What is the importance of implied terms to the contract of employment?

A contract of employment comes into existence once an employee's offer of services has been accepted, and the employer is required to issue a written statement of the main terms and conditions of employment[1]. Because the employment relationship is so extensive it is impossible to capture all the 'intentions' of the parties or 'necessities' of the employment relationship on that statement. This means that the contract of employment – in addition to being represented in other forms[2] – is also governed by implied terms, which allow the courts to 'read in' certain terms that are necessary to make the contract of employment work. The test for implication of terms is 'necessity'[3] and not reasonableness[4].

There are three ways of incorporating implied terms into the contract of employment, by fact, by law, and custom[5]. A term implied by fact is specific to the particular contract of employment. It would include the doctor working in a hospital who is a nice caring person to practise. Two tests are used to determine whether there is a term of specific implication - the business efficacy test of whether the term was necessary to make the contract work[6], and the officious bystander test of where an officious bystander to suggest the express provision of the term the parties have been supposed with a common "Oh, of course!" because the term seems obvious and necessary to both parties[7]. If the parties do not have agreed a term, case law suggests that it cannot be implied by fact[8].

The terms implied by law are obligations so fundamental that they apply to the status of being in employment. These type of terms are either implied in statute, as with provisions in the Equal Pay Act 1970[9] imposing a pay equality clause into the contract of employment, or by common law because "specific duties of right to the exactness to the type of contract and relationship in question"[10], such as an employee's duty to faithfully serve his employer[11].

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[1] Steve Anderman, Chapter 4 p62, Labour Law: Management Decisions & Workers' Rights 4th edition, Butterworths (2000)

[2] Express terms, collective agreements, working rules, and statute.

[3] *Talbot House Properties Ltd v Jones* [1986] AC 80

[4] *Neigate v Union Manufacturing Co* [1918] 1 KB 592

[5] G.H. Treitel, The Law of Contract 9th edition, Sweet & Maxwell (1995)

[6] *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108

[7] Mackinnon L.J. in *Southern Foundries Ltd v Shirlaw* [1940] A.C. 701, *Aspinwall v Sandstone Trading Ltd* [2003] EWHC 49

[8] *Liver v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555; *Mole v Nash & Tompkins Group* [1990] 1 W.L.R. 212

[9] S1(1)

[10] G.H. Treitel, p193, The Law of Contract 9th edition, Sweet & Maxwell (1995)

[11] *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80

A term may be implied by custom if it is reasonable[12] and relevant to the 'market, trade and locality in which it is made[13], unless the custom is inconsistent with the express terms of the contract[14]

Why is it necessary to imply terms into the contract of employment?

The main importance of implying terms to the contract of employment is that it allows courts/tribunals to incorporate important terms that have not been 'caught' or expressed in the statement of terms and conditions.

Further to the importance of implied terms by assessing the employment relationship in terms of the employee's obligations to the employer and the employer's obligations to the employee rather than providing a series of 'right/wrong' arguments.

The employee's obligations to the employer include the duty to obey reasonable orders, to exercise reasonable care and competence, to cooperate, to maintain fidelity and good faith. The employer's obligations to the employees include the duty to pay wages, to (sometimes) provide work, to exercise care and to cooperate[15].

Terms implied into contract of employment help to protect the interests of the employer in a way that would impossible if the written statement of terms alone constituted a contract.

The employee's **duty to obey lawful instructions** is a 'condition essential to the contract of employment[16]. Failure to adhere to reasonable instructions of the employer means that the employee is not fulfilling that which it is reasonable to expect in order to deem regards to his employment contract and so falls amounts to a repudiation of contract.

However an employee may refuse to obey instructions that are unreasonable[17] or unlawful[18].

The interests of the employer are also protected by the implied term of **duty of good faith** to the employer. An employee must not purposely act in such a way that would seriously damage the employer's business[19].

