- Duty of fidelity
  - Duty not to disrupt employer's business
  - Duty not to compete
  - Duty not to solicit customers
  - Duty not to entice away employees
  - Duty to disclose wrongdoing
  - Duty of confidentiality
  - Duty not to misuse employer's property

## Employer

- Duty to pay wages
- Duty to indemnify
- Duty to provide work
- Duty to give reasonable notice
- **Health and safety duties**
- **Duty provide a suitable working environment**
- **Duty to provide reasonable support**
- **Duty to redress grievances**

## Employee

- Duty to account
- Duty not to act in conflict of interest
- Duty to obey lawful and reasonable orders
- Duty to be adaptable
- Duty to exercise reasonable skill and care
- Duty to give reasonable notice
- **Duty of Mutual Trust and Confidence**

## Employer

- **Duty not to act capriciously in relation to pay**
- **Duty to advise employees of rights and benefits**
- Duty to give references
- **Duty of Mutual Trust and Confidence**



# Mutual Trust and Confidence

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# Mutual Trust and Confidence



Malik and another v Bank Of Credit & Commerce International SA 1998

*"The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"*

# Mutual Trust and Confidence

- Mutual duty (rarely used against employees)
- Breach is repudiatory
- Malice not necessary
- Judged objectively
- Not a good faith duty (innocent mistakes can breach)

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# Mutual Trust and Confidence



- Reasonable and proper cause
  - Hilton v Shiner Ltd Builders Merchants 2001
  - The demotion of the employee was likely to damage trust and confidence
  - But the EAT found the employer had reasonable and proper cause for the demotion because it believed the employee to have been guilty of dishonesty

# Mutual Trust and Confidence



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  - The demotion of the employee was likely to damage trust and confidence
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A close-up photograph of two people in white business attire shaking hands. The background is blurred, showing other people in a professional environment. A large white arrow-shaped graphic points from the left towards the center of the image.

# Suitable/Safe Working Environment

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# Safe/suitable working environment



- Take reasonable steps to provide a safe workplace and safe system of work
- Duty extends to mental as well as physical health
- Duty can apply to express contractual terms i.e. long hours of work commitments

# Safe/suitable working environment



The employer must

*"provide and monitor, for his employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by the employees of their contractual duties"*

# Safe/suitable working environment

This could cover:

- Temperature
- Equipment
- Tools
- Premises
- Unacceptable behaviour

# Unacceptable behaviour

- Moores v Bude-Stratton Town Council 2000 EAT
- An employer must take reasonable steps to protect employees from unacceptable behaviour such as bullying or unauthorised interference in work duties.

*“Further, it is an implied term of every contract that the employer will provide and maintain a working environment, which is reasonably tolerable to all employees. Such term must apply to protection from unacceptable treatment and behaviour and unauthorised interference in work duties.”*

# Unacceptable behaviour

- Chell v Tarmac Cement and Lime Ltd 2020.
- An employer could not be expected to increase supervision or take other steps to protect a worker where it was aware that there were rising tensions in the workplace, but there was no anticipated threat of violence.

# Unacceptable behaviour

- Horkulak V Cantor Fitzgerald 2005
- Recognised that the modern employment contract included obligations on the employer in connection with the self-esteem and dignity of the employee.
- That it was clear from the case law that the use of foul and abusive language can undermine the contract of employment.

# Unacceptable behaviour

- The fact that a manager is frequently given to foul language does nothing to diminish its power to offend on a given occasion, nor does the fact that the employee may use foul language as well.
- Therefore, an aggressive or abusive management style which undermines the employee is capable of breaching the implied term.

# Unacceptable behaviour

- McBride v Falkirk Football and Athletic Club EAT 2010
- The test for whether trust and confidence has been broken is an objective one and should not be diluted by the concept of an "industry standard" of bad management style.

# Unacceptable behaviour

- It was no defence to a constructive dismissal claim for the employer to point to a high-handed and autocratic management style being the "norm" in football clubs:

*"An employer cannot pray in aid that he and others in his industry treat all employees badly and therefore treating an employee badly cannot amount to a breach of the duty to maintain trust and confidence"*



# Reasonable Support / Workloads

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# Reasonable Support

- Wigan Borough Council v Davies 1979 EAT
- There was an implied term in an employee's contract that her employer would take such steps as were reasonable to support her in her duties without harassment or disruption from colleagues.

# Reasonable Steps

- Hobbs v British Railways Board UKEAT/340/94
- In order to determine whether an employer has failed to take reasonable steps by way of support, the tribunal must consider whether what the employer actually did was within the range of reasonable responses of a reasonable employer.

# Workload

- Hellman International Forwarders Ltd v Cooper EAT 1996
- The employer was in breach when it told an employee that, if she did not complete an unfeasibly large backlog of paperwork within a fortnight, she would lose her job.

# Workload

- *Governors of Exeter School v Wright* EAT 1999
- A school employee gave evidence against the Headmaster in a disciplinary enquiry.
- The Headmaster was cleared of the charges, the employee was victimised by other staff.

# Workload

- The EAT would not comment on whether putting her in a position of conflict between her loyalty to the Headmaster and colleagues, and her loyalty to the school, was a breach of the implied term by the school.
- However, it held that, having put her in that position, the school had a duty to support her if it was satisfied she was being honest.

# Working Patterns

- UB (Ross Youngs) Ltd v Elsworthy EAT 1991
- Husband and wife both worked for the same company.
- Were placed on separate shifts so that they were rarely at home together.
- The employer refused to remedy the situation.

# Working Patterns



- Held it was in breach of the implied term.
- There was no reasonable and proper cause for the employer's actions.
- It could, with a little extra thought, have arranged things so as to avoid such an intolerable situation.



Pay

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- F C Gardner Ltd v Beresford 1978.
- There is normally an implied term that an employer will not treat employees  
*"arbitrarily, capriciously or inequitably in matters of remuneration"*

# Pay

- Glendale Managed Services v Graham and others 2003.
- This duty has since been described as simply one part of the more general obligation not to act in a manner likely to destroy the mutual trust and confidence

- Mutual Trust and confidence obliges employers to treat employees:  
*"even-handedly"*
- This does not necessarily mean treating them identically.
- If the employer treats one employee differently from the rest, its reasons must not be capricious.

# Pay

- Transco plc v O'Brien 2002
- The employer was offering enhanced pay terms to all permanent employees as a loyalty incentive during a restructuring.
- Its refusal to offer the new contract to Mr O'Brien was a breach of trust and confidence.

# Pay



- Court of Appeal's said, there were few things more likely to damage trust and confidence between an employer and employee than to single them out and refuse to offer them the same terms as the rest of the workforce.
- Transco's honest mistake in thinking that this particular individual was not a permanent employee was not an excuse.

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**Any Questions?**

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## **About Brachers' Employment team**

Our [Employment and HR team](#) take pride in delivering employment law and HR services that are tailored to your needs. We are dedicated to listening and learning about your business to understanding the challenges you face, your ambitions, and how to retain, your key asset, your people.

We are one of the largest employment and HR teams in the South East, working alongside businesses with 60,000 employees in the region.

We appreciate that business is about taking managed risks. Our commitment to you is that we will not sit on the fence but will make recommendations using the benefit of our judgment and experience.

## **Free online consultation**

If you would like more information on how we can support you with the issues covered in this webinar, [book a 30-minute online appointment](#) with a lawyer from our Employment team for an initial discussion on your needs and to find out how we can help.

## **Presentation slides**

Please email [events@brachers.co.uk](mailto:events@brachers.co.uk) if you would like us to send you a copy of these presentation slides.