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I. General Survey of Employee Obligation to be Loyal

Under Swedish law, employees have a far-reaching obligation to be loyal to their employers. The concept of loyalty covers an array of different obligations. Between themselves, these are rather divergent. Their common denominator is that they are considered to be part of a general and overriding employee obligation to be loyal to their employer.

In brief, loyalty means an obligation of the employee to put the interests of the employer ahead of personal interests and to avoid situations entailing a collision of interests. To phrase it differently, employees must not act in such a way as to harm the employer. Yet another way to express the concept of loyalty succinctly is to say that the employer enjoys exclusive rights.

In a 1993 ruling, the Labour Court elaborated on the loyalty obligation. Said the Court: "For natural reasons what demands are reasonable to put (on employees) must depend, inter alia, on conditions in the industry, the nature of the activity concerned, the nature of the work tasks, the position of the employee within the company and whether the employee in any way has jeopardised employer relations to customers. It is obviously not possible to provide a simple formula to describe what obliges an employee under normal circumstances but one common denominator has been held to be that the employee is under an obligation to put the employer's interests ahead of personal interests and to avoid situations where he or she can face a conflict of duties."[1]

Other important factors when discussing employee loyalty are trust and confidence. A basis for the employment relationship is that the employer has trust and confidence in its employees. If that trust is lost, then the employment relationship is seriously wounded. If the employer is justified in having lost confidence in the employee, there

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1. Labour Court ruling 1993, No. 18.

usually is just cause for dismissal. Breaches of loyalty are eminently conducive to employer loss of trust in employees.

The prime elements of employee loyalty are the obligation (1) to render a satisfactory job performance, (2) to respect confidentiality, (3) not to criticize the employer or the workplace beyond certain limits, (4) not to compete with the employer, (5) to be careful and prudent, (6) to inform the employer about dangers and unacceptable conditions at or connected with the workplace, and (7) to behave with integrity.

Employee loyalty is not based on statutory regulation. There are no statutory rules to that effect. Case law is the main source of law. It is based on the notion that employee loyalty is contractual, either an individual contract of hire or a collective agreement. In real life, many agreements have express rules on employee loyalty, but others do not. A more realistic way of approaching employee loyalty is to say that it is based on labor market traditions and generally prevailing principles of employment law. Historically, employee loyalty was part of statutory law under the master and servant regulation. This regulation was in force for several centuries until the advent of industrialization in the 19th Century. (It was repealed in 1926, but had lost virtually all its importance by that time.) The "modern" employment contract that replaced the master and servant contract was based on many of the principles of this contract. Employee loyalty is one of them. Without specifically referring to the master and servant regulation, the Labour Court, already in its infancy in the late 1920s and early 1930s, indirectly built upon that regulation. As a consequence, employee loyalty is firmly embedded in employment law and is one of its leading principles.

II. Satisfactory Job Performance

Employees are under an obligation to perform their jobs in a satisfactory way. Employers cannot demand that employees outperform themselves, but the employee is to "fully exploit his/her working capacity," as the Labour Court expressed it in a 1945 ruling.[2] The employer must accept that work capacity changes with age. Variations due to temporary illness or other personal factors, such as family problems caused by divorce or the death of a near kin, must also be tolerated to a reasonable extent. Curative measures are called for if employee work performance deteriorates seriously. Termination of the employment contract is a last resort and can be resorted to only in

2. Labour Court ruling 1945, No. 47.

rather exceptional circumstances when remedial action has failed. It is quite another matter if the employee purposefully fails to perform according to capacity. From a qualitative point of view, employees are "to perform their work tasks with the diligence that these require." The employer is entitled to expect a "reasonable work result every day."[3]

Employees are free to spend their time off as they see fit. This is the point of departure. However, this does not at all mean that employees are at liberty to do whatever they please. Generally speaking, employees must not behave in ways during time off that will jeopardize satisfactory work performances during working hours. Nor must employees behave in such ways as to undermine their credibility and integrity vis-à-vis those that they are employed to serve, e.g., customers or the public at large. A basis for the employment relationship is that the employer has trust and confidence in its employees. Employee behavior during time off can jeopardize that relationship of trust. Gambling policemen or fornicating clergymen are risking precisely that, to mention two extreme examples. This means that employee freedom in this respect depends to a great extent on what the work tasks are. The factory worker is placed in a rather different position than the clergyman, to give an extreme example. Further, by way of illustration, reference can be made to a ruling where the Labour Court accepted the transfer of a female prison warden after she had taken up cohabitation with a former inmate.[4]

To what extent is holding a second job, "moonlighting," acceptable? No statutory limitations exist for private sector employees. For example, working time legislation imposes maximum levels in various respects. These apply only to the relationship between one employer and its employees, and not to the overall situation when an employee is employed by two or more employers. With one exception, all other labor and employment statutes are structured the same way. The 1977 Work Environment Act is the exception. It is true that this act is also concerned with the individual relationship between one employer and its employees. However, every employer has a responsibility for the health and safety of each of its employees. Holding more than one job might expose an employee to overwork and increase the risk of work related accidents. This means that every employer must take into account the overall situations of employees. No case law exists to illustrate the particularities of this responsibility with reference to "moonlighting" employees.

