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Buckland v Bournemouth University Higher Education Corp.

Citation for published version:

Cabrelli, D 2011, 'Buckland v Bournemouth University Higher Education Corp.' *Modern Law Review*, vol 74, no. 1, pp. 122-34., 10.1111/j.1468-2230.2010.00839.x

Digital Object Identifier (DOI):

[10.1111/j.1468-2230.2010.00839.x](https://doi.org/10.1111/j.1468-2230.2010.00839.x)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Author final version (often known as postprint)

Published In:

Modern Law Review

Publisher Rights Statement:

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***Buckland v Bournemouth University Higher Education Corp:* Statutory Constructive Dismissal and the Implied Term of Mutual Trust and Confidence**

David Cabrelli

Abstract

The decision of the Court of Appeal in *Buckland v Bournemouth University Higher Education Corp* [2010] EWCA Civ 121; [2010] ICR 908; [2010] IRLR 445 is one which has ramifications for the common law and statutory regulation of the contract of employment. However, its significance does not end there, since it offers wider insights into the relationship between common law and statute law, as well as the English and Scots law of contract generally.

INTRODUCTION

In the case of *Buckland v Bournemouth University Higher Education Corp*,¹ (*Buckland*), the Court of Appeal handed down judgments which were of significance for the doctrines of general English contract law, the law governing the common law implied term of mutual trust and confidence – which is a key component of the contract of employment – and the law of statutory constructive dismissal which forms part of statutory employment protection legislation in the UK. The decision also raises questions about the relationship between the common law and employment protection legislation, as well as the relevance of the contract of employment being relational in nature. Overturning the earlier decision of the EAT,² the leading judgment was delivered by Lord Justice Sedley. The decisions of Mr Justice Underhill in the EAT in *Sheffield Black Drugs Service v Nagi*³ and *Burton, McEvoy & Webb v Curry*⁴ followed very shortly thereafter and supplement the decision of the Court of Appeal, putting some of the points decided into sharp focus. One of the two objectives of this piece is to draw the reader's attention to three aspects of the decision in *Buckland* which are particularly deserving of comment. The second is to consider the implications of two of those three factors for our

understanding of the likely evolution of the content of the implied term of mutual trust and confidence and the law of statutory constructive dismissal.

THE FACTS AND THE MATTERS DECIDED IN BUCKLAND

Buckland concerned a dispute between a professor of environmental archaeology and his employer, the University of Bournemouth, over the unauthorised re-marking of exam scripts. Two colleagues of the professor had re-marked the scripts which he had failed and altered the gradings which had been awarded. The general trend was to alter the marks in an upwards direction so that some of the students who had failed were subsequently passed. Moreover, Professor Buckland's marking practice was also criticised. After an independent internal review produced a report which exonerated the professor, he resigned and claimed that he had been constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act (ERA) and that his dismissal was unfair contrary to section 98(4) of the ERA. Section 95(1)(c) of the ERA provides as follows:

an employee is dismissed by his employer if ... the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Pursuant to the decision of the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp*,⁵ if an employee is able to show that the employer's conduct amounted to a repudiatory breach going to the root of the contract of employment, this will be sufficient for the employee to establish constructive dismissal under section 95(1)(c) of the ERA. Subsequent to the decision in *Western Excavating*, it was held that a fundamental breach of an express term, or a common law implied term, of the contract of employment by the employer would be considered sufficiently serious to entitle the employee to a finding of constructive dismissal.⁶ Since the authorities dictate that a breach of the common law implied term of trust and confidence is automatically repudiatory,⁷ the effect is that such a breach will amount to a statutory constructive dismissal.⁸ The next stage for the employee is to satisfy a tribunal

or court that the constructive dismissal was unfair under section 98(4) of the ERA. As a means of evaluating the fairness of an employee's dismissal under section 98(4) of the ERA, case law dictates that an adjudicator should ask whether the substance of the employer's decision to dismiss and the procedure it adopted prior to dismissal, fell within the range of reasonable responses open to reasonable employers.

The professor sought to show that he had been constructively dismissed on the basis of a breach of the implied term of mutual trust and confidence. The Court of Appeal ruled that the employer's actions rendered it in repudiatory breach of the implied term of mutual trust and confidence and that the professor had been constructively dismissed. The employer's report which cleared the professor of incompetence did not operate to rectify the employer's repudiatory breach of the contract of employment. It was also held that the professor's dismissal was unfair and so he was entitled to be paid compensation under section 123 of the ERA.

