



Transcript of Audio Seminar

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Implied Terms in Employment Contracts

1. Introduction

People sometimes forget that an employment contract is simply a contract, subject to all the usual rules of contract law. Express terms, those contained in a written contract for example, are vitally important. However, the law of contract also recognises implied terms – terms which have not been expressly agreed between the parties, but which become part of the contract by implication.

Terms can be implied into a contract for one of four reasons:

- the facts of the contract suggest that a particular term should be implied into it,
- by law,
- by custom and practice, or
- or by statute.

This concept of terms that appear to float about the written contract can fill an employer with dread. How can an employer stick to contractual terms which haven't been agreed and which they may not be aware of? That is the aim of this audio-seminar – to inform you about what kind of terms can be implied into contracts and the kind of duties they create in practice.

- In part 2 of this audio-seminar, we will look at how terms can be implied into employment contracts and their interaction with express terms.
- In part 3, we will look at the employee's implied contractual obligations and in particular the implied duty of fidelity.
- Part 4 will cover the employer's implied duties.
- In part 5 we will look at the implied term that we hear about most in employment law – the implied duty of mutual trust and confidence.
- Part 6 is the conclusion.

2. How are the terms implied into contracts?

A term can be implied into a contract in different ways, by the common law or by statute. The common law is the body of law created by judges making decisions in cases and has been in place since the Middle Ages. Statutes are acts of parliament signed off by the government of the day, such as the Equality Act 2010.

Implied terms can arise in a number of ways.

Terms implied by facts

Sometimes in an employment contract, the express terms – whether written or verbal – will not deal with a particular issue that arises. The courts will have to decide whether a term should be applied ‘in fact’. There are two key tests and only one needs to be met in order for the term to be implied – it’s either/or, not both:

- The ‘**business efficacy**’ test – a term will be implied if it is needed to give business efficacy to the contract – in other words, to make it work properly.
- The ‘**officious bystander**’ test – a term will be implied if it is so obvious that if someone outside the contractual situation suggested that the parties should include the term in the contract, the parties would say ‘well of course’. In other words, it’s so obvious that it goes without saying.

Implying a term due to business efficacy

To meet this test, the term must be needed in order to make the contract work overall, rather than making a part of it work.

Example – employees are entitled to enhanced pension provisions under their contracts of employment, but they are unaware of this entitlement. A term requiring the employer to tell the employees about this right is not needed to make the employment contract work overall. Therefore the business efficacy test does not apply here. [These facts are taken from a case called *Scally v Southern Health and Social Services Board*, and although the business efficacy test didn’t apply, a term requiring the employer to tell the employees about their enhanced pension rights was implied in another way, which I’ll come onto later].

What kind of term will meet the business efficacy test? In *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood*, the Supreme Court looked at an employment contract which contained no terms on when contractual notice took effect. They decided that a term about notice needed to be implied to make the contract work. They concluded that, in the absence of an express term, the rule established in a line of EAT cases applied - that notice of termination took effect when it came to the employee’s attention, and they have read it or had a reasonable opportunity to do so, not when it was delivered to the address or deemed delivered.

The officious bystander test – patently obvious terms

A term will be implied if it is so obvious that it goes without saying. Timing is important here – a term will only be implied if it would have been obvious at the time the agreement was first entered into, not at the time the dispute arises. This makes sense – by the time there is a dispute, one or other party will be adamant no term should be implied.

A term won’t be implied under the officious bystander test just to make things fair. The question is whether it is an obvious term and both parties would have agreed to it. In *Vision Events v Paterson*, an employee worked under a flexible hours scheme which didn’t contain any provision for payment in lieu of unworked hours on termination. He left with 1000 hours

that he hadn't taken off in lieu. He brought a claim saying he was owed payment in lieu of those hours. The EAT said no such term was implied as it was not a term which both parties would have agreed to. The apparent unfairness was irrelevant to the officious bystander test.

What happens after a contract is made can sometimes demonstrate what term was intended at the time the contract was entered into. Let's say a business has never paid sick pay to employees. The employee has never previously asked for sick pay. If there is then a dispute about sick pay, the courts are likely to look at the conduct of the parties and imply a term that there is no sick pay entitlement. It isn't the conduct that creates the entitlement, rather the conduct is evidence of the parties' contractual intentions playing out in real life.

Terms implied in law

A term will be implied in law if it is a 'necessary condition' of the relationship between the parties. It is wider than the necessity test in the business efficacy test. For example, a term might be implied in law if it is necessary to give effect to a particular benefit. Going back to *Sally v Southern Health and Social Services Board*, the House of Lords decided that the 'business efficacy' test didn't apply, but there was still an implied term because the employer was under a legal obligation to take reasonable steps to tell employees about their enhanced pension entitlements.

A term might be implied in contract where there is a duty of care in tort (a tort is a civil rather than a criminal wrong). The most common tort is the tort of negligence. Sometimes, these tortious duties can also be implied contractual terms. For example, there is a duty to take reasonable care in the preparation of a reference and that could also be an implied term in an employment contract.