3. Labour Court ruling 1980, No. 10.
4. Labour Court ruling 1982, No. 29.

Collective agreements often contain rules about second jobs. These rules are virtually always concerned with the possibility that a second job might entail competition with the main employer or otherwise expose an employee to double loyalties. This aspect is discussed in section IV. These rules usually do not in other respects limit "moonlighting."

III. CONFIDENTIALITY

Confidentiality is at the heart of employee loyalty in the private sector of the labor market.

Several statutes contain rules on confidentiality. These statutes concern specific areas, e.g., information received when participating in co-determination with the employer, or work in connection with safety and health issues in the workplace. Examples here are employer plans regarding investment, marketing or changes in the size or composition of the workforce, or issues regarding the health of individual employees. Statutory rules are confined to the specific areas covered. In addition, a general principle of confidentiality applies. The point of departure is that it is an employer's prerogative to decide what information is confidential. If nothing has been said in particular, the point of departure is that all information of any significance to the operations at the workplace are confidential. Generally speaking, employee confidentiality encompasses every piece of information that might harm the employer if disclosed.

Much information is kept strictly secret by employers, such as trade secrets. It is obvious that breaches of confidentiality in these respects represent serious infringements on the part of the employee. In many other instances, employees are the originators of secret information. Indeed, employee knowledge may represent a crucial, perhaps even *the* crucial, asset of a company. In other circumstances, employees become privy to confidential information as part of performing their daily work tasks. This is not confined to higher echelon employees. The assembly line worker learns much as well, for example, the design and engineering of a new car or machine when prototypes are being produced. Confidentiality binds all these employees.

Unwarranted disclosure of confidential information is sometimes a criminal offense. The 1990 Act on Protection of Trade Secrets is a focal piece of legislation here. Suits for alleged employee breach of confidentiality are rather common. At issue is whether disciplinary dismissal of the employee by the employer is for just cause. This situation is discussed in section IV.

IV. Right to Criticize the Employer and to Disclose Information About the Workplace

Closely related to employee confidentiality is employees' right to criticize the employers or conditions at the workplace. The situation in this respect differs between the public and the private sector of the labor market. Public sector employees enjoy far-reaching freedom of expression and freedom to communicate information to journalists or others for the purpose of publication. These freedoms include a right to publicly criticize conditions at the workplace. The freedoms are part of the general freedom of expression enjoyed by every citizen in the land. Private sector employees, on the other hand, are in a completely different situation. Confidentiality is the overriding norm (see section III). This means that private sector employees cannot avail themselves of constitutionally protected freedoms of expression since that franchise exists only in the relation between citizens and the state, and not between private parties. The fact that nearly forty percent of all employees, i.e., those in public service, enjoy these freedoms, but the remaining sixty percent do not, has caused consternation and anger. This feeling of imbalance, or even discrimination, is particularly keen among employees who are employed in privatized, previously public sector, activities. They feel deprived of something they possessed previously. It is true that nothing prevents private labor market parties from contracting for extended freedom of expression for employees and the concomitant freedom to criticize. Still, few collective agreements to that effect exist, and they seem to be limited precisely to privatized, previously public sector, enterprises.

Issues regarding the right to criticize and disclose information comprise an area of the law that has attracted much attention in the past two decades. No specific legislation of general coverage deals with this issue. The 1982 Act on Employment Protection states that termination of employment contracts by the employer may be for just cause only, but the Act does not elaborate on the meaning of this requirement. The 1982 ILO Convention, No. 158, Concerning Termination of Employment at the Initiative of the Employer, is of relevance. Sweden has ratified the Convention. The Convention does not accept as just cause for termination that the employee has supported a bona fide complaint against the employer to a government agency.[5] The 1990 Act on Protection of Trade Secrets applies as well. The Act specifically addresses the issue. First, the Act does not at all protect information about clearly illegal activities, even if the employer treats

5. *Cf.* Labour Court ruling 1994, No. 79.

the information as trade secrets and attempts to seal the lips of employees by covenants of confidentiality. Such covenants are legally null and void. Disclosure by an employee of such information is protected activity, barring any action by the employer detrimental to the employee. Second, the Act does not protect employers against disclosure by employees of information regarding truly unacceptable conditions at workplaces, even if they are not clearly illegal. Indeed, disclosure is protected even if it means that genuine trade secrets are revealed as a necessary step to reveal the unacceptable conditions.

Several much-publicized instances of whistleblowing and investigative journalism have occurred in the last two decades. The Labour Court has been called upon to decide some much debated cases. So far, case law has only been concerned with instances where the employer has specifically stated that the information disclosed, though confidential, does not constitute trade secrets in the sense of the 1990 Act. This means that case law spells out generally prevailing principles of law concerning disclosure of information and the right to criticize. In a 1982 ruling, the Court stated that "the point of departure must be that the employee . . . enjoys a far-reaching right to criticise and question employer actions. This follows from the civic freedom of speech, one of the pillars of our legal system." Reiterating that statement, the Court, in a 1994 ruling, added that "an employment contract does not in principle constitute an obstacle for an employee to participate in public debates concerning matters of general interests."[6]

But the right to criticize has limits. Bona fide disclosure and criticism is usually protected since it serves a public interest and is conducive to amelioration. Public criticism and disclosure for other reasons are suspect. For example, the employee might be motivated by vengeance for alleged wrongdoings of a private nature by the employer towards the employee or by a desire to create difficulties for the employer. Seriously offensive comments or invectives are not tolerated either.

