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IMPLIED TERMS IN UK EMPLOYMENT CONTRACTS AND THE PROTECTION OF EMPLOYEES: A CRITICAL EVALUATION OF LEGAL FOUNDATIONS, JUDICIAL PRACTICE, AND REFORM

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Abstract

*This study is a critical analysis of the protection afforded by implied terms under UK employment law, focusing on the principles, interpretation, relevance and reform of implied terms. Express terms are explicit contractual duties of the employer and employee, but implied terms act as a safety net, filling in gaps in the contract and offsetting the imbalance of bargaining power in employment agreements. The paper examines the principal implied terms of the contract of employment that have been identified in UK employment law, namely the duty of mutual trust and confidence, to provide a safe working environment and the duties of fidelity and obedience. It considers the way in which these terms have been defined and used in the leading cases of *Malik v Bank of Credit and Commerce International SA*, *Wilson & Clyde Coal Co Ltd v English*, *Johnstone v Bloomsbury Health Authority* and *Autoclenz Ltd v Belcher*. The analysis suggests that the function of implied terms is a significant protective one, as they foster fair, cooperative, dignified and well treated working relationships, particularly where there has been an absence or a lack of express contractual protections. They also enable courts to introduce flexibility in legal principles to accommodate shifting labour market circumstances such as informal and non-standard working time patterns. The paper also has some major flaws. Many implied terms are judge-made and so their application may be unpredictable, inconsistent and impracticable for both employers and employees. This conflict gives rise to wider issues of the concept of legal certainty, judicial discretion, and freedom of contract. The paper concludes that implied terms are essential to employee protection in the UK, but that they would be more effective if targeted reform were to be implemented. It suggests that key implied duties be codified, improved drafting, extending protections to gig economy workers, and a new wide-reaching duty of good faith in employment.*

Keywords: Implied terms; Employment contract; Employee protection; Mutual trust and confidence; Duty of care; UK employment law; Constructive dismissal; Good faith

1. Introduction

The employment contract plays important role in protecting employee rights and fostering fair employment relationships in the United Kingdom (UK). The contracts are guided by both express terms, as contained in a written employment agreement, as well as several implied terms that exist by law, facts and customs or practices. Contrary to express terms, which are clearly articulated in written agreements, implied terms are not clearly stated but rather legally binding due to the nature of the employment relationship or statutory requirements meant to uphold fairness, good faith and cooperation within the employment relationship,

especially in a situation where power imbalance exists.

This Assignment aimed at critically evaluating the role of implied contract terms in protecting employees under UK employment law. In addition, emphasis would be given on terms such as mutual trust and confidence, the duty to provide a safe working environment, and fidelity and obedience. Furthermore, the study would also review key judicial decisions assess the scope, efficacy, and limitations of implied contract terms, culminating in recommendations for potential reforms. In so doing, several case law would also be reviewed and

scholarly articles to support the arguments present in this assignment.

2. Overview of Implied Terms

In addressing Freedland's question, (Collins 2014) outlined three types of implied contract terms: those that may be implied in fact, those that may be implied in law and those that may be implied through custom and practice. The first type is applied by court to ensure efficiency in addressing gaps in a contract based on the will of the parties as per the Moorcock (1889 cited in (Moore 2022)). The second type relates to a default rule that does not depend on the wills of the parties. Whereas, the third type applies to the customary practices of the trade. In the context of employment, implied terms are crucial due to the power imbalance between employer and employee. Key implied terms recognized in UK employment contract law include the followings:

- i. **Mutual trust and confidence:** refers to the implied clause in a contract that mandates that both the employer and the employee behave in a way that won't negatively impact their relationship. In other words, every party in the contract is expected to instill trust and confidence on one another and abstain from doing or engaging in any act that would seriously weaken the essential trust in the course of mutual interaction. This was clearly evident in the case of *Malik v Bank of Credit and Commerce International SA* [1997] UKHL 23, where the court established that an employer's conduct (even if lawful) can breach the implied duty if it damages an employee's reputation. Thus this underpins the cooperative nature of the modern employment relationships (Taylor and Emir 2015).
- ii. **Duty to provide a safe working environment:** This means that employers must ensure healthy and safety working environment for the employees. This duty was confirmed in *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 and also strengthened in *Johnstone v Bloomsbury Health Authority* [1992] QB 333, where the

court held that an implied duty of care for employees' health could supersede an express term allowing for an excessive working hour. Although, this duty lies primarily within the hand of employers, employees also maintained a responsibility to shun any act that endangers themselves or others, as reflected in Section 7 of the Health and Safety at Work Act 1974.