THREE POINTS TO NOTE

Three points emerge from the decision in *Buckland*. First, it was held that whether an employee has been constructively dismissed in terms of section 95(1)(c) of the ERA is to be determined by a court or tribunal in accordance with the traditional approach enunciated in *Western Excavating*.⁹ Lord Justice Sedley directed employment tribunals to enquire whether there had been a repudiatory breach of contract on the part of the employer in accordance with an objective standard of review, rather than a range of reasonable responses test.¹⁰ Indeed, LJ Sedley paraphrased the words of Mr Justice Underhill in the case of *Amnesty International v Ahmed*¹¹ when he stated that it was 'unhelpful to introduce into the concept of constructive dismissal a conceptual tool [such as the range of reasonable responses test] devised for an entirely different purpose.'¹² The 'entirely different purpose' being referred to was, of course, the appropriate test of 'reasonableness' for the purposes of ascertaining whether the 'dismissal' of an employee in terms of section 95(1) of the ERA was unfair under section 98(4) of the ERA. Since it is settled law that a breach of the common law implied term of mutual trust and confidence will automatically amount to a repudiatory breach of contract,¹³ the outcome of

Buckland is that an adjudicator must apply an objective level of scrutiny where a claim that there has been a breach of the implied term is raised by an employee in the common law courts as a means of attaining damages or as a ground for claiming statutory constructive dismissal in an employment tribunal in terms of section 95(1)(c) of the ERA. To that extent, orthodoxy has been restored to the law of statutory constructive dismissal. The effect of Sedley LJ's judgment in Buckland is that the decisions of Lady Smith in *Abbey National v Fairbrother*¹⁴ and *Barratt v Accrington and Rossendale College*¹⁵ and Mr Justice Elias (as he then was) in *Claridge v Daler Rowney Ltd*¹⁶ have been 'discredited' in the words of Mr Justice Underhill in *Sheffield Black Drugs Service v Nagi*,¹⁷ since in *Abbey National*, *Barratt* and *Claridge*, it had been held that a range of reasonable responses test should be applied to the employer's conduct in order to evaluate whether there had been a constructive dismissal.

Secondly, Sedley LJ's judgment in *Buckland* suggests that it is unsound to treat the implied term of mutual trust and confidence as constituting two separate limbs which must be approached in terms of separate sequential steps, ie whether (i) the employer's conduct was calculated to destroy or seriously undermine the employer/employee relationship of trust and confidence and (ii) the employer had reasonable and proper cause for its conduct. Instead, these two limbs should be conceived of as being intertwined, mutually reinforcing each other. Otherwise, as argued by the writer earlier in another journal, treating them cumulatively would amount to 'a rather artificial exercise importing unwarranted rigidity into the adjudicator's task'.¹⁸

The rejection of an inflexible, sequential approach is implicit in Sedley LJ's reference in *Buckland* to the continued relevance of the concept of 'reasonableness' as being 'one of the tools in the Employment Tribunal's factual analysis kit',¹⁹ whilst recognising that it will be of only some significance in establishing trust-destroying conduct on the part of the employer.²⁰ This is a point which is drawn out much more lucidly by Mr Justice Underhill in the case of *Burton, McEvoy & Webb v Curry*.²¹ Mr Justice Underhill explained that:

[a]lthough the Malik term is not equivalent to a term simply that the employer will behave reasonably, nevertheless in deciding whether it has been breached it will generally be relevant to consider whether the conduct complained of was reasonable: if it was, the employer will generally have 'reasonable and proper cause' for it, and, if it was not, that fact is likely to be at least material to the question of whether it was such as to destroy or seriously damage the relationship of trust and confidence between employer and employee.²²

The notion that a more elastic, as opposed to mechanical approach, should be applied towards limbs (i) and (ii) above accords with Brodie's conceptualisation of both strands as functioning on two different, yet mutually connected levels, in the sense that (i) is concerned with substantive fairness, whereas the reasonable and proper cause strand (ii) acts as a plank on which the procedural fairness of the process leading up to the employer's trust-destroying conduct (ie the constructive dismissal in a section 95(1)(c) ERA claim in the employment tribunal) can be assessed.²³

