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Evolution of implied terms in the contract of employment

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Abstract

This essay provides a comprehensive exploration of the historical evolution of labour and labour law in the United Kingdom, tracing its progression from antiquity to modern times. It elucidates the changing dynamics of employment relationships and the legal protections afforded to workers, emphasizing the concept of implied terms, particularly trust and confidence, and their construction and utilization in case law. Through detailed analysis, it highlights the crucial role of implied terms in addressing contract ambiguity and unfair treatment, aiming to ensure a balanced relationship between employers and employees to prevent labour exploitation. The essay concludes by advocating for the recognition and preservation of implied terms as fundamental principles in employment contracts to safeguard workers' rights effectively.

Keywords: Labor law, implied terms, trust and confidence, employment relationships

Introduction

The evolution of labour throughout history is a journey worth investigating given the central role it plays in people's lives. To most people, it is the primary source of income, while for others it provides a purpose and a sense of belonging to society.¹ The concept of labour, as well as the norms and laws it must follow, evolved throughout the United Kingdom's history: from slavery to feudal serfdom, over to master and servant law, and finally, the distinction of the contract of services.²

The widespread understanding and research knowledge that employment relationships often exhibit a significant imbalance in bargaining power. This imbalance typically leaves employees at a considerable disadvantage, making them vulnerable to potential mistreatment or, in some cases, even exploitation by their employers. For this reason, and to prevent the occurrence of such undesired situations, it is important to study the evolution of labor law and its judicial protection. One of the major changes in the labour concept happened in 1944, when the International Labour Organization, and by extension many countries in the international community, recognized that "*Labour is not a commodity*".³ As such, labour should be studied and treated differently than regular commercial transactions and relationships.

Mark Freedland, along with other scholars, have conceptualized and emphasized the unique aspects of an employment contract. These include the provision of personal service, the unequal bargaining power between the parties, and the legal protections afforded to the worker, some of which are often referred to as implied terms.⁴

This research project will concentrate on the evolution of implied terms, exploring their range as defined by case law, and examining how courts utilize these terms to address issues of contract ambiguity and unfair treatment. This essay will primarily examine trust and confidence, considering their crucial role in understanding the significance of implied terms in employment contracts. The objective of this work is to address the critique regarding the sufficiency of implied terms to balance the relationship between employer and employee. In this study, labour exploitation is understood as the violation of an individual's rights in their

¹ *Reference Re Public Service Employee Relations* [1987] 1 SCR 313 (Canada Supreme Court) 368.

² Hugh Collins, Keith Ewing, and Aileen McColgan, 'The Contract of Employment', *Labour Law* (2nd ed, Cambridge University Press 2012 2019).

³ International Labour Organization, *Declaration of Philadelphia* (1944).

⁴ Mark R Freedland, 'Content and Construction', *The Personal Employment Contract* (Oxford University Press 2005), 113-196.

working conditions, accompanied by an exploitative transaction that benefits the employer, irrespective of the employer's awareness of such exploitation.⁵

This essay is organized in the following manner: First, it provides a historical overview of the employment contract, focusing on its unique features and weaknesses. Second, it explains the construction and nature of implied terms in general. Third, it delves into how case law specifically influences the implied terms of trust and confidence.

The Contract of Employment

Until the 19th Century, the contract of employment, also known as the contract of services, was categorized under contract law alongside other commercial transactions and agreements. It remained so until lawyers of that era advocated for a distinction between the contract for services and the contract of services, recognizing their distinct nature, and departing from the tradition of master and servant law.⁶

In addition, through the development of structural principles (integration, fair exchange, and reciprocity) made by judicial adjudication, which means the involvement of judge-made case law to identify the contract and prescribe its functions, shaped the contract of employment and, attributes various implied terms establishing the essence of the contract, its content, and the view of how disputes should be solved.⁷

A distinctive feature of the employment relationship is the significant level of subjugation experienced by employees and the discretionary power wielded by the employer over them; inherited by the masters and servant law by the notions of control, subordination, and dependency of the employee.⁸ The possibility of misusing the employer's power drove the adjudicative approach to an employee perspective focusing on fairness and industrial justice, reinforcing the worker's protection through legislation in the 1970s.⁹

Historically, employment contracts were often made orally. However, due to frequent misunderstandings between employees and employers about terms and conditions, courts established default rules by the contractual formalism adjudicative approach¹⁰. These rules,

⁵ Ben Ferguson and Hillel Steiner, 'Exploitation' in Serena Olsaretti (ed), *The Oxford Handbook of Distributive Justice* (Online Edition ed, Oxford University Press 2018) 551.