Several additional factors are of importance. The position of the employee is one. The higher the position, the more loyalty is required, leaving less room for public criticism.[7] The degree of publicity plays a role. Criticism revealed to fellow employees only is less sensitive than that revealed to people outside the company. On the other hand, disclosure is particularly sensitive for the employer if the employee decides to turn to the press. The room for criticism is larger if

6. Labour Court ruling 1994, No. 79.
7. *See, e.g.*, Labour Court ruling 1982, No. 110.

the employee decides to turn to the government agency concerned. The reason is that "there is no decisive obstacle for an employee against pointing out unsatisfactory conditions to the competent agency," although a caveat is called for because, at the same time, a complaint can be seen as an expression of disloyalty.[8] It is also of great importance if the employee has pointed out the alleged unsatisfactory condition to the employer, but to no avail. The harm inflicted on the employer counts. After all, the lodestar for employee loyalty is not to harm the employer (see section I). The seriousness of the allegations also counts. The purpose of disclosure is of great importance. So are the veracity and degree of justification of employee criticism.[9]

An overall assessment is required in each case and no factor is decisive *per se*. The legal situation undoubtedly puts the employee at risk. Miscalculations can result in disciplinary dismissal. However, it seems justified to say that case law offers ample protection for employees. Only when the employee has abused the right to criticize, for example, in order to harm the employer, or used it for purposes other than to try to correct unsatisfactory conditions, has the Labour Court ruled for the employer.

Following are some examples to illustrate. The answers given to these model situations should be read with the above information in mind. Countervailing factors are conceivable, e.g., employee vengeance or a wish to be mentioned in a newspaper article.

An employee knows that the canned baby food sold by the employer does not have the food value represented on the label. Can the employee inform public health officials about that? Most certainly yes! This is the archetypal situation where an employee can disclose secret information with impunity. It does not matter whether the employer treats the misleading information about the food value as a trade secret or not. Besides, as was mentioned above, the 1990 Act does not protect information about illegal practices. The model employee should perhaps discuss the matter with the employer before turning to the public health agency. However, that is far from certain since the employer is committing a very serious offense—a crime, in fact. The answer will be precisely the same if the employee turns to a journalist instead, well knowing that the reporter will publish the information. Here it would be far more in the natural order of things for the employee to talk with the employer about it in advance and resort to other measures only if that step was to no avail.

8. Labour Court ruling 1986, No. 95.
9. *See, e.g.*, Labour Court ruling 1997, No. 57.

The answer would be different if the employee knows, or at least has reason to believe, that ultimately responsible company officials are unaware of the unacceptable condition. In that situation, the employee would basically be under an obligation to notify such company officials first (see section VII, below). However, failure to do so would not necessarily constitute just cause under the 1982 Employment Protection Act to dismiss the employee. An employee who is ordered to print or disseminate the misleading information is not obliged to obey the order. Refusal to do so is protected against any disciplinary or otherwise retaliatory action by the employer.

Suppose that a truck mechanic knows for sure that there are too few mechanics to keep the trucks in good repair, and as a consequence, the brakes are frequently faulty. This is an archetypal situation where the employee should first turn to his/her superiors, perhaps side-stepping his/her immediate superior. Turning to a journalist before doing so would put the employee in a precarious situation. Informing the police would be less risky. Telling fellow employees, in particular the drivers, would be of little risk since they are under the same obligation to treat company information in a confidential way.

It might even be that the company sends out trucks knowing that they are not in good repair or have faulty brakes. Can the employee inform a journalist about that? Again, the employee should first turn to responsible managers in the company. This would be mandatory if the trucks are in such a shape that they would pass the prescribed yearly safety inspection. If the trucks are not in such a condition, then the employer would be in violation of traffic laws if its drivers were ordered out on the roads. The drivers are exempt from their duty of obedience, so they can lawfully refuse to drive. The employee who turns directly to the police or the press is legally immune from any retaliation by the employer.

V. Competition

Yet another element of employee loyalty is the prohibition against competition with the employer. Again, no statutory rules exist. Case law dominates the field. Rules in agreements, collective or individual, are frequent. So are stipulations in company handbooks or rules of conduct.

The prohibition works with full force during the employment relationship. It restricts employee possibilities to freely use time off. The employer may dismiss the offending employee if the offense does or might inflict serious damage to the employer or is otherwise disloyal. Case law does not demand much to satisfy that requirement. It

is immaterial whether competition results from independent work by the employee or from work for a competing enterprise.

Under rather exceptional circumstances, employee competition also constitutes a crime. In truly egregious situations, a breach of trust occurs when an employee in a leading position abuses his/her position of trust and inflicts damage on the employer. However, instances of criminal prosecution are very few.