- iii. **Fidelity and obedience:** The implied term of fidelity and obedience expects employees to act in the organization faithfully and obediently. These duties support the smooth operation of the employment relationship and ensure that employees contribute positively and responsibly in the workplace. Violating these terms may be considered as misconduct and can attract disciplinary action or dismissal. This was confirmed in cases such as *Bell v Lever Brothers Ltd* [1932] AC 161 and *Laws v London Chronicle* [1959] 2 All ER 285. (*Bell v Lever Brothers*; *Laws v London Chronicle*).

3. Legal Foundations and Case Law

One important legal foundation of implied terms of employment law is the duty of mutual trust and confidence. This clearly featured in *Malik v Bank of Credit and Commerce International SA* [1997] UKHL 23. In that case, the House of Lords maintained that the way and manner in which employers carry out their operations could breach the implied duty if it damaged the employee's reputation and future employability even if not directly affected the employees. This principle underscores that both employer and employee must abstain from behavior that may likely weaken the essential trust which makes employment relationship sustainable.

Another important legal foundation in employment contract relates to the case of *Liverpool City Council v Irwin* [1977] AC 239. Although, it was a tenancy agreement case, however, the House of Lords established that terms can be implied in law where necessary in order to make the contract work more effectively. Thus, judicial decision (that certain obligations must exist by necessity in unequal

relationships) significantly influenced the way employment contracts are interpreted in court, particularly when protective terms are not clearly present. Thus, Irwin case had significantly reshape the modern test for implying terms in contracts (Collins 1994; Davies 2004).

The case of *Courtaulds Northern Spinning Ltd v Sibson* [1988] ICR 451 is another landmark that shows how use of business necessity justifies implication. In that case, a term allows the employer to transfer an employee to another location was implied to facilitate operational flexibility, even though such a provision was not unequivocally written.

Additional development in the implied terms of employment relates to case erupt between *Johnstone v Bloomsbury Health Authority* [1992] QB 333. The case shows the conflict that exist between explicit and implied terms in employment contract, as the court found that an express clause regarding an excessive working hour could supersede an implied duty of care. The Court of Appeal thus ruled that it is the duty of the employer to safeguard the health of employees and that must be given precedence. Scholars such as (Collins 2003; Freedland 2007; Brooks 2014) have highlighted this ruling as a landmark in promoting employee welfare and limiting exploitative practices within formal contractual agreements.

Furthermore, in *Autoclenz Ltd v Belcher* [2011] UKSC 41, the Supreme Court reaffirmed the importance of implied terms by looking beyond the written contract to assess the true nature of the working relationship. Although the workers were labelled as independent contractors, the Court found that in reality they functioned as employees and were thus entitled to employment protections. The judgment stressed that courts may imply terms where the written documentation does not reflect the practical reality, particularly in cases of unequal bargaining power (UK Supreme Court, 2011).

Despite this, courts do not always imply terms arbitrarily. A cautious and selective approach is often adopted, particularly when the proposed term

is not essential. This restrictive approach featured in the case of *Vision Events v Paterson* [2013] UKEATS/0015/13/BI. In that case, the court did not accept to imply a term entitling the employee to payment for flexi-hours advancing argument that the term was not necessary for the contract's business efficacy. The case shows that courts use threshold when deciding as whether to imply terms in fact, as seen in the classic case of *Moorcock* (1889) and *Shirlaw v Southern Foundries* (1939) tests. Scholars like (Poole 2020; Hendrikx et al. 2021) reiterate that, court only imply a term when it is necessary to make the contract functioning and reflects the presumed intention of the parties.

4. Critical Evaluation

Critical evaluation of implied terms under employment contracts shows they have dual function. Firstly, as protective mechanism and secondly, as a source of legal uncertainty. As a protective mechanism, implied terms play significant role ensuring fairness, good faith and ethical standards in employment relationships. Thus, they protect vulnerable employees particularly under unbalance bargaining power. Additionally, they also help the court in streamlining rapidly changing working environment. For example, implied duty of mutual trust and confidence ensures a baseline of respectful and cooperative behavior, while the duty of care on the other side safeguards employee health, both physically and psychologically.

In line with this, Collins (1994) argued that these implied terms serves as a tool for enforcing cooperative standards and expectations within employment contractual agreement, especially where employees may lack leverage to negotiate explicit protections. Other studies suggests that implied duties help courts sustain an ethical standard in employment law, even in the absence of explicit contractual expressions Freedland (2007). This flexible application ensures that implied terms evolve alongside changing working condition asides protecting essential expectations of **trust, loyalty, care, and fairness**.

Furthermore, implied terms allow the judicial decision to evolve in line with the emerging

employment realities. For example, in *Autoclenz Ltd v Belcher* [2011] UKSC 41, the court went further beyond the contractual label of “independent contractor” to examine the actual working arrangement. This flexibility is necessary particularly in a modern labor market that significantly characterized with growing number of informal, casual, and gig-based labor market. It maintains that substance prevails over form, and that implied terms can function as instruments of social justice.