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[12] *Hollwick v Marks Area Health Authority* [1975] IRLR 319
[13] *Sagar v Ridehalgh & Son Ltd* [1931] 1 Ch. 310
[14] G.H. Treitel, p90, The Law of Contract 9th edition, Sweet & Maxwell (1995)
[15] Employment Law Card series, Employment Law 3rd Edition, Cavendish (2002)
[16] *Lakas v Lotson Chronicle (Proprietor Newspapers)* [1959] 1 W.L.R. 698
[17] *Johnstone v Bloomsbury HA*; [1992] Q.B. 333 *Ottoman Bank v Chakarian* [1930] A.C. 277;
[18] *Morris v Meikys (Holdings)* [1973] 2 All E.R. 137; *Gregory v Ford* [1951] 1 All E.R. 121

This duty does not apply to all information learnt by the employee during the course of employment. In Faccenda Chicken Ltd[20], *the court held that the employee was generally allowed, when his employment ceased, to apply the skill and knowledge he had acquired during specific trade secrets remained the intellectual property of the 'master' and could not be used by the employee.*

A statement from Kentucky Fried Chicken's website discloses that for years its 'secret formula' for fried chicken was carried in the heads of just two people who made a way in a safe in Louisville, Ky. Only a handful of people know what makes our recipe."[21]

Should one of those people trade this 'secret formula' to competitor KFC its niche in the chicken market.

Although there may be express terms in the contract dealing with confidential information[22], *duty of loyalty is such a fundamental term that the courts, where necessary, will imply it into the contract of employment*[23].

A ***duty to cooperate with the employer*** *is also fundamental to the employee's contract of services. In Secretary of State for Employment v ASLEF (No.2)*[24], *the court imposed that duty using a variation of instruction contained 'reference and adjudication the motive of objective with which it is done'*[25] *because it was done with an uncooperative state of mind in order to frustrate the contract. Thus the courts not impose that term of cooperation, the employer may not have recourse to prevent the employees from enforcing the working rules as disputed terms of employment rather than as a rejection of managerial prerogative, thus working against the commercial interests of the business.*

Cresswell[26] *also explained that duty of cooperation in implying into the contract of employment that an employee was required to* ***adapt to new working methods****, complex methods for which the employer should provide training.*

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[19] This includes working in competition with him, disclosing confidential information to outside parties etc. See *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch. 169

[20] [1987] Ch. 117

[21] http://www.kfc.com/about/secret.htm

[22] These are called restrained of trade clauses.

[23] *Marshall v Industrial Systems & Control* [1992] I.R.L.R. 294

[24] [1972] 2 Q.B. 455

[25] Lord Denning MR ibid at 492

[26] *Cresswell v Inland Revenue Commissioners* [1984] 2 All E.R. 713

These cases show that these duties may be implied into the contracts of employment, the contracts do not just relate to 'work'[27] – employees do also owe implied duties of fidelity as well.

Now let us consider the importance of implied terms from the perspective of the employee. The inherent bargaining power is usually lacking when 'agreeing' the terms of employment. Hence the terms are often accepted on a take it or leave it basis. Implied terms thus serve as the **vehicle through which the courts can vary the employees actual rights and protection in the employment relationship**.

The common law protection of employees by implied terms to employees is centrally largely on the duty to **determine the trust and confidence** of the employee. **Malik v BCCI**[28] confirms this development in the modern employment of the employer taking on some of the responsibility for the physical and psychological welfare of the employee. In **Malik**, an employee whose employers had engaged in fraudulent activities so that the stigma affected his employability was told by the trial judge[29] that there was no term in the contract of employment which required the employer to place the employee in a good position for employment, should the current employment be terminated. The House of Lords unanimously overturned this decision, holding that the employer had breached an implied term of the contract not, without reasonable and proper cause, conduct himself in a manner likely to damage the relationship of mutual trust and confidence between the employee. In this case, the employability of the appellants was based on their reputation, and conduct of which most conduct of the appellants made them unemployable.

This implied term of mutual trust and confidence is not being used by interpreted to cover arbitrary treatment of the employee, extending limited treatment such as termination as repudiation of contract or constructive dismissal. This was certainly the case in **Wilson v Austin**[30], where it was implied that an express penalty clause was subject to an implied term of **reasonable notice of termination** - the employer has conducted itself in a manner that has destroyed the relationship of mutual trust and confidence between the employee by requiring him to move in such a short notice period.

Similarly, statutes to protect an employee from sexual harassment[31] and to respond to the employee's concerns on safety issues[32] have been used to broaden the implied term of trust and confidence.

