

Chapter 6: The implied terms of the personal employment contract

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1. Which of the 'gap-filling', 'interpretative', or 'regulatory' functions do you believe the implied terms should seek to play? Give reasons for your answer.

Author's answer: A regulatory role is the most interventionist of these three options, since it would enable the courts to apply the implied terms in law of the contract of employment to cut down or overrule the express terms of the contract of employment. The implied term of mutual trust and confidence is an obvious candidate implied term that is broad enough to perform this role. If an express term was interpreted in a way by a court that it served to destroy or severely undermine the employee's trust and confidence in the employment relationship without reasonable and proper cause, this would be a radical development. In essence, it would mean that this implied term had become a mandatory norm. The displacement of the express term would strike at freedom of contract, which in a liberal democracy is a position that needs careful justification. As such, although the courts have come close to such a 'regulatory' role for the implied terms, they have tended to step back from specifically saying that they are overruling or ousting express terms. The 'gap-filling' role for implied terms is the least far-reaching, since it would envisage implied terms in law as terms that plug gaps in employment contracts, somewhat akin implied terms in fact (for the distinction between 'implied terms in law' and 'implied terms in fact', see *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd.*¹ Finally, an 'interpretative' function is the most common role played by the implied terms in law. This involves harnessing the implied terms in law as contextual instruments that provide background meaning against which express terms contained in employment contracts should be interpreted.

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2. Explore the relationship between the common law implied terms and statutory employment protection rights.

Author's answer: Some of the implied terms of the contract of employment are subject to, or influenced by employment protection rights conferred on employees and workers by statute. For example, the implied term enjoining the employer to make payment to the employee where the employee is ready and willing to work is bolstered by the statutory regime that prohibits an employer from making unauthorised deductions from an employee's wages or salary, as set out in Part II of the Employment Rights Act 1996. The same implied term is also subject to the employee's and worker's entitlement to be paid the national minimum wage. Another example is the implied term of fidelity and loyalty which imposes an obligation on the employee not to disclose the confidential information of the employer to third parties whilst the employee is working. This implied term is subject to the statutory whistleblowing protections which find their expression in sections 43A to 43L of the Employment Rights Act 1996. These statutory provisions enable employees and workers to make a 'protected disclosure' and blow the whistle on their employers where to do so would be in the public

¹ [2015] UKSC 72; [2015] 3 WLR 1843.

interest. Finally, the implied term of mutual trust and confidence is subject to the statutory unfair dismissal regime enshrined in Part X of the Employment Rights Act 1996. The existence of this statutory framework precludes an employee from deploying the implied term of mutual trust and confidence to claim that the manner of his/her dismissal constituted a repudiatory breach of the contract of employment entitling him/her to common law damages. As such, these three examples give some indication of the complex relationship which arises between the common law implied terms and various statutory employment protection rights, but these are only some of the interactions that exist.

3. Which of the implied terms imposing duties on employers are the most significant in the common law of the contract of employment? Give reasons for your answer.

Author's answer: The implied term of mutual trust and confidence is undoubtedly the most significant of the implied terms. It has been described judicially as an overarching implied obligation imposing obligations on employers and employees alike. Unlike other implied terms, which tend to be precisely crafted and are not necessarily reciprocal, the trust and confidence implied term is designed to constrain arbitrary conduct at a general level, including circumstances where a series of minor incidents combine to act as the 'last straw'. The implied term is also broad enough to prohibit an employer or employee from omitting to act where such an omission destroys or severely damages trust and confidence.

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1. Rather than drawing a proposition of law that all pre-termination activity preparatory to post-termination competition is unlawful, in *Helmet Integrated Systems Ltd. v Tunnard*, the Court of Appeal decided that the nature of the employee's job was the principal relevant factor in determining whether the preparatory pre-termination activities breached the implied duty not to compete with his employer. Do you believe that this is a satisfactory rule?

Author's answer: The purpose of this approach is to ensure that whether the individual is held to have engaged in unlawful pre-termination conduct will be context-dependent in nature, e.g. so that it is shaped, not only by the employee's conduct, but also by the nature of his/her job, his/her experience, seniority, and the content of the contractual obligations imposed upon him/her. This affords the courts and tribunals a great deal of flexibility in taking a view as to whether the individual employee concerned has crossed the line over to engaging in unlawful activity. The courts and tribunals will make this judgment call by examining all of the evidence in the case and weighing it all up in the balance. On the other hand, this approach undoubtedly has the disadvantage of uncertainty, in the sense that it is difficult for employers and their advisers to know whether their employees have breached the implied duty not to compete. Ultimately, the existing case law has to be exhaustively analysed and the factual evidence that convinced the courts or tribunals in a particular case to hold that an individual was in breach, or not, as the case may be, duly reflected upon and examined.

