



Employers' Duty of Care

Employers have a legal duty of care to their employees. In essence this means that they should take all steps which are reasonably possible to ensure their health, safety and wellbeing. This duty arises under health and safety and employment legislation, and also under the common law. Requirements under an employer's duty of care are wide-ranging and may manifest themselves in many different ways. We have touched on some of these below but shall be happy to provide further detail.

1. Health and Safety

Every employer has a duty to take "reasonable care of the health and safety of its employees" and also to take "reasonable steps to provide a safe workplace and a safe system of work". For employers, this duty manifests itself principally as follows:

The Health and Safety at Work etc Act 1974

Health and safety in the workplace is governed chiefly by the Health and Safety at Work Act 1974 (HSWA 1974), which also acts as a framework for associated health and safety Regulation and compliances. These statutory provisions lay down the specific duties an employer owes to its employees, including a duty to take reasonable care of the health (both physical and mental) and safety of everyone at work, including visitors and other non-employees who use the employer's premises.

Requirements include:

- Providing and maintaining safe plant and equipment;
- Carrying out "sufficient and suitable" assessments of the work related risks faced by employees and any others who might be affected by the activities of the employer;
- Recording the findings of those risk assessments, noting in particular whether there are any groups of employees who have been identified as being at risk;
- Ensuring the health and safety of employees by providing adequate and understandable information, instruction, training and supervision as required;
- Providing and maintaining a safe working environment by the use of safe systems of work;
- Providing adequate welfare facilities such as first aid facilities, changing rooms etc;
- Having a written health and safety policy (for employers with more than five employees) that is reviewed regularly to ensure its adequacy; and
- Appointing one or more competent persons to implement the measures needed to comply with the relevant health and safety laws.
- A breach of the statutory health and safety provisions could result in an employee commencing civil proceedings against his employer, or criminal

prosecution by the Health and Safety Inspectorate through the appropriate enforcement procedure.

Directors, company secretaries and managers can be held personally liable for health and safety offences, examples include where a person has deliberately cut corners to save money, putting others at risk or where a person has turned a blind eye to unsafe practices in the workplace.

Common law claims for negligent personal injury

Employers are also under a common law duty to take reasonable care of the health and safety of employees in the workplace by providing competent staff, adequate plant and equipment, a safe system of work and safe premises. A breach of this duty may give rise to a claim for personal injury by the employee, the success of which will depend on whether: (a) the employee can show that the employer has breached this duty of care; (b) it was reasonably foreseeable that an injury would result from this breach; and (c) a loss in the form of personal injury has occurred, which can be physical and/or mental. Damages awarded may be high with figures in the hundreds of thousands in the most serious cases. Employers should be particularly wary when dealing with issues of stress in the workplace and which may potentially give rise to a foreseeable personal injury.

Breach of the employment contract

Express terms of the employment contract, such as those relating to hours of work, must be interpreted where possible, as subject to an implied term that an employer will take reasonable care of an employee's health and safety. For example, an express provision enabling an employer to require an employee to work overtime must be exercised in light of the duty of care.

2. A Suitable Working Environment

An employer is also under a duty to provide a suitable working environment. This duty is broader than the health and safety duty referred to above and may cover for example, temperature and unacceptable behaviour. Again, this duty manifests itself both through various statutory provisions and as an implied term in the employment contract. It should be noted that statutory provisions include not simply health and safety related provisions, such as the Health Act 2006 dealing with smoking in the workplace, but also employment related legislation including:

The Working Time Regulation and compliances 1998

Under the Working Time Regulation and compliances, all workers are entitled to a minimum of 5.6 weeks paid holiday a year, including public holidays. The Working Time Regulation and compliances also provide a maximum number of hours work on average a worker should perform each week (although a worker can opt out of this provision) and requirements regarding rest breaks, night working etc.

Protection from Harassment Act 1997

An employer may also be liable under the Protection from Harassment Act 1997 where, amongst other factors, the act complained of occurs more than once and is serious enough to amount to a criminal act. It is arguably more difficult but not

impossible for an employer to bring a claim a claim under these provisions. Sanctions for breach include a fine (and/or imprisonment of the perpetrator).

Corporate Manslaughter and Homicide

In extreme cases, where the failings and omissions of an organisation lead to the death of an employee, a company may be liable under the Corporate Manslaughter and Corporate Homicide Act 2007.

An organisation will be guilty of corporate manslaughter where its activities are both managed and organised in such a way that it either causes a person's death, or amounts to a gross breach of the relevant duty of care owed by the organisation to that person. Where organisations are found to be guilty of the offence, they can be subject to a fine, which in accordance with new Guidelines laid down by the Sentencing Council will be rarely less than £500,000 for a case involving a single fatality and will be considerably more for multiple fatalities, although the fine may be reduced on account of an early guilty plea. In addition to this, a court may order that the organisation publicise their conviction.

There have already been a number of convictions for corporate manslaughter, with fines ranging from £187,500 to £480,000. Examples include an organisation that was fined for failing to prevent an employee falling through a roof and another that failed to provide adequate health and safety for a geologist employee, who died when a pit that he was working in collapsed.

Other Considerations

We have touched above on the principal circumstances where the duty of care as a specific concept is commonly referred to. However, please be aware that the duty of care is arguably a broader concept capturing an employer's treatment of an employee from recruitment, through employment to termination and beyond. In particular, please note that:

- All employment contracts contain an implied term of trust and confidence owed by an employer to an employee and which essentially governs an employer's behaviour towards an employee during employment. An employer must not act in a way that is intended or is likely to destroy the relationship of trust and confidence between it and the employee, including in the steps leading up to the dismissal of an employee. A breach of this term may entitle an employee to resign and claim wrongful and/or unfair dismissal. Whilst liability for wrongful dismissal will be limited to an employee's losses in respect of his or her notice period, an employee who brings a successful unfair dismissal claim will be entitled to compensation for all financial losses arising from his or her dismissal, subject to a statutory cap, £72,300.
- Whilst the most common claims an employee will bring against an employer are for breach of contract, breach of the various statutory provisions regulating employment and personal injury, the tort of negligent misstatement should not be overlooked in the context of the duty of care. During employment, negligence is most likely to be an issue where assurances or

promises are being made as part of a restructuring or business transfer or potentially in discussions on remuneration structures, such as bonuses. However, employers may still owe a duty of care to former employees and therefore equal care must be taken in any statements made in references or in other communications to prospective or new employers. The High Court recently held that an employer still owed a duty of care to an employee who had left six years previously and consequently was liable to that employee for unfavourable comments made in an email to his current employer.

- See more at:

<http://www.osborneclarke.com/connected-insights/publications/an-employers-duty-of-care-what-is-it/#sthash.xsCdUHdU.dpuf>