"It would be hard to over emphasise either the contribution made by implied terms in building up a contract of employment or the flexibility and power this operation gives to the judges whose job it is to construe the contract" – Discuss.

Employment law is a very complex subject and greatly dynamic this is because law is always changing. More and more rules and regulations are brought about, more terms are being introduced as well this is because of flexibility of the judges. This occurs during a tribunal or employment law related case.

When an offer of employment is been accepted unconditionally a contract of employment comes into play the terms of a contract can be written or oral as well as implied. Even though the written statement that exists is not the contract, this can still be used as evidence later on when a dispute occurs between the employer and employee. The terms can be found in a lot of places including job adverts, letters to the employee and staff handbooks. A written contract must be written up when the employee is at the same place of work for a month or longer, this will include the term and conditions of the employment. To change the existing contract of employment the employer must get consent either written oral or implied though a collective agreement this is an agreement between the employer and employee or their representative, it is no more than a "gentleman's agreement". In British law collective agreements are not legally binding, it must be an agreement in writing. If the employer does not make this agreement the employee can sue for breech of contract. Changes in the contract may be due to economic changes or due to reorganisation of the business from the employer's point of view. The changes that usually occur are those referring to pay, hours of work, duties and place of work. For example when an employer needs one of their employees to move to a different place of work then the employee is entitled to one months notice of that change. On the other hand when the employee wants to change the contract the same has to be done, the reason for the employee wanting to change the contract would be to bring about improvements of pay, requesting additional holidays or even requesting to change from full time employment to part time employment due to domestic or social circumstances.

Contractual terms of any contract are the rights and obligations which join together the parties of the contract. There are many terms that apply in a contract; these include express terms, implied terms, and flexibility terms, also can be explicitly agreed. Express terms are those explicitly agreed between parties this also can be written or oral, express terms are usually written clearly on the contract of employment. For example it will state on the contract the number of hours the employee is entitled to work per week, or the amount the employee is to get per hour – "you will be paid £X per hour". In the case Tayside Regional Council v McIntosh [1982] ICR 420; the council put up an advert for a vehicle mechanic in a local newspaper it clearly stated that a clean valid driving license was essential; this was also restated at the interview. Whilst McIntosh was employed he had lost his licence, he was therefore unable to drive and therefore unable to do his job. He was then dismissed. When McIntosh was claiming for unfair dismissal he said in his terms and conditions of employment it never stated that he needed a driving licence, courts decided in express terms that he was required to hold a clean driving licence, even

though it was not written in a statement. McIntosh did not win his case, as with all contract terms they have equal validity, and express terms will override implied terms.

Implied terms do not depend on an existent written source but they do however reflect the presumed intention of the parties involved, courts will look at the contract when the employee starts work. If there was no written contract then there is little an employer can do but the employee must still honour the implied terms of a contract. Which include the duty not to release any personal or confidential information from a previous employer to the new employer, for example employees are unable to disclose any information about business plans, marketing or other information that will be sensitive to the previous business. If this is done then the previous employer will be able to sue for damages against the business. Terms are implied because they can be too obvious to write down mention or need stating, for example the employer will do everything they can to make the work place a safe working environment. Terms are also implied to make the contract workable. Implied terms include the duty of the employer to provide a safe working place for employees – as mentioned above, the employees duty to provide an honest and loyal service to the employer and the implied duty of mutual trust and confidence between the employer and employee, that they will not act in a way to breech that trust. A term that is to be implied into a contract must have requirements before hand and must be satisfied before it can be put into the contract by implication, these requirements is that it must be reasonable and equitable, and must make the contract work in terms of business efficacy, it must also be obvious without saying. These requirements can be shown in a number of cases which include Courtaulds Northern Textiles v Andrew. Andrew worked oversees, the courts asked what had been the contract between the employer and employee; courts decided that there was a breech of the implied term of mutual trust and confidence. The EAT added during this case that this implied term is one of which that has great importance to good industrial relations. In recent times it has become established that neither side should act in a way which is likely to damage the relationship of mutual trust and confidence which ought to subsist between them, this was a new developing trend for the courts and tribunals to find there has been a breech of this implied term of mutual trust and confidence. If there is no other way of correcting agreements of employee who has suffered as a result of harsh conducts and conducts which is generally acceptable by today's standards. In the Malik v BCCI 1997, Malik worked for the bank for a number of years, in this time the bank operated in an illegal way. After some time the bank went into liquidation. When Malik tried to get another job, he mentioned his previous employer. No employers would employ him, as if he was part of the illegal operation. This was known as 'the kiss of death', as he was unable to find any employment. Therefore he took action against the bank. Courts decided employer had duty of care to conduct the business in a legally correct manner, since the business did not do so Malik was tainted by association, the courts agreed, Malik had been stigmatised by the bank and was awarded stigma damages because of the breech of implied term of mutual trust and confidence. In some circumstances under implied term to be used as a basis for a claim by the employee who has not been badly treated but treated less favourably by other employees in the case of Transco plc v O'Brien, the employee was sourced through an agency basis he was then made permanent, all full time offered new terms with the new company, but not O'Brien, court decided he was not treated badly but treated less favourable which was a breech of implied duty of mutual trust and confidence.