2. Critically evaluate the relationship between the implied term of fidelity, loyalty, and confidence

and the implied term of mutual trust and confidence. To what extent do these terms overlap?

Author's answer: These two implied terms overlap to the extent that the former is much narrower in scope than the latter. The implied term of mutual trust and confidence applies to impose duties on both the employer and the employee, whereas the former implied term only functions to govern the behaviour of the employee. To that extent, the former can be thought of as a subset of the latter, and in most cases, a breach of the former will also entail a breach of the latter. However, the main difference between the two implied terms is that an employee would have a 'reasonable and proper cause' defence in the case of a claim purporting that he/she has breached the implied term of mutual trust and confidence, whereas no such defence would be available in the context of a claim rooted in the implied term of fidelity, loyalty, and confidence. A second possible difference between the two implied terms concerns the extent to which they continue in operation post-termination: the implied term of fidelity clearly continues in operation subsequent to the termination of the employment contract, particularly in the context of the protection of the employer's trade secrets and confidential information equivalent to such trade secrets. However, the jurisprudence is mixed regarding whether the implied term of mutual trust and confidence subsists post-termination. On the one hand, in *Braganza v BP Shipping Ltd* ([2015] UKSC 17, [2015] 1 WLR 1661 [54] (Lord Hodge) and [104] (Lord Neuberger)), Lord Hodge remarked obiter that '[the implied term of mutual trust and confidence] as an inherent feature of the relationship of employer and employee does not survive the ending of the relationship, such as by dismissal or the expiry of a contractual period of employment'. This is consistent with the common-law rule that the implied term of mutual trust and confidence cannot be invoked to police the employer's power of dismissal at the point of termination. Furthermore, at the point immediately before termination in circumstances where the employee is on 'garden leave', it is on the judicial record that the content and scope of the implied term of mutual trust and confidence may be truncated as regards the obligations it imposes on the employer (*Tullett Prebon v BGC Brokers* [2011] EWCA Civ 131, [2011] IRLR 420 [41] and [45] (Kay LJ)). Nevertheless, although the implied term is off-limits at the exact point of termination of the contract by the employer, it assumes central importance in the context of its termination for constructive dismissal (*Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693 (CA)), and in determining whether the employer is justified in summarily dismissing an employee without notice (*Jervis v Skinner* [2011] UKPC 2). Likewise, it was observed obiter in *Braganza* that the implied term of mutual trust and confidence survived the termination of the employment contract on the account of the death of the employee (*Braganza v BP Shipping Ltd* ([2015] UKSC 17, [2015] 1 WLR 1661 [54] (Lord Hodge) and [104] (Lord Neuberger)). The burgeoning jurisprudence concerning the operation of the implied term of mutual trust and confidence in the context of the employer's pension obligations also underscores the post-termination vitality of the term (*Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] IRLR 66 (Ch)).

Indeed, the principal argument in favour of the continuing effect of the implied term of mutual trust and confidence when the after the termination of the employment contract is attributable to the fact that it evades categorization as a primary obligation concerned with the exchange of wages for work and thus subsists to subject the employer and employee to a degree of control after the contractual relationship has ended. Additional support for the view that the implied term

of mutual trust and confidence is not entirely decommissioned at 'termination' is furnished by the judgment of Lady Hale in *Société Générale (London Branch) v Geys* [2012] UKSC 63, [2013] 1 AC 523. Here, Lady Hale held that the implied term of mutual trust and confidence operates at the point the contract transfers to post-employment in so far as it impresses a common-law duty on the employer to provide notification to the employee of the fact that the contract is being terminated summarily with or without payment in lieu of notice (*Société Générale (London Branch) v Geys* [2012] UKSC 63, [2013] 1 AC 523 [57]–[60] (Lady Hale)). To that extent, although the point is quite evenly balanced, it is argued here that it is inaccurate to characterize the implied term of mutual trust and confidence as a term whose flame starts to flicker out the closer it gets to the point of termination of the employment contract: it may indeed do so in certain fact-specific contexts—such as in relation to the act of dismissal itself—but it is not necessarily universally so.