Finally, in *Buckland* it was held that as far as English law is concerned, it is impossible for a party in repudiatory breach of the contract of employment to cure or rectify that breach by his/her unilateral actions.²⁴ The Court of Appeal was not prepared to disturb general contractual principles of English law. Therefore, if the conduct of an employer destroys or severely undermines mutual trust and confidence and there is no reasonable and proper cause for that conduct, a repudiatory breach of contract arises which is incapable of being expunged at the behest of the employer alone. Instead, the employee has an option and it is over to him/her to accept the repudiation, terminate the contract and claim constructive dismissal under section 95(1)(c) of the ERA or to affirm the contract, whereupon the contract of employment continues. For example, in *Buckland*, where the professional integrity of the professor had been undermined by colleagues who had arranged for exam papers which he had corrected to be re-marked without authorisation from the board of examiners, there was no scope for the employer to ascribe legal significance to a subsequent internal report which vindicated the employee's original marking. The subsequent internal report did not function to cure the repudiatory breach which had been constituted by the undermining of the employee. However, the Court of Appeal did indicate that the employer's subsequent conduct may serve to invite the employee to

affirm the contract. In such circumstances, the signal was despatched to employment tribunals that they would have the power to ‘take a reasonably robust approach to affirmation’ in the sense that the employee will have a limited period of time to accept the repudiatory breach, after which the employee will be presumed to have affirmed.²⁵

STATUTORY CONSTRUCTIVE DISMISSAL AFTER BUCKLAND

Inherent in the statutory concept of constructive dismissal lies a tension which is captured in terms of Beatson's reference to the ‘oil and water’ relationship between statute and the common law.²⁶ This is the notion which represents the traditional orthodoxy espoused by English law²⁷ that the common law and statutes (such as the ERA) constitute two independent layers of regulation, and that the predicates on which each are legitimized are divergent and wholly unrelated. The two shall not mix and cross-fertilization is rejected, since legal evolution by analogy with the other may lead to cross-contamination. When examined in light of this conceptual debate and other key decisions of the courts and the EAT, the decision in Buckland has implications for the approach which employers should tactically adopt towards the defence of a statutory constructive dismissal claim. Indeed, those implications owe at least some of their existence to the somewhat beguiling interplay between the common law and statute, bearing in mind that in fleshing out the meaning of the statutory concept of constructive dismissal, contrary to the orthodoxy described above, the judiciary have specifically opted to harness common law concepts in aid of interpretation.²⁸ Furthermore, a ‘feedback’ dynamic has been generated in terms of which the content of the common law has developed by analogy with statutory employment rights.²⁹

With this general point in mind, it is submitted that post-Buckland an employer has two defences to a claim that its conduct amounted to a breach of the implied term of mutual trust and confidence (1) amounting to a statutory constructive dismissal under the ERA or (2) conferring a right to damages in favour of the employee in the common law courts. First, the employer may defend the claim by demonstrating that it had reasonable and proper cause for acting, or omitting to act, in a way which functioned to destroy or severely undermine trust and confidence in the employment

relationship. Secondly, since a constructive dismissal claim is predicated on the contention that there has been a repudiatory breach of the common law contract of employment, the notion of reciprocity of obligations which is a fundamental component of the law of contract applies. The question is whether the notion of reciprocity travels such a distance that it is open to the employer to defeat an employee's constructive dismissal claim by demonstrating that the employee had committed an anterior breach of the mutual trust and confidence implied term or some other implied term in a manner which was repudiatory? The response to this question can only be proffered by resorting to contractual principles, relying as section 95(1)(c) of the ERA does on the general law of contract. Therefore, when the issue arose in the recent Scottish case of *Aberdeen City Council v McNeill*,³⁰ it was incumbent on Lady Smith to apply the general principles of Scots contract law. Her Ladyship decided that where there has been such an anterior breach, the employee will have no right to rely on the employer's subsequent breach of the implied term and his/her constructive dismissal claim will be dismissed. This proposition affords the employer a further defence to a constructive dismissal claim which is grounded on a breach of the implied term of mutual trust and confidence. A similar result was reached in *RDF Media Group Plc v Clements*.³¹

However, the approach in *Aberdeen City Council* would appear to be misconceived, since it is by no means correct to say that Scots law directs that a party in anterior material breach is disentitled from exercising his/her rights under a contract where the counterparty is also in material/repudiatory breach (eg by electing to sue for damages for breach or by electing to accept the repudiation and rescind/terminate the contract). Indeed, the Scots authorities cited for such a proposition are arguably no longer good law³² and/or taken out of context, since in the case of *Bank of East Asia Ltd v Scottish Enterprise*,³³ in a speech in the House of Lords (with which the rest of the House concurred) Lord Jauncey remarked that he 'did not consider that ... any material breach by one party to a contract necessarily disentitles him from enforcing any and every obligation due by the other party.'³⁴ Indeed, it is also unlikely that such a defence would be available in English law. In *Tullett Prebon plc v BGC Brokers LP*,³⁵ Jack J doubted the soundness of the reasoning in *RDF Media Group* and citing *Chitty on Contracts*,³⁶ stated 'if there is a breach of a contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in

being and may be terminated by the first party if the second party has himself committed a repudiatory breach of the contract.³⁷