⁶ Collins, 'The Contract of Employment', n 2.

⁷ Freedland, 'Formation and Internal Structure', n 4 at 28-51.

⁸ Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Freedland M and others (eds), *The Contract of Employment* (Oxford University Press 2016) 321.

⁹ Freedland, 'Formation and Internal Structure', n 7.

¹⁰ *ibid.*

embodied in a standard format and complemented by both express and implied terms, led to the creation of the legal institution of the employment contract, which is the focus of this study.¹¹ Even though the employment contract can still be made orally, it is common to find a written form with the main conditions followed by the employer's internal rules.¹²

Since the full employment conditions are often indirect in the contract, the courts complement it with implied terms.¹³ Contract law applies differently when it comes to the contract of employment: rather than centring on the conditions that validate the contract, the focus is on recognizing the rights and obligations of the parties as established by statutes or judicial rulings, to prevent abuse of power.¹⁴ *French v Barclays Bank* illustrates the court's commitment to implied terms when the employer unilaterally changes internal regulations affecting the employee's interest. Lord Waller pointed out that there is no attitude more likely to intentionally damage the trust and confidence in the employment relationship than a change of terms in it.¹⁵

Implied Terms

The contract of employment has proven its usefulness in facilitating labour relationships, but it still yet faces some challenges. Firstly, there is the issue of bargaining power: in practice, employment contracts often lack true contractual freedom for both parties.¹⁶ Many contracts are presented by the employer on a take-it-or-leave-it basis, leaving little room for negotiation.¹⁷ Secondly, there's the matter of flexibility: the terms of these contracts are typically fixed over time and subject to the employer's discretion. This rigidity means they may not adapt well to changing contexts and often fail to meet the long-term cooperative expectations of the parties (e.g., wage increases or promotions).¹⁸ As Lord Steyn highlighted, these expectations can be addressed by the implied terms, thereby introducing more flexibility into the agreement.¹⁹

Expressed and implied terms are legally binding for the parties involved in a contract, establishing their rights and obligations.²⁰ Lord Steyn describes these terms as instruments

¹¹ *ibid.*

¹² Freedland, 'Content and Construction' n 4 at 113-196.

¹³ *ibid.*

¹⁴ Freedland, 'Formation and Internal Structure' n 4 at 59-112.

¹⁵ *French V. Barclays Bank Plc.* [1998] IRLR CA.

¹⁶ Freedland, 'Formation and Internal Structure', n 4.

¹⁷ Collins, 'The Contract of Employment', n 2.

¹⁸ *ibid.*

¹⁹ Hugh Collins, 'Implied Terms in the Contract of Employment' in Mark Freedland and others (eds), *The Contract of Employment* (Oxford University Press 2016).

²⁰ Freedland, 'Formation and Internal Structure' n 4.

used by the courts to harmonize the interests of the parties and avoid unfair agreements, thereby protecting the less favoured party from being improperly exploited or treated unfairly.²¹ Additionally, implied terms can also be established by the custom of the trade and may be articulated using various terminologies.²²

Freedland suggested that implied terms are just guiding principles that emerged from case law.²³ However, legal history has shown otherwise, particularly in situations involving silent contracts or discrepancies between implied and express terms.

In *O'Brien v Associated Fire Alarms*, there were no express terms agreed upon regarding employee mobility. The employer argued that it was an implied term that employees were required to work in any area under the employer's control and that they could ask employees based in Liverpool to work in Barrow, where the labour force was low. Lord Denning accurately noted the unfeasibility of daily trips from Liverpool to work in Barrow.²⁴ This case exemplifies the exploitative advantage taken by an employer on the grounds of contract ambiguity.