Implied terms can be implied by conduct in the case Lotus Cars v Sutcliffe 1982 this was regarding redundancy pay and the number of hours worked per week. Sutcliffe became redundant, there pay was calculated by the number of hours meant to work which was 40 per week in the original contract, but in the staff handbook it referred to working a 45 hour week where the extra hours were normal extra time. Ha claimed that he had worked the 45 hour week and should have been entitled to that as redundancy pay. Tribunal looked at this from the point of view that this might have become a contractual term and could they imply a term to change this? The employees were not actually expected to do a 45 hour week it was just corporate because he was not contractually obliged to do so. Business efficacy was part of this decision. Business efficacy was first stated by Bowen LJ in "the Moorcock". This was "what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties who are businessmen". In the case Marshall V Sloan &Co Ltd 1981, Marshall was a commercial traveller and one of his duties was to take valuable samples out of his car everyday. One day ha was sick and did not do that duty, and that valuable samples were stolen out of his car. He was then dismissed; he then took action for unfair dismissal. His defence concluded that since he was off sick then he did not need to go into work, because he did not need to go in then all contractual obligations were suspended including his duty to take the samples our if his car. The tribunal did not agree it did not make common sense. They had to imply all obligations that he was 'unable to carry the samples out of his car' because he was responsible for the employers goods he should have made arrangements for the samples to be carried into the house. Court said to do otherwise would mean supporting the employee to make the equipment valuable.

The officious bystander test is best described as the 'oh, of course test'. In the case Lake v Essex County Council 1979 this best explains what it means by the implied term. Lake was a part time teacher who was employed by the council; she tried to argue that she did work the minimum amount of hours per week to clam unfair dismissal, at that time it was 21 hours per week. Lake worked 18; she argued that she did do the minimum amount of hours if you take into account her preparation time and travelling time. This took her to well over 21. Tribunal never agreed, but the appeal tribunal did, and the court of appeal never. Courts said if the officious bystander had asked Lake and council the question 'Is she contractually required to work such hours outside school time to prepare her work?' the council said no, no such term was then agreed. In McAndrew v Prestwick Circuits Ltd 1990, McAndrew had a mobility clause, he had to move at short notice some distance away. In the McAndrew case, the inner housed the Court of Session held at the power of any mobility clause had to be qualified by an implied term to exercise the power reasonably. Although in a later case and the EAT decision felt that reasonableness was not a requirement when interpreting a mobility clause. There view was simply a matter of implying the terms of the contract; however they did say an employer should not exercise the right to move the employee so that it makes it impossible for them to continue working. In the case of United Bank Ltd v Akhtar 1989, Akhtar worked in Leeds and was given four days notice to be transferred to Birmingham. Akhtar had a lot of issues and the employers refused to give him more time. Reasonableness is an implied issue, current position is that overriding contractual terms as to the relationship of mutual trust and confidence between the employer and employee remains, as employer does not have to implement an express term in a reasonable matter – he does not have good faith. In the case Ali v Christian Salveson

Food Services Ltd 1997 employees were required to work a 40 hour week and overtime on top of that, but no overtime was paid until they reached a certain amount of hours (1824). They were made redundant before reaching that amount. They claimed that they should be able to claim Pro Rata; however the tribunal interpreted it literally and said they were not having it. The reason that they gave was because the annual hours had been agreed in the terms and conditions in the interests of the employees, it was reasonable to assume that all of these issues should have been thought through. No reason to imply a term that was not there.

The implied Duties of an employee is that the employee has to be ready to work and willing to work and to obey lawful orders this can be explained in the case of Pepper v Webb 1969. Judges implied terms to make them work, these terms have become duties. Pepper was a gardener employed by Webb, when Pepper was asked by employer's wife to put some plants in her garden, Pepper used a choice of words that indicated he would not obey these instructions. He was then dismissed and tried to sue for wrongful dismissal. Court decided it was his refusal rather than the way he refused, the employee can refuse unlawful instructions. Another case which involved the implied duty of being ready and willing to work is the case of Boychuk v Symons (holdings) Ltd; this case regarded dress codes in the workplace. Boychuk was an accounts clerk, she sometimes came into contact with customers and she always wore bright big badges referring to lesbianism, they included 'gay power'. Her employers ordered her to remove these badges or she will get dismissed, she refused and therefore dismissed. She claimed for unfair dismissal, courts looked at all the circumstances and decided it was fair. Since this case there have been discrimination laws, sex, race, gender, and disability and gender laws reassigned. Therefore of this case was decided today it would have been a very different outcome. In the implied term duty to give faithful service, employer is under no duty to disclose his own misconducts or any wrong doings but under a duty to disclose the misconduct of his/her subordinates, even if by doing so they criminate them selves.

In conclusion implied terms are of customary practice, we see implied terms can be made because of the power of the judges' decisions and also the flexibility of the judges. This can be seen in the case of Malik explained in detail above. Since employment law is forever changing some of the cases above would have different outcomes if they went to court today. I feel as if the flexibility and power of the judge's makes less contribution to building up a contract of employment than implied terms, this is because implied terms are more frequently cited against employers.

Word Count: 2,492