Even rather low skilled manual work can meet the necessary requirement. One case before the Labour Court concerned a hairdresser. She accepted personal friends as private customers on a small scale during her time off. The applicable collective agreement contained a prohibition against work of any kind in the business during non-working hours. This contractual prohibition was probably stricter than generally prevailing rules, but enforcement had been somewhat lax. The Labour Court upheld her disciplinary dismissal.[10]

The requirement making employee actions illicit can also be met at a preliminary stage. That occurs when the employee is actively and materially planning to engage in competition after terminating the employment relationship, even if actual competition in the marketplace has not yet occurred. In a 1993 case, the Labour Court was confronted with the question whether four employees could be summarily dismissed for participating in planning and preparing for competition with their employer, a catamaran shipping company. One of the employees was the owner of a company. The idea was to use this company as the platform for launching a catamaran shipping company in more or less direct competition with the employer. The project did not involve competition with actual operations of the employer company, but competition with activities simultaneously under planning by the employer company. Employee planning was fairly advanced at the time of the dismissal, far beyond an initial phase of formulating ideas. However, the project was still far from constituting competition in the sense of actually carrying passengers. The Court found that the employer company had suffered damage because the four employees had been in contact with business partners of the employer company. Such contacts might conceivably have negative effects on future business relations between the employer company and these partners. The employees and their union took the position that since no actual competition had occurred, the actions by the employees could not be considered disloyal. Said the Court, "The Labour Court cannot share that point of view. Not only actual competition but also plans to start

10. Labour Court ruling 1993, No. 18.

a competing activity can, at least under certain circumstances, be seen as disloyal behaviour entitling the employer to terminate an employee. . . . The project could conceivably result in a forced closure of (the employer company). Furthermore, it would be unrealistic to assume that the four, while working on the project, had abstained from taking advantage of the information that they had obtained about the planning of a new catamaran service line by (the employer company). Against this background, the participation of the four in the project stands out as highly disloyal. By participating, the employees must be said to have gravely disregarded their duties towards the employer."[11] Given that the four employees were managerial employees at high echelons, the Labour Court upheld their summary dismissal without notice, a step that is acceptable only under the most egregious circumstances.[12]

What is the legal situation if it is a family member, rather than the employee, who is engaged in competition or works for a competing company? The Labour Court has not yet squarely faced that situation. However, it obviously puts the employee in a difficult and delicate position since it tends to create a situation of double loyalties. By and large, employers are entitled to enjoy unmitigated job loyalty from their employees. The employer has exclusive rights. Consequently, it can safely be said that the employee faces a serious risk of transfer or even dismissal in a situation like this.[13] It most likely will make no difference if the family member operated the business before the employee went to work for the employer. It might even be an aggravating factor. The employer might be justified in suspecting that the employee came to work in order to collect information about things of interest to the business of the family member. Employer trust in the employee will erode further if the employee helps the family member during non-working time.

The only disloyalty case that comes even close to involving a close family member was decided in 1989. A fairly high ranking employee in a wholesale company had become a board member of a retail company that was a customer of the wholesale company. The employee had not been active in the retail company. However, his female life companion was half-owner of and very active in the retail company. Obviously, there was no competition between the two companies. Many retail companies were customers of the wholesale company. The evidence presented in the case indicated that there was not

11. Labour Court ruling 1993, No. 12.
12. *Id.*
13. *See* Labour Court ruling 1982, No. 29, referred to in section II.

much competition between retail companies either. It was also shown that the wholesale company discouraged competition between them. The wholesale company had not been able to show the Court how the retail company could gain a competitive edge if it were to have access to the information that the employee in question had access to in the wholesale company. For this and other reasons, the Court did not uphold the company's decision to dismiss the employee. This ruling casts virtually no light on a situation where a family member engages in direct competition with the employer company. It does show, however—if anyone doubted it—that the Court will take into account the activities of a person close to an employee when considering employer discipline of the employee.

Holding a second job is not *per se* disloyal (see section II). However, working for a competitor will invariably put the employee at serious risk. Working for a competitor is disloyal to a certain extent no matter what position the employee has at the second workplace. The main employer is entitled to unmitigated job loyalty. Anything that might jeopardize this puts the employee at risk. In most instances, the employer would be justified in not fully trusting the employee. If the second job is of the same category as the main job, there can be no doubt that the main employer is entitled to summarily dismiss the employee. If the second job is in no way related to the main job and if both jobs are unskilled, there normally would not be just cause for dismissal even if the employee does not quit the second job after being notified by the main employer to do so. In situations between these two extremes, the main employer would probably be entitled in most instances to dismiss the employee with notice after first offering the employee the chance to rectify the situation by quitting the second job.

Collective agreements sometimes contain rules relating to this issue, in particular white-collar collective agreements. The leading white-collar employee agreement states that "a white-collar employee is not allowed to perform work, or be directly or indirectly engaged in activities for a another company, in competition with the employer. The white-collar employee is not allowed either to accept assignments or to engage in activities that can be detrimental to his work performance." A unilateral employer commentary to this stipulation states that its purpose is to ensure that the "white-collar employee does not place himself in a situation that entails a risk for a conflict of loyalties between the interests of the employer and those of the employee or others." The agreement also stipulates that the employee "ought to consult with the employer before accepting an assignment or a second

job of some magnitude." The employer commentary states that "[T]he purpose is to avoid conflicts of interests."