It should not be overlooked that it is also open to the employer to contend that although its conduct was sufficiently serious to result in a constructive dismissal of the employee in terms of section 95(1)(c) of the ERA, nevertheless it was substantively or procedurally fair in terms of the range of reasonable responses test applicable under section 98(4) of the ERA.³⁸ Technically, this is not a defence to a claim that an employee has been constructively dismissed, but rather applies to negate the employee's contention that the constructive dismissal was unfair. Of course, it would be a formidable challenge for an employer to convince a court or tribunal that its conduct in constructively dismissing an employee fell within the range of reasonable responses open to a reasonable employer, especially given the fact that at the earlier stage of determining whether there had been a constructive dismissal, the employer had failed to demonstrate that it had reasonable and proper cause for its conduct which destroyed or severely undermined trust and confidence.³⁹ This is a point which was made by Richardson J in *Nationwide Building Society v Niblett*⁴⁰ and Mr. Justice Underhill in *Burton, McEvoy & Webb v Curry*.⁴¹ However, that is not to say that it is impossible, as exemplified by case law such as *Savoia v Chiltern Herb Farms Ltd*,⁴² *Industrial Rubber Products v Gillon*⁴³ and *Logabax v R H Titherley*,⁴⁴ three cases which expressly rejected the contention that a constructive dismissal inevitably would be automatically unfair under the then identical equivalent of section 98(4) of the ERA.

The decision in *Buckland* also has implications for the maintenance of the employer's reasonable and proper cause defence to a claim that its conduct undermines trust and confidence. As noted above, an employer is entitled to argue that its actions in constructively dismissing an employee fell within the range of reasonable responses for the purposes of evaluating the substantive or procedural fairness of the dismissal under section 98(4) of the ERA. Since that is the case, one might argue that the effect of *Buckland* and *Burton, McEvoy & Webb* is that the application of the reasonable and proper cause strand of the implied term of mutual trust and confidence at the earlier stage of determining whether there has been a constructive dismissal under section 95(1)(c) of the ERA appears somewhat anomalous. It would appear to offer an employer a further, yet unwarranted,

bite at the 'reasonableness' cherry on which to resist liability, since a 'reasonableness' evaluation operates first in the context of section 95(1)(c) and subsequently pursuant to section 98(4). This calls into question the desirability of preserving the employer's defence of reasonable and proper cause in the context of a constructive dismissal claim which is predicated on a breach of the implied term of mutual trust and confidence. Another factor provides support for the excision of the defence in the context of the implied term of mutual trust and confidence. As noted by Brodie, the reasonable and proper cause defence which is housed within the obligation of mutual trust and confidence itself is concerned with the achievement of procedural justice in the sense that part of its function is to ensure that the processes which are applied in connection with managerial decisions affecting employees are inherently fair and transparent.⁴⁵ If that is correct, then it means that two distinct conceptions of procedural justice are in play where a constructive dismissal claim is premised on a breach of the obligation of trust and confidence, ie within the fabric of the implied term itself and assuming that a repudiatory breach and constructive dismissal is established, then subsequently for the purposes of establishing the procedural fairness of the constructive dismissal under section 98(4). One must query whether it is conceptually coherent for an adjudicator to undertake two separate reviews of the procedural fairness of the process leading up to the constructive dismissal of the employee in the same case. Therefore, at a more general level, perhaps it would be more rational to remove the reasonable and proper cause limb from the content of the implied term.