Freedland extends his critique of implied terms by questioning the courts' intervention degree in the parties' freedom of contracting.²⁵ This is in line with Lord Wright's assertion that the courts cannot rewrite contracts for the parties to make it fair.²⁶ Lord Denning suggests that when the parties have not established rules for a particular situation under express terms, the courts shall imply terms as though the parties, being as honest and prudent, would have intended.²⁷ This can be seen in *O'Brien v Associated Fire Alarms*, where Lord Denning overturned the Divisional Court's misapplication of implied terms for not being objective.²⁸

This argument strengthens Collins' position on the impracticality of using implied terms as an interpretation technique because, in some cases, implied terms unveil situations that were not considered by the express terms.²⁹

Similarly, Freedland critiques the extent to which the courts are interpreting or making law by presenting a paradox: while courts claim they are merely interpreting the intended

²¹ *Malik v BCCI SA* [1997] ICR 606 HL.

²² Collins, 'The Contract of Employment' 96, n 2.

²³ Freedland, 'Content and Construction', n 4...

²⁴ *O'Brien and Others v Associated Fire Alarms Ltd* [1968] 1 All ER 93 CA.

²⁵ Freedland, 'Content and Construction' n 4.

²⁶ *Luxor (Eastbourne), Limited, and Others Appellants; and Cooper Respondent* [1941] 108 -137 AC.

²⁷ *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260.

²⁸ *O'Brien and Others v Associated Fire Alarms Ltd* [1968].

²⁹ Collins, 'Implied Terms in the Contract of Employment' n 19.

meaning of the contract without establishing new rules, their efforts to discern what the parties implied often result in the creation of new legal principles.³⁰

Collins addressed Freedland's questions in his study of judicial work, outlining the types of implied terms. According to Collins, there are three types of implied terms: (a) those implied by fact, (b) those implied by custom, and (c) those implied by law.³¹ The first type is used for efficiency by the courts to address gaps in a contract based on the will of the parties. The second type is those implied due to customary practices of the trade. The last type represents a default rule that does not rely on the will of the parties.^{32,33}

To sum up, Browne-Wilkinson states that the employment contract must not be vague or obscure in the conditions of employment. It should be a universal rule applicable to all employment contracts: an implied term that lends effectiveness to the contract, which may differ from case to case.³⁴ In this context, implied terms ought to be presumed to be present when no express terms contradict them.³⁵

Considering the logic behind the creation of implied terms, it is reasonable to use them as a foundational rule to ensure the fairness and efficiency of agreements, even if this requires the creation of new laws. Hopefully, courts will depart from traditional legal orthodoxy favouring express terms over implied terms, particularly when there is an evident imbalance in the relationship.³⁶

The implied terms of trust and confidence

Implied terms in common law arise to address societal needs. In this context, the implied terms of trust and confidence have evolved gradually as the traditional contract model of 'master and servant' has become outdated. This evolution has its origins in the general duty of cooperation and reciprocity that exists between contractual parties.³⁷

As a starting point, we may consider the case of *Lister v Romford Ice and Cold Storage* as discussed in the House of Lords. This case revealed certain implied terms that a servant is obligated to honour his master. Lord Tucker's reasoning goes as follows:

³⁰ Freedland, 'Content and Construction' n 4.

³¹ Collins, 'Implied Terms in the Contract of Employment' n 19.

³² *ibid.*

³³ Collins elaborates on how each type of term serves different functions and has varying scopes within the context of an employment contract.

³⁴ *Jones v Associated Tunnelling Co Ltd* [1981] IRLR 477 EAT.

³⁵ Collins, 'The Contract of Employment' n 2.

³⁶ *ibid.*

³⁷ *Malik v BCCI SA* [1997].