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[27] This reiterates the business efficacy principle.

[28] [1998] A.C. 20

[29] Evans-Lombe, J in *Malik v BCCI* [1994] I.R.L.R. 282

[30] [1989] I.R.L.R. 507

[31] *Bradmage Engineering v Jolly* [1990] IRLR 3 EAT

[32] *British Aircraft Corp v Austin* [1978] I.R.L.R. 332

It can be implied into the employment contract the duty of the employer to take reasonable care for the safety of the employee[33]. By virtue of this implication, an employee could sue under the 'master-servant' relationship compelling him to obey the employer's every instruction relating to his personal safety[34]

The employer's obligation to pay agreed remuneration was implied when an employee whose wages were cut was entitled to the difference between what was paid to him under his contract and entitlement in wages[35].

The point to be made is that the courts not imply these terms, it is very unlikely that those rights and interests of the employees would be protected.

Social constraints impose on employer.
Collective agreements can provide a remedy to the employee by harmonising pay in cases through out an industry

Implied does not protect employee completely. Implication only get protection if its incorporated

Privity of Contract

Roger Rawson suggests that implied terms interfere with the privity of contract. His argument is that where there is a provision in the express terms which states that it will not imply any implied term, the courts have no business in 'interfering' because the damages the expectation of the parties in a contract which has been agreed. A privity clause, for example, is creation of the expectation which has been the result of businesses to responding to changing circumstances, employees can be required to meet such change - to vary their existing duties using an implied term restricting the right to move the employee to an area within travelling distance of his home[36] is to work against the interest of the business.

Rawson also argues that most of the implied terms are too general and overlap with one another. The duty of fidelity covers the use of confidential information, making a secret profit and duty to work normally, duty to account, loyalty, good faith, good citizenship 129, CH7. This gives the courts unlimited discretion to formulate 'meaningless' policies rather than imply terms as the particular employment relationship requires. He argues that the obligation of trust and confidence is a dangerous concept because it

[33] Employment Rights Act 1996, s100
[34] Southwood v Bloomsbury HA [1992] Q.B. 333
[35] Agbay v Heinz [1988] I.C.R. 29
[36] Courtaulds Northern Spinning v Sibson [1988] I.C.R. 451

'relates to a state of mind that cannot be assessed'[37], and is capable of 'supplementing' and the other terms of the contract or the implied.

Mason concludes by urging the courts and tribunals express terms as overriding implied terms in order to maintain the 'grip' they have on interpretation of contracts.

While I agree with Mason on the issue that some of the implied terms overlap they certainly creating too much of a wide scope for 'reading into' the employment contract, there can be no doubt as to the importance of the implied terms to the contracts of employment not least because they help to compensate the employee for his unequal bargaining power in negotiating the contract of employment. Any unilateral variation of the written statement of terms and conditions must be subject to implied terms where necessary thereby taking the contract in the direction certainly imagery of a master-servant relationship[39].

How, if at all, do the terms generally implied into the contract of employment cause it to differ from other forms of contractual arrangement?

The workforce[40] in the UK comprises of workers employed under a contract of employment or of services – employees and the latter working under some other form of contractual arrangement. The most common other form of arrangement is as a self-employed independent contractor/ working under a contract for services. There are, however, special classes of workers that do not technically conform to the traditional categories of employee or independent contractor (although they may sometimes be classified as either for certain purposes).

Let us briefly look at these special types of workers that are 'employed under other forms of contractual arrangements.

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[37] Ibid at page 134

[38] In *Briss v South East Thames AHA* [1987] I.C.R. 700 the claimant successfully argued that he had been unfairly dismissed when dismissed for refusing to take a psychiatric test because of his previous conduct; in *Nevans v British Airways Plc* [1992] I.R.L.R. 575 the claimant hoped to successfully argue that his contract of employment had been breached when the employer transferred the business without consulting him

[39] There is no doubt that the employer still wields more influence in the employment relationship but at least managerial power is now subject to implied duties and obligations.

[40] Estimated to be 28.27 million as at January 2004 by the Office of National Statistics

[41] Estimated at 3.6 million as at January 2004 by the Office of National Statistics

Apprentices or trainees may be employees under trainee or apprenticeship contracts where the employer agrees to teach a trade them in this trade, and to maintain the training the existence of that relationship.