However, despite the attraction of such a development for the purposes of injecting an element of coherence into the law of statutory constructive dismissal, there are considerable impediments to the rejection of the reasonable and proper cause defence. Depriving the employer of it could mean that a positive act of suspension or putting an employee on garden leave⁴⁶ automatically amounts to a breach of the implied term of mutual trust and confidence. Recent examples include *Gogay v Hertfordshire County Council*⁴⁷ and *Milne v Link Asset & Security Co Ltd*.⁴⁸ and in the case of *TFS Derivatives Limited v Morgan*,⁴⁹ Cox J in the High Court recognised that an enforced period of garden leave by the employer may amount to trust-destroying conduct. Since the employer's reasonable and proper cause defence would no longer exist, the automatic outcome of a suspension or an instruction to take garden leave would be that there had been a repudiatory breach and the

employee would be taken to have been statutorily constructively dismissed or would be entitled to damages in a common law court. Therefore, in order to ensure the reasonable and proper cause defence no longer presents a challenge for the law of statutory constructive dismissal, rather than remove it outright, an alternative way of proceeding would be to limit its preservation to the situation where it is invoked by an employee as a means of claiming relief in the common law courts. However, if the defence was removed in the context of statutory constructive dismissal, but retained in the case of a common law claim, the danger is that the law would be open to the charge that it was intrinsically disjointed since the content of the implied term would vary, depending on the forum in which it was advanced as the basis for a claim, leading to a 'dual nature' implied term. It is submitted that the degree of doctrinal confusion generated by a dual nature implied term would be far greater and more insidious than the current difficulties caused by the existence of the reasonable and proper cause defence for the law of statutory constructive dismissal articulated above. This discourse feeds into the 'oil and water' debate about the relationship between the common law and statute, ie whether it would be conceptually coherent for section 95(1)(c) of the ERA specifically to adapt itself to such an extent that it travels in another direction from the original common law source.⁵⁰ Therefore, on balance, despite initial misgivings, the writer is of the view that there are compelling arguments in favour of the preservation of the reasonable and proper cause limb (ii) of the implied term from a doctrinal perspective. The end result is the current legal position, ie that limbs (i) and (ii) are assessed by a court and tribunal on the basis of an objective standard of review under section 95(1)(c) of the ERA for the purposes of a common law claim in the courts, whereas the overall fairness of the trust-destroying conduct in repudiatory breach of the contract of employment is approached from the perspective of the range of reasonable responses standard of review for the purposes of section 98(4) of the ERA.

THE OPPORTUNITY TO CURE A REPUDIATORY BREACH OF CONTRACT

In *Buckland*, Sedley LJ made it abundantly clear that it was impossible under English law for a wrongdoer to take unilateral action to rectify a repudiatory breach of contract. Since a breach of the implied term of mutual trust and confidence is treated as automatically repudiatory,⁵¹ it stands to reason that an employer has no power to rectify trust-destroying conduct. However, one should perhaps stand back and enquire whether this rule of law is doctrinally or logically sound, bearing in mind that it was recognised by Sedley LJ in *Buckland* that English law recognises the ability of a wrongdoer to cure an anticipatory breach of contract. The Court of Appeal in *Buckland* felt constrained by well-established principles of English contract law and was not prepared to alter the common law of the contract of employment and release the contents of a ‘Pandora's Box’ since it would have repercussions for the general law of contract. This is another example of the tendency of the judiciary to rely on common law concepts in order to infuse meaning into constructive dismissal. It also links in with the notion that the contract of employment is relational in nature⁵² involving future co-operation and ongoing personal social exchange amongst the parties over a long-term period.⁵³ The ‘relational-ness’ of the employment contract finds its expression in the implied term of mutual trust and confidence which amounts to the principal relational norm inherent within the employment relationship.⁵⁴ The normative expectations which can be derived from the implied term are aspects which the employee expects to adhere to and are also such that they anticipate adherence from the employer (and vice versa). Thus, if such a normative proposition which is so central to the employment relationship is breached, social solidarity and trust between the contracting parties is severed and the innocent party should no longer be expected to continue with the relationship should it so wish, irrespective of any atonement on the part of the wrongdoer.⁵⁵ It is implicit in the notion of an ‘opportunity to rectify’ that the innocent party should be deprived of that right to withdraw. This would result in the continuation of the employment relationship against the will of the employee and it is this idea which is so incompatible with the relational nature of the employment contract, ie that once an employer has breached the trust and confidence implied term, a repudiatory breach and constructive dismissal has occurred enabling the employee to be discharged from any further

performance, since the employer has evinced an intention no longer to be bound by the contract. It is also at odds with the elective theory of termination of the contract of employment, ie that a repudiatory breach of the contract does not automatically bring it to an end.⁵⁶

