

It is normal for many of the obligations of an employer to his employees to be unspoken and not formally set out in their employment contracts. The law requires employers to give employees a written statement of basic employment particulars (ERA 1996 s.1 but no contract will, or could, include every term governing the relationship of the employee and employer. Many terms will simply be "implied".

Some of these obligations will be imposed by statute (eg the Equal Pay Act 1970 implies an "equality clause" into every agreement under which an individual is employed in Great Britain unless there is an express equality clause - see Eq PA 1970 s.1(1) and Sex .Others obligations can be implied by custom, common law or trade usage (eg a right not to work on bank holidays can be implied by "custom of the trade") and all employers have a common law duty to provide a safe environment.

A particularly important implied obligation is that of (mutual) trust and confidence. An employee might be entitled to treat his contract as terminated without notice if this duty is seriously breached by his employer.

Over time the courts have developed guidelines as to the circumstances in which they may be prepared to imply terms into a contract of employment. The courts will not lightly imply a term. Thus if there is an omission from a carefully drawn up agreement the natural inference will be that it "was omitted advisedly from the terms of that agreement on the ground that it was seen as too controversial or too complicated " and the court will not fill the gap with what it considers reasonable ([Ali v Christian Salvesen Food Services Ltd CA 1997](#) ICR 25, CA).

Basically, for a term to be implied it must be either:

- (i) so common in the relevant trade or area or so obvious that it must be taken to have been impliedly agreed even though it was not expressed; or
- (ii) be one which is needed to give "business efficacy" to the contract - ie to make the contract work; or
- (iii) have been incorporated into individual contracts by custom over a period of time (for example see [Albion Automotive Ltd v Walker & ors CA 2002](#) EWCA Civ 946, Court of Appeal on 21st June 2002).

There is an important general rule (sometimes called the rule in *General Billposting Co Ltd v Atkinson* 1909 AC 118 HL) that where an employer has behaved so badly towards his employee that the employee can treat his employment contract as at an end ("repudiated") then, because the contract has been ended by his own fault, the

employer cannot enforce any post-termination restrictive covenants it may have contained (see for example [Cantor Fitzgerald International v Bird and ors \(QBD\) 2002](#) High Court (QBD) on 29th July 2002).

It has gradually become accepted by the courts that there is a duty of "trust and confidence" in employment contracts which can generally be automatically implied. This is of profound significance. In recent years the courts have used the idea of a breach of this implied duty to whittle away at the long accepted principle that an employer has no general contractual obligation to act "reasonably" towards his employees (for more detail see notes at [Implied terms in employment contracts/duties of employer](#) - good examples contrasting the old and new approaches are [White v Reflecting Road Studs Ltd 1991](#) ICR 733, EAT on the one hand and [Transco plc v O'Brien 2002](#) ICR 721, CA on the other).

In addition, and separately, an employer owes his employees a common law duty of care to keep them adequately informed of the details of changes to their terms of employment which may follow from a company reorganisation and can be sued for the tort of negligence if he is in breach of that duty (see [Hagen and ors v ICI Chemicals and Polymers Ltd and ors QBD 2002](#) IRLR 31, High Court QBD).

However it is established that there is no overall implied duty of disclosure in employment contracts and in normal cases neither party is obliged to disclose to the other all facts which the other may consider relevant to deciding to enter into the contract (*Bell v Lever Bros* 1931 AC, 161, HL).

Breach of an implied term of a contract has the same consequences as breach of an express term. In particular, if the breach is a serious breach of a fundamental term of the contract, it will justify the other party in treating the breach as a "repudiatory breach" (see [REPUDIATION OF CONTRACT BY EMPLOYER OR EMPLOYEE](#)).

The implied term of mutual trust and confidence has only been developed by the courts in recent years with the ruling in *Western Excavating v Sharp*¹ . The courts are now much more likely to insert the term into every contract of employment which applies to both employer and employee. If either party is in breach of the term then they have to prove that the other party have acted unreasonably and that they are

¹ (1978) ICR 221

entitled to bring their contract of employment to an end by means of constructive dismissal and therefore walk out of their place of work.

The courts and tribunals will look at the implied term in the absence of any express term as a contractual entitlement² especially in relation to the implied term of mutual trust and confidence. It has been said that this term of mutual trust and confidence is an umbrella term to cover the whole of the employment contract where the employer acts with omissions or with negligence towards their employee's interests³. *S.100 ERA 1996 states that an employee can leave the workplace and sue for unfair dismissal if there is a health and safety danger.*

The umbrella term of the duty applies to complaints being ignored by employers after being made by employee's⁴. This has been discussed in more detail by the EAT in the case of *WA Goold (Pearmark) Ltd v McConnell*⁵ which stated that the employer must give proper consideration and access to grievances. *Smith and Woods* goes further to state at P.233

The implied term of mutual trust and confidence has been expanded further with the ruling in *Malik v BCCI*⁶. The duty now extends outside of the existing employment relationship to cover future prospects of the employee after the existing employment relationship has ended.

² Woods v WM Car Services (Peterborough) (1981) IRLR 347 per Browne-Wilkinson J

³ BAC v Austin (1978) IRLR 332

⁴ Bracebridge Engineering v Darby (1990) IRLR 3

⁵ (1995) IRLR 516

⁶ (1997) IRLR 462