The fact that an employee chooses to do strictly private business with a competitor does not *per se* constitute disloyalty. Everyday examples here would be a waiter in a restaurant who goes to a competing restaurant to eat, a vendor of cloths who prefers a competitor for his/her own purchases, or an auto plant worker who buys a car from a competing auto company, even if parking it in the employer's parking lot. Legally relevant disloyalty will occur only under special circumstances. One example might be an employee who openly flaunts his/her business partner or the product involved, e.g., the new car, perhaps urging fellow employees to follow his/her example. Another example might be the employee who patronizes a competitor's business to humiliate his/her employer or as a way of disparaging his/her employer.

After the expiration of the employment contract, the situation is completely different. The point of departure is that the former employee becomes a free agent. The employment contract does not *per se* have any surviving effects. However, here as in virtually all other matters concerning employee loyalty, freedom of contracts prevails. Restrictive covenants are legal if freely entered into. Courts can set them aside or modify them only if they go beyond what is "reasonable."

A 1969 collective agreement between the dominant employer confederation SAF and the leading unions concerned aims at limiting the use of restrictive covenants. The agreement contains detailed rules on restrictive covenants in all relevant aspects. The agreement has attained status of the law of the land in its field. Courts will rarely deviate from the principles of the agreement, even in disputes between parties not directly covered by it. Generally speaking, restrictive covenants are acceptable only to protect knowledge that is unique for the company. Factors related to personal employee skill, knowledge and experience are outside the realm of the agreement. Restrictive covenants must not be used to protect the employer from competition based on such factors. Also, they must not be used when employment is terminated at the initiative of the employer. The agreement contains detailed rules on union access to information about existing restrictive covenants at the workplace.

Restrictive clauses usually prohibit competition at the risk of payment of a specified sum of money. Fines can be very stiff. The Labour Court once accepted the equivalent of one year's salary. The 1969 agreement curbed abusive use of restrictive covenants. They be-

came rather rare in the 1970s and 1980s. However, they seem to have become more prevalent in recent years. Perhaps the reason is the emergence of the information society and the increased role of employee knowledge. To make such clauses less odious to employees, employers seem to be trying to relabel them, substituting the term "loyalty clauses" for the less appetizing term "anti-competition clauses." Reality remains the same, however. Stock option programs are increasingly being seen as better alternatives than restrictive covenants. They function as a carrot rather than as a stick, as it were.

The requirement for disciplinary action by the employer because of disloyal competition can also be satisfied if the employee quits without observing the statutory or agreed-upon period of notice and starts competing while still legally employed. In a leading case, the Labour Court was faced with the situation where three employees left the employer company, a temporary work agency, without awaiting the expiration of the agreed upon period of notice.[14] During that period, the three employees started a company in open and direct competition with the employer company. The Court ruled that by doing so, the employees "disregarded their duty of loyalty under the employment contract." Another issue at stake was how to compute the damages due to the employer company from the offending employees. The employer company alleged that it had suffered a severe decrease in value because the three had left and started a competing business. The employer company demanded compensation for the exact decrease in value. While not denying that the company had decreased in value in the way alleged, the Labour Court refused to hold that this decrease was fully recoverable as damages. The main reason advanced by the Court was that this decrease would have occurred even if the employees had quit in a lawful manner, awaiting the expiration of the period of notice. Employees are under virtually no restriction against starting a competing business once the employment relationship is legally terminated. The fact that an employee is a key figure does not alter that, nor does the fact that the employer company is small and completely dependent on its key personnel. Such factors are nothing more than the normal hazards of running a business. The damages actually awarded were nevertheless quite substantial under Swedish standards—1.5 million Swedish kronor, i.e., approximately US $200,000.[15]

Two additional aspects should be mentioned regarding the fact that former employees, in the absence of a restrictive clause, are at

14. Labour Court ruling 1998, No. 80.
15. *Id.*

liberty to compete with their former employers. First, the former employee is completely free to try to lure business partners and customers of the former employer to switch their allegiance to him/her, abandoning the former employer company. This might be ungracious, but it is part of business life. So are attempts by the former employee to try to lure former fellow employees to leave their employment and move to his/her company. The former employee can do so any way he/she likes, e.g., by inviting all former fellow employees to a recruitment meeting, by writing individually to them or by soliciting those that are of special interest. In other words, enticement of employees is neither a civil nor a criminal offense. That was the case under the master and servant regulation, but the "modern" employment contract law did not adopt this particular rule in the 19th century (see section I).

Two caveats should be added. It is obvious that predatory behavior of the kind mentioned can be looked upon as morally reprehensible. That does not, *per se*, alter the legal situation. However, under special circumstances it does.

First, a civil law comment. Suppose that information about customers and employees constitutes trade secrets for the former employer. Suppose further that the former employee took a job primarily in order to find out secret information for the purpose of using such information afterwards. Or suppose that the former employee was dispatched by a competitor to the company attacked in order to find out secret information about that company to be used at a later stage by the dispatching company. Both of these situations are addressed by the 1990 Act on Protection of Trade Secrets. One rule deals with the former employee. It makes the former employee liable to pay compensation for the damage inflicted on the former employer. A second rule makes anyone who uses trade secrets obtained from this former employee liable for damages as well. In both instances, punitive damages can be awarded in addition to full financial compensation. These rules protect companies to some extent against industrial espionage disguised as bone fide employment work.