However, in Scots law, there is the possibility that the legal position may well differ from English law as there is some authority to suggest that a party in breach of contract ought to be allowed to cure, thus limiting the scope for the innocent party to terminate the contract.⁵⁷ However, other commentators have submitted that it is not entirely clear that this is the 'true' Scots law position and rather it is better to conceptualise the ability of the wrongdoer to cure as an indicator by the law that the breach in question is not material, ie that it is not repudiatory.⁵⁸ Such an argument posits that implicit within a finding that a wrongdoer has a right to cure a breach of contract is the recognition that there has been no repudiatory breach. The debate surrounding the true nature of the Scots law rule has implications for the proposition of law expressed above that a breach of the implied term of mutual trust and confidence is automatically repudiatory. If a future Scots court or tribunal were to hold that an employer was entitled to cure or rectify a breach of the implied term of mutual trust and confidence, this would mean that it was not automatically repudiatory and a clear divergence of approach between Scots law and English law would have been opened up. However, reverting to the idea that the employment relationship is predicated on a relational contract of employment, and the normative propositions which formulate its content and scope of application are relational in nature, such as the implied term of mutual trust, it is submitted that the Scots courts would have taken a wrong turn were they to adopt such a position. For that reason, analysed from the perspective of relational contract theory, it is doubtful whether it would be conceptually desirable for a Scots court to afford an employer the right to cure in such circumstances.

A number of commentators have questioned the coherence of the rule that a breach of the implied term of mutual trust and confidence should be treated as automatically repudiatory.⁵⁹ On one view, it might be considered as stretching logic to contend that actions or omissions which are so extreme that they destroy trust and confidence are of insufficient quality of themselves to amount to a repudiatory breach. The terminology of 'destruction' and 'severe undermining' of trust and confidence is sufficiently emphatic to infer repudiation on the occurrence of a breach. On the other

hand, there is considerable force in the contention that treating the implied term of mutual trust and confidence in this way sets it apart⁶⁰ from other implied terms of the contract of employment which do usually require something else to be established in order to amount to a repudiatory breach. For example, in the context of the implied term of the contract of employment which enjoins the employer to exercise reasonable care for the well-being of its employees, there is scope for an employer in breach to argue that its actions were insufficient to constitute a repudiatory breach of contract.⁶¹ The employer's point here would be that no repudiatory breach had been established as it had good cause for acting in the way it did or that its conduct was not sufficiently wrongful. Indeed, it is suggested that the absence of any presumption that a breach of another implied term is automatically repudiatory operates as the functional equivalent of the reasonable and proper cause defence at limb (ii) above where it is alleged that there has been a breach of the implied term of mutual trust and confidence. This is another reason for maintaining the reasonable and proper cause defence as an inherent part of the lexicon of the implied term. Furthermore, bearing in mind the relational philosophy intrinsic to the employment relationship, this provides further support for the view that the Court of Appeal was right to reject the notion that a wrongdoer should have the right to cure.

STATUTORY CONSTRUCTIVE DISMISSAL AFTER BUCKLAND

The decision of the Court of Appeal in *Buckland* reinforces the relational nature of the contract of employment by depriving an employer of the scope to make amends where it is in repudiatory breach. *Buckland* is also compatible with the notion that the elective theory of termination is applicable in the case of the common law of the contract of employment. The key role of objectivity in ascertaining whether there has been a constructive dismissal was restated, implicitly drawing a distinction between the standard of scrutiny of the managerial prerogative associated with it and the range of reasonable responses test. Finally, *Buckland* clarifies that an employer has a number of defences where an employee claims that he/she has been unfairly constructively dismissed.

Acknowledgements

I would like to thank Douglas Brodie for reading over a previous draft of this note and for offering helpful comments. The usual disclaimer applies.