3. Explore the relationship between the common law implied term of fidelity, loyalty, and confidence and the fiduciary obligations of an employee treated as a fiduciary. Why is the distinction relevant and is it justifiable?

Author's answer: Where fiduciary obligations are impressed upon an individual, that individual is treated as a fiduciary. The general rule is that an employee will not be treated as a fiduciary as a direct consequence of him/her simply being an employee. Instead, the case law indicates that the employee must be in a senior or managerial position or possess a specialist skill, role, status, expertise, or set of qualities before such a fiduciary office will be impressed. Where an employee is held to qualify as a fiduciary, he/she will be subject to equitable fiduciary obligations which are much more extensive than those imposed by the implied contractual term of fidelity, loyalty, and confidence. For example, unlike a 'bog-standard' employee, the fiduciary employee will be required to comply with a 'no-conflict' duty, which will require him/her to subordinate his/her own personal interests to those of the employer. More importantly, unlike the position in the case of an employee bound by the contractual implied duty, a breach of the fiduciary obligations of the fiduciary employee will enable the claimant employer to seek a much broader range of remedies, including restitutionary relief. As such, the employer would not be required to prove it suffered loss flowing from the breach of fiduciary duty. Instead, it would be entitled to proprietary and personal gain-based damages, an accounting of profits, and restitution generally.

The implied term of fidelity, loyalty, and confidence is a contractual duty, rather than a fiduciary duty. The case law is quite clear that despite the terminology of 'loyalty' and 'fidelity', this is an implied contractual term impressing contractual obligations on the employee. As such, if the employee breaches the contractual duty, the employer is entitled to recover its loss for a breach of duty only. Here, the principal remedy available is damages, i.e. compensation for loss, subject to each of the controlling mechanisms supplied by contract law, e.g. the duty to mitigate loss, contributory fault or negligence, the remoteness of damages rules. This can be contrasted with a fiduciary duty, which is not contractual in origin. Instead, the obligations imposed on employees who are fiduciaries arise independent of the contractual agreement struck between the employee and the employer. Where the employee is held by a court to have breached the fiduciary duty, the employer is entitled to recover its loss by claiming damages, but it may also disgorge any profit made by the employee fiduciary as a result of the breach. There are additional remedies available

to the employer, including restitutionary remedies, knowing receipt, knowing assistance, etc.

There is a debate in the scholarship as to whether it is justifiable that the implied term of fidelity, loyalty, and confidence has been treated as a contractual duty. For example, Flannigan argues that the term ought to be treated as imposing fiduciary obligations on the basis that the historical genealogy of the term demonstrates that the English courts had originally intended for it to so. In essence, the argument runs that the English courts took a 'wrong turn' in the decision of the Court of Appeal in *Robb v Green* [1895] 2 QB 315. Flannigan's position can be contrasted with that of Frazer who maintains that the English courts settled the legal position just right. The reasons advanced by Frazer are partly historical and partly rooted in the implications which would arise if such duties were treated as fiduciary ones. Essentially, the problem is that all employees would become fiduciaries, meaning that they would have to subordinate their own interests to those of their employers. It is questionable whether the remuneration, pay and reward package received by many employees for hiring out their labour power is sufficiently weighty or material to justify such an intrusive set of fiduciary obligations of this sort of magnitude.

5. Do you agree with the flexibility adopted by the common law in drawing up no precise definition of 'trade secrets' and confidential information which is the equivalent of the same?

Author's answer: This question evokes the classic debate in the academic literature regarding the benefits of flexibility versus certainty in the law (see also the response to the question at page 230 above). As such, although the law is less certain in having no concrete or specific meaning attributed to the expressions 'trade secret' or 'confidential information equivalent to a trade secret', this is offset by the flexibility it affords the courts and employment tribunals in deciding whether certain information that is the subject of an employment dispute falls within the ambit of these two categories. Of course, this is constrained to some extent by the series of criteria that the common law has developed in the decision of the Court of Appeal in *Faccenda Chicken* [1987] Ch. 117. In conclusion, one can see the attractions in both flexibility and certainty, but a balance has to be struck somewhere and the courts have done so by proffering some guidance, whilst leaving the ultimate decision regarding classification of relevant information to themselves.