The second caveat is related to criminal law. Suppose that the employee removes copies of company files before leaving, e.g., personnel files or customer records. It might very well be that the employee was entitled to use those files and records as part of his/her work. It might also very well be that the employee, as part of his/her job assignment, had prepared these documents. Alternatively, it might very well be that these documents were the work material of the employee. Can the employee take them with him/her when leav-

ing the company and use them afterwards? No! Does it matter if the material consists of copies made by the employee prior to leaving? No! Does it matter that other copies of the material may still be in the possession of the company? No! In a 1994 case, a court of appeals ruled that unauthorized removal and subsequent use of such material constituted a crime because the material was not in the sole and exclusive possession of the employee.

VI. Carefulness and Prudence

Employees are to behave in a careful and prudent way. No statutory rules exist. Case law is meagre at best. This means that little can be said for sure about the substance of this obligation.

Unilaterally established employer regulations for all employees in the mechanical engineering industry, the heart of industrial Sweden, state the following: "Unnecessary expenditures must be avoided to the degree possible. Strict economy and carefulness shall be exercised by employees when handling company property such as raw material, half-finished products, expendable articles, office utensils, machinery and tools." This statement probably reflects the prevailing attitude among employers. It probably also reflects the law of the land.

VII. Duty to Notify

As was mentioned in section IV, employees are under an obligation in some instances to inform employers about dangers and unacceptable conditions at the workplace. Generally applicable statutory rules are non-existent. However, the 1976 Work Environment Act imposes a general obligation on employees to participate in efforts to keep the workplace safe and to do what is needed to achieve a good work environment. Ordinances by the Labour Safety Board sometimes specifically state that employees are to report accidents and near-accidents to employers.[16] Even in the absence of any statutory rule, employees sometimes are under an obligation to notify the employer, but the extent of this duty probably depends much on the position of the employee. Where much can be expected from managerial employees, particularly in higher echelons, less can be expected from the rank and file.

The rules of conduct in the mechanical engineering industry state that an employee who "observes or suspects defects or damage on machines or installations must make a report to supervisors without

16. *See, e.g.*, Ordinance 1985:17, Section 5, on dangerous substances; and, Ordinance 1997:12, Section 7, on biological substances.

delay. The same applies with regard to defects or damage on raw material, products under work or finished products." It can be said again (see section VI) that this stipulation probably reflects the prevailing attitude among employers. It probably also reflects the law of the land.

An archetypal situation where an employee is under an obligation to notify his/her superiors occurs when the employee knows that other employees are stealing from the employer. The Labour Court has acknowledged that the employee here is in a difficult position, because denouncing fellow employees is necessarily a sensitive thing. However, the principle is clear, so employee qualms can serve only as a mitigating factor. In a 1981 ruling, the Court nevertheless found that the employer did not have just cause to dismiss a truck driver despite the fact serious criticism was warranted.[17] On one occasion, the driver had allowed a fellow employee to load goods on a truck to be driven by him. During the drive, the employee realized that the goods had been stolen from the employer. The driver nevertheless allowed the fellow employee to unload the stolen goods at the end of the drive. The driver did not inform the employer. On a second occasion, the driver had allowed another fellow employee to steal goods from the load on the truck. The goods stolen had only insignificant value, around the equivalent of US $15. The employee did not report the incident to his superiors. The Court sternly criticized the driver, but came to the conclusion that dismissal was not justified. Several arguments were presented to support that conclusion. The employee did not personally profit from the thefts and had taken no part in planning them. A somewhat mitigating factor was that the employee who stole from the goods loaded on the driver's truck was the son of the owner of the employer company. Furthermore, the employee had an unblemished work record and had been employed for over five years. One of the two management members on the bench dissented.[18]

Another archetypal situation when the employee is under a firm notification obligation is where the employee knows that supervisors falsify records to make their departments look better than they actually are. The situation is delicate for the employee and fraught with danger of retaliation from the falsifying supervisors. Still, the principle is clear and unequivocal. Higher management representatives must be notified. The Labour Court has never squarely faced this sit-

17. Labour Court ruling 1981, No. 14.

18. *Id.*

uation, but there can be no doubt that the Court would be very strict on an employee who turns his/her head away.

Case law regarding the obligation to notify is scarce. As was pointed out in section IV, disputes concerning the employee's right to criticize the employer or conditions relating to the workplace are rather common. A common employer position in such cases is that the employee should have notified the employer first and awaited corrective measures prior to taking any other step. In these cases, the Labour Court is not called upon to define the notification obligation *per se*, but the Court nevertheless provides guidelines. Case law demonstrates that the more serious the unacceptable conditions are *per se*, for the employee concerned, or for the entire employee community, the more likely it is that the Labour Court will accept sidestepping the employer. In one leading case, the Court said the following: "At least if very serious breaches of existing rules or otherwise truly unacceptable conditions are not involved, the employer must . . . be considered to have a legitimate claim that the employee attempts in a serious way to point out to the employer or its representative the unacceptable conditions that the employee considers necessary to remedy, before turning to the government agency concerned."[19] This means that the Court supports the employer position in principle. Case law also demonstrates that the Court often decides for the employer on matters of principle, but holds for the employee in the case at hand.