Footnotes

1. [2010] EWCA Civ 121; [2010] ICR 908; [2010] IRLR 445.
2. *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.
3. UKEAT/0233/09/LA (EAT 29 March 2010).
4. UKEAT/0174/09/SM (EAT 21 April 2010).
5. [1978] QB 761; [1978] IRLR 27.
6. M. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003) 155–156; L. Barmes, 'Common Law Implied Terms and Behavioural Standards at Work' (2007) 36 *Industrial Law Journal* 35, 37–38.
7. *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84, 86 (Arnold J); *Woods v WM Car Services* [1981] ICR 666, 672 (Browne-Wilkinson J); *Morrow v Safeway's Stores* [2002] IRLR 9 and *Amnesty International v Ahmed* [2009] IRLR 884, 898 para 70.
8. *Eastwood v Magnox Electric plc (and McCabe v Cornwall County Council)* [2004] IRLR 733, 735 at paras 4–7 (Lord Nicholls); M. Freedland, n 6 above 155–156; L. Barmes, n 6 above, 37–38; B. Hepple, *Rights at Work: Global, European and British Perspectives* (London: Sweet & Maxwell, 2005) 52.
9. See n 5 above.
10. *Buckland* n 1 above, 448 paras 23–27 (Sedley LJ). In 'Re-establishing Orthodoxy in the Law of Constructive Dismissal: *Claridge v Daler Rowney Ltd* [2008] IRLR 672 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606' (2009) 39 *Industrial Law Journal* 403, 407–408, the writer argued that an objective standard of scrutiny differs from a range of reasonable responses standard and *Buckland* suggests that this is correct.
11. [2009] IRLR 884, 898, para 70.
12. *Buckland* n 1 above, 448 at [23]. Writer's annotations shown in square brackets.
13. See n 7 above.
14. [2007] IRLR 320.
15. UKEAT/0099/06/RN; [2007] All ER (D) 34 (Jan), paras 29–32 (Lady Smith).
16. [2008] IRLR 672.
17. UKEAT/0233/09/LA (EAT 29 March 2010) para 40.
18. See n 10 above.
19. *Buckland* n 1 above, 448 at [28].
20. That is to say that 'reasonableness' has a part to play in the context of the adjudicator's assessment of the employer's cause for the trust-destroying conduct, rather than the conduct itself. See M. Freedland, n 6 above, 160.
21. UKEAT/0174/09/SM (EAT 21 April 2010).
22. UKEAT/0174/09/SM para 17. Of course, if it is alleged that there has been a breach of an express term or a different implied term of the contract of employment, the question of reasonableness will be irrelevant prior to the assessment of the substantive or procedural fairness of the constructive dismissal under ERA, s 98(4) in accordance with the range of reasonable responses test. This was one of the central issues addressed in the case of *Burton, McEvoy & Webb v Curry*. This reminds us of the distinctiveness of the implied terms of the contract of employment, ie that they are divergent and have differing origins, content and scope.
23. D. Brodie, 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37 *Industrial Law Journal* 329, 341.
24. *Buckland* n 1 above, 449, para 44.
25. *ibid.*
26. See J. Beatson, 'Has the Common Law a Future' (1997) 56(2) *Cambridge Law Journal* 291, 301; J. Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247; R. Zimmermann, 'Statuta Sunt Stricte Interpretanda? Statutes and the Common