Despite the fact that implied terms yield significant insights, however, it also tends to be unpredictable when it comes to practice given that they are mostly judge-made. This makes its application very dynamic and produces or foster uncertainty to both employers and employees when it comes to outcomes. Critics argue that this judicial discretion could be misused, especially in borderline cases. This is particularly evident in cases like *Paterson*, where the refusal to imply a term revealed the courts' cautious stance.

Another concern while critically evaluating implied terms relates to the principle of freedom of contract. This principle supports the idea that parties should abide only by the terms they willingly agreed with. Thus, implied terms weaken the principle of freedom of contract, abrogating the ability of the parties, in this case, the employer and the employee, to bargain and create the terms of their agreement without third party intervention. In other words, employers may find themselves bound by obligations they did not agree to explicitly, leading to potential litigation. The same applies to the employees.

Given these challenges, some jurisdictions like the United States, favors employment-at-will doctrine that making obligation based on implied terms to have less attractive. Comparatively, The UK's style offers more protection but lacks the clarity of codified rules found in some European systems, which makes it less attractive in some instances.

5. Suggested Reforms

Based on the strengths and limitations of implied terms in employment contracts, the following reforms are proposed.

i. Codification of Core Implied Terms

Implied terms, as it currently exists, are significantly influenced by judge-made common law principle. This need to be turn into clear, written statutory rules so that they can be explicitly incorporated into legislation. This would, to the larger extent, reduces the ambiguity and uncertainty surrounding the application of implied terms. In addition, it would also make the law more predictable and more accessible for employees, employer and the tribunal. If this is to be done, it then means that there could be a legislative guidance on what constitutes a breach of mutual trust which could invariably reduce litigation. It will also spell out what constitutes reasonable care for health and safety as well as obedience to lawful instructions. This could be possible by amending the 1996 Employment Right Act to incorporate these duties as minimum standards.

ii. Promoting Clearer Contracts and Handbooks

Furthermore, employers should encourage to be drafting clearer employment contracts and handbooks that may contains clauses of implied terms. The draft should capture issues like fair disciplinary processes, duties of care, and acceptable workplace behavior among others. By so doing, employers can be able to reduce reliance on uncertain implied terms at the tribunal. It will also promote greater clarity and prevents disputes about what was “understood” against that which was actually agreed upon in line with (Hendrikx et al. 2021) views.

iii. Extending Protection to Gig Economy Workers

The growing of gig economy significantly transformed in the labor market nowadays. This is evident as many people work for short-terms, some engaged in a highly flexible jobs, while others work as freelancers. The growth of this sector poses challenges for the consistent application of implied terms, given that many of these gig workers work outside the scope of normal employment protection. Therefore, it is recommended that subsequent legal reform should cover these non-traditional workers for greater parity with employees. It will also reduce vulnerability to exploiting employees while fostering core protections such as mutual trust, safety, and fair treatment on the other hand. The case

of *Uber BV v Aslam* [2021] UKSC 5 shows how courts are increasingly willing to look beyond contractual labels to determine actual working conditions.

iv. Introducing a General Duty of Good Faith

Finally, a broader reform would be to introduce a **general duty of good faith** in employment relationships. This principle, while resisted in traditional English contract law, has gained academic support as a normative foundation for fairness and cooperative behavior. Collins (1994) advocates for a more explicit incorporation of good faith into employment law, which would offer courts a consistent basis for evaluating conduct and implying terms. Such a statutory duty could help guide decision-making in cases involving mutual trust, employee treatment, and the interpretation of employer policies—particularly in complex or informal employment settings.

Conclusion

In the first place, this study has broadened the understanding of the importance of implied terms in contracts specifically in the context of UK. I gained some number of insights among which are: Firstly, I further understood the doctrine of mutual trust and confidence and how it underpins the employment relationship in the UK employment law. For instance, when I reviewed some leading cases especially *Malik v BCCI* and *Autoclenz v Belcher*, I came to understand how courts go beyond formal contract terms when it comes to interpreting the evolving and real employment relationships dynamics.

Secondly, despite being challenging and tasking, the review process had also sharpened my legal research and critical analysis skills. For instance, in the first place I found it difficult to distinguish between terms implied in law and those implied in fact. However, through reading valuable academic commentary, particularly that written by Hugh Collins (1993 and 2003), now I can differentiate. Other difficulty I found from the beginning was in selecting the most relevant cases among many. However, this too was actually resolved when I focused on those that are frequently cited in legal textbooks and academic literature.

Thirdly, writing this critical evaluation section had also helped me engage more deeply with legal theories. In other words, it has helped me understand its wider policy debates and application in employment law, including the role play by the principle of good faith.