VIII. Integrity

Employees are to behave in a way that protects their integrity. Of particular importance in this respect is that employees must not engage in corrupt practices. The taking or offering of bribes is at the heart of corrupt behaviour. Rules in the Criminal Code make such practices criminal offenses.

Extreme caution is expected from employees. Case law is very strict indeed. Generally speaking, gifts—received or offered—related to the performance of employment duties must not exceed the symbolic. Even a bottle of whiskey puts the employee at risk, regardless of whether the employee offers or accepts it. Calendars, ballpoint pens, a box of chocolate, or a bunch of flowers are usually acceptable, but anything beyond that is risky. Infringements will often lead to disciplinary transfer or dismissal, regardless of whether criminal charges are brought. Employees in medical care services are particu-

19. Labour Court ruling 1986, No. 95. *See also*, Labour Court ruling 1994, No. 74.

larly exposed to receiving gifts from grateful patients. By the same token, this makes them especially susceptible to disciplinary measures.

IX. Participation in Legal Proceedings Against the Employer

Participation by an employee in legal proceedings against the employer for matters not related to the employee's personal status as an employee is potentially dangerous for employees. Participation is like an invitation for the employer to retaliate, as it were.

Employees can become involved in litigation either as a plaintiff or as a witness. Issues relating to such participation would be brought to the attention of the courts if employees alleged employer retaliation against them for such participation. However, to the best of my knowledge, no such cases are reported. The Labour Court has never been called upon to rule in a suit of this kind, at least since the advent in 1974 of employment protection legislation. As an issue, it has attracted virtually no attention in Sweden.

Employee participation as witnesses in trials before the Labour Court is very common. To prove a case, the parties in most trials rely to some extent on testimony by witnesses. Both sides often call employees, depending on what they have to say. This often means that employees testify as witnesses against employers. Subsequent retaliatory action by the employer might seem guaranteed. However, it is virtually unheard of.

Still, the question remains what the legal response to retaliation would be. Following are some examples to illustrate:

An employee works for a toy manufacturing company. Suppose that a child of the employee is injured by a defective toy manufactured by the employer. Suppose further that the employee brings suit against the employer. Finally, suppose that the employee is not motivated by any other cause than the fact that the employee seeks redress for the injury to the child. Can the employer retaliate against the employee? Would dismissal be for just cause? Most definitely not! To bring a bona fide lawsuit is a human right. Reference can be made in this respect to Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Suppose instead that the employee is called as a witness in a suit brought by someone else, a friend or a stranger, against the employer. The situation might be that the plaintiff has been injured by a faulty truck belonging to the employer or by some negligent act by a fellow employee. While appearing before the court, the employee is called

upon to state "the truth, the whole truth and nothing but the truth," and does, in fact, do exactly that. Can the employer retaliate against the employee? Would dismissal be for just cause? Most definitely not! Would the situation be different if the employee volunteers to witness? Most definitely not, provided that the employee has no other motive than to see justice done.

Several rules of general bearing apply in the witness situation. Bona fide testimony can never constitute disloyalty, however damaging the testimony is to the employer. Much to the contrary, to testify in a court proceeding is a civic duty under Swedish law.[20] Giving false evidence or suppressing the truth while under oath is perjury, a very serious crime indeed. It most definitely is not an excuse that the employee did so to protect the employer. The importance attached to the civic duty to testify as a witness is illustrated by the fact that it is generally held that an employee must not be denied time off to fulfill this duty before a court.

Another example: Suppose that an employee in the accountancy department is called to a Stock Exchange to be a witness in a proceeding involving the registration contract between the Exchange and the employer company. The proceedings concern the accuracy of employer financial reports on profits and the financial condition generally of the company. The accountant testifies truthfully. The testimony reveals serious deficiencies in company reports. Can the employer discipline the employee? Most definitely not! Deficiencies in this respect are serious offenses and in most instances criminal. As was pointed out in section IV, information about illegalities or truly unacceptable conditions is not protected information under Swedish law. Precisely because of that, retaliatory measures by the employer are not acceptable.

These model situations have certain traits in common. Most conspicuously, any retaliatory act by an employer would be in blatant violation of the law. Dismissal would constitute an egregious act on the part of an employer. It is more or less unthinkable in today's Sweden that an employer would do such a thing. An employer who contemplates retaliation against an employee would most certainly be strongly advised against doing so by the employer organization. Indeed, the employer organization would most certainly distance itself from any such action and not represent its member, the employer company, in subsequent legal proceedings.

20. Code of Procedure, Chapter 36.

X. Mixed Situations

Several forms of employee behavior do not squarely fit under any single aspect of employee loyalty. Some examples will be dealt with here. As was pointed out in section I, loyalty generally means to put the interests of the employer ahead of private interests, to accept that the employer enjoys exclusive rights, and to act in such a way as not to harm the employer.

An employee, while at work, might tell customers that they can buy certain products at lower prices somewhere else. Some customers follow the advice, some do not. What action, if any, can the employer take against the employee? There is no doubt that the employee is in breach of the loyalty obligation. Obviously, the employee cannot be said to be putting the employer's interest first, even if the information offered is accurate and true. The employer is entitled to reprimand the employee and call for a change of behavior. If the employee persists, a situation where there is just cause for disciplinary dismissal will occur. The situation will be the same if the employee tells customers that the quality of products sold is poor.