- Law: A Continental Perspective* (1997) 56(2) *Cambridge Law Journal* 315, 320 and B. Hepple, n 8 above, 39.
27. P. Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1.
 28. *Western Excavating* n 5 above and S. Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 *Industrial Law Journal* 223.
 29. M. Freedland, n 6 above, 339–344 and *Johnson v Unisys Ltd* [2001] IRLR 279, 286 para 36 (Lord Hoffmann).
 30. [2010] IRLR 374. Reliance was placed on the cases of *Thorneloe v McDonald & Co* [1892] 29 SLR 409; *Ramsay & Son v Brand* [1895] 25 R 1212; 6 SLT 114; *Alexander Graham & Co v United Turkey Red Co Ltd* [1922] SC 533; 1922 SLT 406; *Steel v Young* [1907] SC 360 and *RDF Media Group Plc v Clements* [2008] IRLR 207.
 31. See *RDF Media Group* *ibid*. However, this was a case where the remedy sought by the employee was common law damages for breach of the implied term of mutual trust and it was not a claim of statutory constructive dismissal.
 32. See *Thorneloe*, *Ramsay & Son*, *Alexander Graham* and *Steel* all n 30 above.
 33. 1997 SLT 1213.
 34. See *Bank of East Asia* *ibid*, 1216L. In their 'Report on Remedies for Breach of Contract' (Scot Law Com No 174) 22, para 7.13, the Scottish Law Commission agreed that this proposition represented the legal position in Scotland.
 35. [2010] IRLR 648.
 36. H. Beale (ed), *Chitty on Contracts* (London: Sweet & Maxwell, 30th ed, 2008) vol 1, para 24–015, citing *State Trading Corporation of India v Golodetz Ltd* [1989] 2 Lloyd's Rep 277, 286 per Kerr LJ.
 37. *Tullett Prebon*, n 35 above, 676 at [83].
 38. In terms of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 and *Post Office v Foley* [2000] IRLR 827.
 39. Alternatively, the employer might have argued that there was no dismissal at all in terms of ERA, s 95(1), in which case it would be rather counterintuitive for it to then argue that the constructive dismissal was based on one of the six valid reasons for dismissal specified in ERA, s 98(1), (2), (2A), (3) and (3A), that such constructive dismissal fell within the band of reasonable responses and so was fair in terms of ERA, s 98(4), on which see *Buckland* n 1 above, 450, para 47, *Derby City Council v Marshall* [1979] IRLR 261, 263, para 16 (Mr T P Rogers) and P. Elias, B. Napier and P. Wallington, *Labour Law: Cases and Materials* (Butterworths, London, 1980) 564.
 40. UKEAT/0524/08/ZT, (EAT 2 July 2009) para 43.
 41. UKEAT/0174/09/SM, (EAT 21 April 2010) paras 14 and 18.
 42. [1982] IRLR 166.
 43. [1977] IRLR 389.
 44. [1977] IRLR 97.
 45. D. Brodie, n 23 above at 341.
 46. For example, in the absence of an express power in the contract of employment in favour of the employer. However, this logic would not apply to dismissal as a result of the decisions of the House of Lords in *Johnson* n 29 above and *Eastwood* n 8 above.
 47. [2000] IRLR 703.
 48. [2005] All ER (D) 143 (Sep).
 49. [2005] IRLR 246.
 50. This is something which has occurred in respect of the law of frustration applicable for the purposes of ascertaining whether there has been a termination of the contract of employment in terms of the statutory regime of unfair dismissal (ie ERA, s 95(1)). Based on *FC Shepherd & Co Ltd v Jerrom* [1986] IRLR 358 and other cases, Freedland has demonstrated how it has gradually come to diverge from its source, namely the common law of frustration applicable in the case of the law of termination of the contract of employment, on which see M. Freedland, n 6 above 441–449.
 51. See 7 above.
 52. See *Johnson* n 29 above, 283 para 20 (Lord Steyn).
 53. I. McNeill, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven and London: Yale University Press, 1980).
 54. See M. Boyle, 'The Relational Principle of Trust and Confidence' (2007) OJLS 633, M. Freedland, n 6 above 88–92 and D. Brodie, 'Beyond Exchange: the New Contract of Employment' (1998) 27 *Industrial Law Journal* 79, 101.
 55. M. A. Eisenberg, 'Relational Contracts' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995), H. Collins, *Regulating Contracts* (Oxford: OUP, 1999) 140–143 and C. Summers, 'Similarities and Differences between Employment Contracts and

Civil or Commercial Contracts' (2001) 17(1) *International Journal of Comparative Labour Law and Industrial Relations* 5, 7.

56. *Boyo v Lambeth LBC* [1994] ICR 727 and *WE Cox Toner (International) Ltd v Crook* [1981] IRLR 443.
57. *Barclay v Anderson Foundry Co* (1856) 18 D 1190; *Lindley Catering Investments Ltd v Hibernian Football Club Ltd* 1975 SLT (Notes) 56; *Strathclyde R C v Border Engineering Contractors Ltd* 1998 SLT 175; *Morrison and Mason v Clarkson Bros* (1898) 25 R 427, 5 SLT 277; *Millars of Falkirk Ltd v Turpie* 1976 SLT (Notes) 66 and *Magnet Ltd v John Cape t/a Briggate Investments*, Sheriff Evans, Cupar Sheriff Court, 19 July 2007.
58. H. MacQueen and J. Thomson, *Contract Law in Scotland* (Edinburgh: Tottel Publishing Ltd, 2nd ed, 2007) 207–208 and *Lindley Catering Investments Ltd v Hibernian Football Club Ltd*. 1975 SLT (Notes) 56.
59. M. Freedland, n 6 above, 167.
60. This serves to highlight that the implied term of mutual trust and confidence is not developing into an overarching or umbrella principle under which each of the more 'traditional' implied terms of the contract of employment might come to rest, on which, see *D. Brodie, 'The Heart of the Matter: Mutual Trust and Confidence'* (1996) 25 *Industrial Law Journal* 121, 123; *D. Brodie, 'Mutual Trust and the Values of the Employment Contract'* (2001) 30 *Industrial Law Journal* 84, 85; M. Freedland, n 6 above 159 and *D. Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?'* (2005) 34 *Industrial Law Journal* 284.
61. *Marshall Specialist Vehicles Ltd v Osborne* [2003] IRLR 672, 674 para 9 (Burton J).