'Servants' of the Crown may be liable to sue under a contract[42] that appears that they may be treated as employees for some purposes and otherwise for other purposes. Military personnel cannot succeed, unless the Crown breach of contract[43].

Office holders include those impositions of authority in public or private institutions, such as policemen, judges of governors of school, clergy, trade union reviewers, etcetera. They cannot be dismissed without being told of their offence and being given an opportunity to present their case[44]. An assistant curate was no private law contract transforming him into an 'employee' and so he was an office holder[45].

The employment status of agency workers is a thing to be that where the relationship has the qualities appropriate in a contract of employment[46] the worker may be regarded as an employee[47].
The Government Worker's Employment Rights Act 1996 of CCC[48], Government by the working class.

Implied terms can cause the contract of employment to be under-inclusive, say a contract for services. The essential difference is that under a contract of employment, the mutual duties are governed by the employee and the employer are protected by the implication of terms into the contract where as there is marginal scope for 'reading into' the contract for services - for instance obligations of trust which are contained in the express terms of the contract are imposed on the working relationship.

This does not mean that some terms such as duty to pay contract damages agreed remuneration and health and safety duties do not apply to a contract of service that the implied terms in the contract of employment impose higher standards and obligations in the employment relationship such as the duty of mutual trust and confidence[49], than do those in contracts for services. Certain legally implied terms[50] are only a natural under the contract of employment. The Court of Appeal, for example, in

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[42] *Crown Choicemaker's Department ex parte Nangle* [1992] 1 All ER 897
[43] Dickson v Combermere (1863) 3F, F527
[44] *Pearce v Bolton (No. 1)* [1964] A.C. 40
[45] Coker v Diocese of Southwark [1998] ICR 140
[46] Obligations of fidelity and confidence, and the payment of weekly wages.
[47] *McMeechan v Secretary of State for Employment* [1995] I.C.R. 444
[48] Farleigh v Secretary of State for Trade and Industry 2000 WL 1212905
[49] *Malik v BCCI* [1998] A.C. 20
[50] Such as pay equality clause, maternity rights, sick pay etcetera

Lane v Shire Roofing Co (Oxford) Ltd[51] *emphasised that where the issue involved was safety at work the tribunal should be treating the claimant as an employee. This judicial decision shows the judicial implication of a duty of care from the employer to an employee under the contract of employment to other workers under a contract for services.*

Some rights such as maternity and paternity leave and pay only accrue to employees[52]

Essentially, employers owe more stringent duties to employees because of terms implied into the contract of employment.

In Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 W.L.R. 1213, the court looked at the relationship between a labour agency and the company which had been working for the claimant, who had been regarded as a "self-employed labour-only sub-contractor", other judicial[53] *shows that the was a contractor, and therefore the employer was liable for breach of an implied statutory duty to provide reasonable safety for the employee.*

Contracts of employment that incorporate implied terms or refer to other forms of contract or arrangement mean that they make it easier for the employee to terminate the contract and sue/claim when an implied term has been breached whereas with these other forms, repudiation depends largely on breach of the express term. This is why it was held in Janey[54] *that the employer had no implied obligation to* protect an apprentice from discrimination – that implied term would only apply if she were an employee under a contract of employment [55].

Vicarious liability were implied into the contract of employment to do the mean that employees could be indemnified against court commitment[56]*; in general employers are not vicariously liable for the negligence of independent contractors*[57] *or workers employed under various forms.*

Sometimes, it would appear that the terms implied into contracts of employment do not cause it to be so dissimilar from other forms of contractual arrangement.

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[51] [1995] I.R.L.R. 493

[52]

[53] The employer paid the workmen a wage on an hourly basis and could dismiss them, and could tell the claimant what to do and where to do it.

[54] *(Janey v Ailsa Shipbuilders [1983] I.C.R. 90)*

[55] That implied term was available to the employee in Webb v EMO Air Cargo (UK) Ltd (No.2) [1995] 1 W.L.R. 1454

[56] Smith v Stages [1989] A.C. 928

[57] Salsbury v Woodland [1970] 1 Q.B. 324