Will the situation change if the employee limits his/her comments to non-working hours? By and large, the answer is no. As was pointed out in section II, an employee is not free to behave at will during time off. The relationship of trust and confidence that must exist between employer and employee can be just as seriously undermined during time off as during working hours. If the employer is justified in considering that the necessary trust in the employee is fatally and irrevocably undermined, a situation of just cause for disciplinary dismissal is at hand. That will usually be the case only if correcting measures have failed.

In a 1982 case, the Labour Court considered an employee who had been summarily dismissed without notice for having acted disloyally.[21] The employee had slandered the company in front of two job applicants by saying that the company was in disorder and that problems could occur when salaries were to be paid. As a result, one of the applicants decided not to accept a company job offer. The Court nevertheless found for the employee. The reason was that the employee had no particular position of trust.[22]

In another 1982 case, the Court was faced with an employee in a high position in a company.[23] The employee had severely criticized

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21. Labour Court ruling 1988, No. 9.
22. *Id.*
23. Labour Court ruling 1988, No. 110.

the company on several occasions. He had said the management was incompetent and that the company had no future and did not intend to continue operations on the Swedish market. He had also advised company salespeople to look for work elsewhere. The Court upheld the company's decision to dismiss him. The extent to which the advice to company salespeople contributed to this outcome is uncertain.[24]

Far more serious for an employee is to let competitors of the employer company know about plans and new products of the employer company. The duty of confidentiality operates at full strength when it comes to information about anything related to employer plans and strategies, new products, or sales campaigns. The prohibition against competition also applies even if the employee does not disclose confidential information in order to compete personally with the employer. Obviously, the employee does not put the interests of the employer ahead of private interests, regardless of what those might be in a situation like this. Summary dismissal without notice is probably justified.

Disclosure of information about the financial situation of the employer company is also highly sensitive. An employee in the accountancy department who lets other employees know about the dire financial situation of the employer company puts himself at risk. This is so even if the information is correct and the employee does not intend to harm the employer company or to encourage other employees to leave a sinking ship. As was pointed out in section III, the employer enjoys the privilege of deciding what information is to be confidential. With regard to the flow of information inside a company, the employer is perfectly entitled to raise internal barriers and to compartmentalize the company. In other words, part of the employer privilege is to decide what information employees may divulge to fellow employees.

Work for a voluntary organization with goals that are not compatible, wholly or in part, with those of the employer company presents another situation. Suppose that an employee of a chemical company joins and becomes chairman of an environmental group. This group is involved in air pollution issues. It makes public an article on air pollution caused by chemical companies, including that of the employer company. The group advocates regulations that would be very expensive for all the companies concerned, including the employer company. Has the employer any cause for action against the employee?

A situation of this kind has never come squarely before the Labour Court. Judging from case law generally, the question is not all

24. *Id.*

that straightforward. On the one hand, voluntary work for a bona fide voluntary organization is a basic civic right. Employees are not excluded from that right. Stipulations in agreements barring employees from membership and active participation would by and large be null and void. On the other hand, employees do have a duty to put the employer's interests ahead of personal interests (see section I). Two interests clash here. My suggestion would be that the Labour Court proceed in the same manner as it does when deciding whether an employee has stepped beyond the permissible limits to criticize the employer and disclose information about the workplace (see section IV). This means that there is much room for active participation in voluntary organizations, provided, inter alia, that the employee does not act out of any anti-employer feelings or purposes. If the employee uses the membership as a disguise for attacks on the employer—whether for political, personal or other reasons—disloyalty occurs. Besides, there are many bona fide voluntary organizations pursuing a wide variety of causes, so the employee can easily find an organization that allows him/her to vent personal opinions and personal passions without necessarily joining an organization that combats the goals of the employer company. An overall assessment is called for. Here, as in the case of employee criticism, no factor would *per se* be decisive.

XI. Concluding Remarks

The preceding discussion shows that the loyalty obligation is far-reaching, comprehensive and extensive. The discussion also indicates that employees enjoy much protection against employer actions for alleged breach of this obligation. How come? The legal answer is that employment protection against disciplinary dismissal, with or without notice, is substantial indeed. Dismissal is seen as a last resort. Only if everything else fails is there just cause for dismissal. Employers are under a far-reaching obligation to try to solve problematic situations short of dismissal. Corrective action is necessary in most instances. The employer must inform the employee that dismissal might be necessary unless the employee changes his/her behavior for the better. Remedial action is necessary as well in most instances. The employer must try to help the employee change. In situations involving loyalty, such action would primarily be educational, one supposes. The employers must investigate whether the employee can be transferred to some other position and, if that is possible, also in fact transfer the employee rather than resort to dismissal.

It is true that employers face far fewer obligations of this nature when employee misbehavior is serious. Indeed, the employer is re-

lieved of all obligations if employee misbehavior is egregious. Breaches of the loyalty obligation are often serious, sometimes even egregious, as in situations of open competition with the employer. However, case law amply illustrates that the Labour Court has a tendency to find for the employer on matters of principle, but for the employee in the case at hand. And it is the case at hand that really counts. Or is it?