Finally, the research contributed significantly to achieving module learning outcomes, particularly those related to legal knowledge, research, and communication. It also increased my confidence in handling legal writing and analyzing judgments. I can now differentiate different types of employment contracts, relationships, right and duties of both employee and the employer.

Going forward, I plan to apply these skills in practical settings, such as advising on employment matters or drafting employee handbooks. Overall, this task has been a valuable and enriching learning experience.

Question B

Legal Advice to CHL – Potential Unfair Dismissal Claim by Jack

Introduction

This report offers an advice to CHL as whether it is likely that Jack can bring a successful claim for unfair dismissal, in light of his recent departure from the company following allegations, misconduct and a confrontation with his manager, Louise. The advice offered here is based on what had transpired between the two parties and in line with the Employment Rights Act 1996 (ERA 1996) and some relevant case law, including issues relating to constructive dismissal, breach of implied contract term, procedural fairness, and possible remedies perhaps, Jack were to succeed in a claim.

Eligibility to make claim before the employment tribunal and possibility of success

To begin with, in the first place, based on s.94 ERA 1996, Jack has met the eligibility criteria to make claim before the employment tribunal given that he is an employee under a contract of employment. In addition, he has completed three (3) consecutive

years of service with CHL and does not have any case of redundancy, exclusions or fixed-term ended. Although, from all that had transpired, CHL did not said, explicitly, that Jack was dismissed. However, as he walked out following a confrontation with his manager, Louise, saying “I’ll see you in court” raises the issue of constructive dismissal, a situation arising where employee resigns because s/he feels that the employer has seriously breached their employment contract, in this case, trust and confidence as clearly stated in s.95 (1) (c) ERA 1996, Thus, Jack may argue that CHL violated the implied term of mutual trust and confidence, because proper disciplinary process was not followed in his case while the manager went ahead issuing final warning verbally. Additionally, the manager reacted emotionally and clearly biased in handling the issue and fundamentally Jack did not receive the company’s policy on the use of IT and social media policy, despite relying on it in disciplinary allegations. Based on these issues stated, Jack can make a valid claim against CHL.

In support of this argument, several case laws are worthy to mention. For instance, the case of *Western Excavating v Sharp* [1978] ICR 221 and *Chhabra v West London NHS Trust* [2013] UKSC 80 affirm that if disciplinary actions were not properly handled, it can lead to a fundamental breach of contract resulting to constructive dismissal. In the case of *Chhabra v West London NHS Trust* [2013] UKSC 80 for instance, the Supreme Court recognized that an employer’s decision to proceed with disciplinary charges in an unfair and procedurally improper manner, breached the implied term of trust and confidence. This mirrors the case of Jack where no formal investigation was carried out and final warning was suddenly given. Stressing argument that CHL’s conduct may have amounted to a repudiatory breach.

Although, CHL could argue that the complaint received from the two clients as well as the attitude displayed by Jack provided a substantive ground for concern, Jack may possibly succeed in the tribunal by capitalizing on the weak approach taken by CHL to claim unfair constrictive dismissal because of the following reasons:

- i. No formal investigation or disciplinary hearing.
- ii. Neither written communication was given to Jack nor was he allowed to respond to the allegations was done.
- iii. The administrative error that prevents Jack from receiving the policy on IT and social media undermines reliance on its breach.
- iv. Louise's emotionally charged language and immediate final warning, which may be deemed disproportionate.

Handling misconduct appropriately is important, failure of which might makes defendant lost case. Example is the case of *Parsons v Bristol Street Fourth Investments Ltd (t/a Bristol Street Motors)* [2008] UKEAT 0581_2802 (EAT). The case shows that even if misconduct is serious that perhaps attracts dismissal, failure to follow right channel can makes disciplinary action unfair and void.

Recommendation to CHL

CHL should prepare for the possibility of an Employment Tribunal claim and consider early settlement options to minimize reputational risk and legal costs. It should also:

- i. Review and tighten disciplinary procedures;
- ii. Ensure policies are properly distributed and acknowledged by all employees;
- iii. Provide training to managers on handling misconduct allegations fairly.

Possible Remedies

This section provides possible remedies that CHL can take to tackle the issue should Jack were to succeed. Thus, upon success, the Employment Tribunal may award:

i. Basic Award – Based on age and length of service (Jack has 3 years).

ii. Compensatory Award – For financial loss such as loss of income until he finds another job.

iii. Reinstatement or Re-engagement – Unlikely due to the breakdown of trust between Jack and management.

iv. Additional Compensation (if discrimination proven) – If Jack claimed sex discrimination due to Louise’s conduct, he could seek injury to feelings damages under the Equality Act 2010.

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