*Without attempting an exhaustive enumeration of the duties imposed in this way upon a servant, I may mention: (1) the duty to give reasonable notice in the absence of custom or express agreement; (2) the duty to obey the lawful orders of the master; (3) the duty to be honest and diligent in the master's service; (4) the duty to take reasonable care of his master's property entrusted to him and generally in the performance of his duties; (5) to account to his master for any secret commission or remuneration received by him; (6) not to abuse his master's confidence in matters pertaining to his service...*³⁸

In the same discussion, Viscount Simonds highlighted the duty of the master, emphasizing that they should not compel the servant to act illegally.³⁹ This idea represents the base argument for the principle of trust and confidence, which will be further elaborated on in the following paragraphs.

Considering all the implied terms to which an employee or servant is subject, and the degree of subordination an employment contract imposes, there was a need for a counterweight to moderate the managerial power of the employer. This need led to the evolution of the mutual obligation of trust and confidence in the mid-1970s.⁴⁰

The concept of mutual trust and confidence was considered as an implied term to give effect to the concept of constructive dismissal. This concept was incorporated into the legislation on unfair dismissal through its 1974 amendment.⁴¹ Constructive dismissal was defined as the termination of employment by the employee due to a repudiatory action made by the employer.

In the 1978 case of *Western Excavating v Sharp*, the court examined the contractual and reasonableness test of the repudiatory action of the employer in the matter of constructive dismissal. The court concluded that the test must be contractual for a breach, whether express or implied, to exist.⁴²

Subsequently, in *Courtaulds Northern Textiles v Andrew* explored the contractual test and incorporated the fundamental principles of the implied term of trust and confidence. The judgment stated:

[I]t was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely

³⁸ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555-594.

³⁹ *ibid.*

⁴⁰ Freedland, 'Content and Construction' n 4.

⁴¹ *ibid.*

⁴² *Western Excavating (E.C.C.) Ltd. v Sharp* [1978] QB 761.

*to destroy or seriously damage the relationship of confidence and trust between the parties.*⁴³

Browne-Wilkinson further refined the concept in *Woods v WM Car Services*, by detailing that any breach of an implied term made by the employer must affect the core of the contract of employment to be considered repudiatory, mainly because of the employee's affectation.⁴⁴ In addition, Lord Ackner in *Lewis v Motorworld Garage* established that the existence of multiple incidents could be considered repudiatory, but not individually.⁴⁵

Moreover, Wilkinson revisited the concept in *Imperial Tobacco*, highlighting the implied obligation of good faith which applies in the exercise of the employer's managerial powers in a fair dealing and whose power shall not be exercised to destroy or damage the trust and confidence between employer and employee.⁴⁶

The implied term became an orthodox principle of constructive dismissal. However, following the judgment in *Malik v BCCI*, it became central to the common law applied to the contract of employment. In this case, Mr. Malik, after being redundant by BCCI, claimed stigma compensation for the disadvantage he faced in the job market due to his association with BCCI and its fraudulent activities.⁴⁷ Revisiting the implied term of Viscount Simonds, Lord Nicholls reinforced it by adding that no employee can be presumed to agree to work for a dishonest business. Therefore, the employer is under the implied obligation to conduct their business honestly.⁴⁸

The Law Lords recognized the implied term of mutual trust and confidence in employment law. Lord Steyn highlighted the term's applicability across a wide range of situations, emphasizing the balance between an employer's interests and the protection of employees from exploitation.⁴⁹

Douglas Brodie describes these terms as 'an obligation of good faith at the heart of the employment relationship', even though English law has not yet recognized a general principle of good faith, although it is widely acknowledged as a distinctive feature of employment law.⁵⁰

⁴³ *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 -86 EAT para 10.

⁴⁴ *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347 at 349 EAT.

⁴⁵ *Lewis (Appellant) v Motorworld Garages Ltd (Respondents)* [1985] IRLR 465- 470 CA.

⁴⁶ *Imperial Group Pension Trust Ltd and others v Imperial Tobacco Ltd and others 2* All ER 597-608.

⁴⁷ *Malik v BCCI SA* [1997].

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ Douglas Brodie, 'Malik v BCCI: The Impact of Good Faith' in Jeremias Adams-Prassl and Alan Bogg ACL Davies (ed), *Landmark Cases in Labour Law* (First ed, Hart Publishing 2022) 245–266.

Despite the progress this term has brought to English employment law, there is ongoing debate among scholars about its scope. Bob Heppel has noted that it is a term in constant development and that it involves the protection of the parties' fundamental rights.⁵¹

Case law regarding implied terms has expanded to include other terms that share the core of trust and confidence. For instance, the *Malik* case proved that there is an implied term against conducting a dishonest business.⁵² *Gogay v Hertfordshire CC* evidence that there is an implied term requiring an investigation before any disciplinary action is taken against an employee.⁵³ *United Bank v Akhtar* recognized an implied term that the employer should provide adequate time and financial support when relocating an employee. *Moore v Bude-Stratton* reflected the implied term that the employer should maintain a pleasant working environment.⁵⁴ These cases, among others, are based on an excess of power by the employer and were ruled as a breach of the implied term of trust and confidence, leading to the recognition of other implied terms, such as the duty of care.

Freedland criticized the broad scope of the implied term of trust and confidence, arguing that it potentially creates disproportionate disadvantages for employers in favor of employees.⁵⁵ This concern was also shared by the House of Lords in *Johnson v Unisys*. The judgment raises the question of whether the term should cover all aspects of employment or just certain parts and whether the breach applies to the term or the whole contract. The Lords outlined the limits of exercising the power of dismissal, to prevent excessively costly remedies.⁵⁶ However, the Employment Appeal Tribunal in *Morrow v Safeway Stores* stated that a breach of the implied obligations would constitute a repudiatory action affecting the entire contract.⁵⁷ The question remains whether the principle of trust and confidence can be limited at all.

The debate over this limitation extends to the issue of contracting out. The orthodox view, as previously mentioned, is that implied terms can be excluded by extensive express terms, or if the parties agree to exclude or modify the implied terms.⁵⁸ However, both Collins and Brodie offer another approach. They recognize the implied term of trust and confidence

⁵¹ Bob Heppel, 'Human Rights - Human rights and employment law' (1998) *Amicus Curiae* Issue 8, 19.

⁵² *Malik v BCCI SA* [1997].

⁵³ *Gogay v Hertfordshire County Council* [2000] IRLR 703-712 CA.

⁵⁴ *Moore v Bude-Stratton Town Council* [2001] LGR 129 -145 EAT.

⁵⁵ Freedland, 'Content and Construction' n 4.

⁵⁶ *Johnson v Unisys Ltd* [2003] 1 AC 518 - 550 HL.

⁵⁷ *Morrow v Safeway Stores plc* [2001] 21092001 EAT.

⁵⁸ *Johnson v Unisys Ltd* [2003] and Freedland, 'Content and Construction'.

as a term implied by law, a principle of good faith that should not be negated by any agreement, as it forms the essence of the employment contract itself.⁵⁹

Conclusion

Considering the historical context of labour relations and the persisting imbalances within them, an employment contract should not be regarded merely as a common contract. Rather, it is a special contract by its very nature, as its object is an individual's labour force, which cannot and should not be treated as a simple commodity.

Regarding contract breaching by repudiatory actions, when it is made by an employee, there is discretionary power of the employer to discipline or dismiss their employee. However, when the repudiatory action is made by the employer and affects the employee, an individual under the protection of the duty of care imposed on the employer, the only recourse often is to terminate the contract. This indicates that all repudiatory actions could significantly impact the core of the employment contract, making it unbearable for the employee to continue the employment.

The adequacy of implied terms in protecting employees depends on the courts' and parliament's recognition of a foundational principle. If there is debate over the scope of the implied term of trust and confidence, disparities in judgments will exist. The approach, as scholars already pointed out, should be: first, the implied term of trust and confidence should be acknowledged as a legal principle; second, as a principle, it should not be subject to contracting out, limitations, or reshaping according to the intentions of the parties; and third, it should be implied where ambiguity exists in the contract, as no one would willingly enter into an inherently abusive contract. For these implied terms to adequately protect employees from exploitation and abuse, courts must overcome their legal orthodoxy of preferring the explicit terms that could be abusive.

⁵⁹ Collins, 'Implied Terms in the Contract of Employment' n 19.

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