Terms implied by custom and practice

We have all experienced the situation where someone's written terms do not reflect the lived reality of the employment contract, where local arrangements differ from the original contract terms and create a different 'custom' or 'practice'.

A custom or practice must be:

- Reasonable, notorious and certain – notorious means that there must be sufficiently widespread knowledge and understanding of the practice
- Followed because there is a sense of legal obligation to do so.

There must be enough evidence to show that both parties consider themselves bound by the custom or practice. The normal position is to look at the situation at the time the contract was made. A contract might be silent on a particular issue, or the relationship may have evolved and changed over time. If the proposed implied term goes against an express provision, there will have to be very long and established practice to override that express

term in order to show the position is either different from the express term or has changed over time.

For example, Sarah's contractual terms say she works 37 hours a week. For the last 8 years she has only worked 25 hours a week. In the absence of being able to show the employer's express agreement, that long period of time working fewer hours may be sufficient to show that her contract hours have changed since the original employment contract.

Terms implied by statute

Statutes imply terms into contracts more often than you think. The annual rises in the national minimum wage rates are implied into contracts of employment. A claim can be pursued as an unlawful deduction from wages or a breach of contract based on that implied term. Section 66 of the Equality Act 2010 automatically implies an equality clause into every contract of employment. This facility for terms to be implied into employment contracts means employees can rely on updated laws regardless of whether employers update their contracts.

3. Employees' Implied Duties

Let's look at the main terms which are implied into employment contracts and create obligations for the employee. An important one is the employee's implied duty of fidelity - the requirement to act in good faith and for the benefit of the employer. This duty continues throughout the period of employment and can even extend to off-duty time, but usually ends when the employment ends. The laws around the duty of fidelity have developed over time through case law which have identified various sub-categories of the duty that employers should be aware of.

The duty of fidelity can be broken down into various strands, each of which we'll look at. They are:-

- duty not to disrupt the employer's business
- duty not to compete
- duty not to solicit employer's clients or customers
- duty not to entice staff
- duty to disclose wrongdoing
- confidentiality
- duty not to misuse company property
- duty to account for profits
- duty not to act in the face of a conflict of interests

Duty not to disrupt the employer's business

Sometimes, performing an employment contract to the letter might breach the implied duty of fidelity. Working to rule – industrial action by working to the letter of the employment contract but no more – can sometimes be used to put pressure on an employer in relation to matters such as pay talks. In *Secretary of State for Employment v ASLEF*, the Court of Appeal said that the employees' actions in working to rule breached the duty of fidelity even though the employees complied with their employment contracts to the letter. It wasn't that the employees were required to go beyond the terms of their contracts, but that they were not allowed to deliberately obstruct the employer in the course of their business.

Duty not to compete

Some employment contracts, especially those for senior employees, will contain express terms about competition, both during employment and beyond (via restrictive covenants). The implied duty of fidelity means an employee may not work in competition with their employer even in the absence of express terms. This lasts throughout employment, including any period of garden leave, but does not survive employment. That means express restrictive covenants are needed to prolong the restraint of competitive trade after employment has ended.

The duty not to compete doesn't stop an employee having more than one job if they are not working in competition and causing serious harm to the employer's business. Modern ways of working mean many employees now work for more than one employer. Contracts of employment often deal with this issue, requiring permission to take on a second job or issuing a blanket ban on second jobs, especially for senior employees.

The duty may extend into an employee's spare time if the work in competition causes the employer serious harm. It might be ok for an odd-job man to work for a rival business in his spare time if the facts show that it does not cause the employer any serious harm. However, if skilled and knowledgeable employees in a specialist business field start working for a rival employer in their spare time, deliberately and secretly, that may breach the duty if it would cause the employer's business harm.

Setting up a rival business

There is a big difference between preparing to set up in competition and being in active competition. Case law has shown that the former will not breach the implied term, but the latter will.

Example - An employee intends to set up in competition with the employer. She buys an off the shelf company and leases business premises with the intention of leaving work and starting her own business. The duty of fidelity is not breached yet.

She then takes a phone call from one of the employer's customers and tells the customer she is leaving to set up a competing business and she can supply the customer instead. This may not be a breach yet either – it is still preparatory rather than being in competition.

She then goes to meet the customer and agrees to supply them in future instead of the employer. This is the point where the duty of fidelity is breached because she is now in active competition with the employer.

The dividing line is quite important. If the duty were breached earlier, in the planning stages, no one could ever start the process of setting up a business in the same line of work without having already left their employer. This would significantly limit their freedom to lawfully compete after leaving employment. But there is a dividing line and once in active competition, the duty of fidelity will be breached.

Duty not to solicit employer's clients or customers

This is very much linked to the duty not to compete. Again, there can be fine margins. In *Wessex Dairies v Smith*, an employee told his customers on the last day of his employment that he was setting up his own business and could supply them with milk. He had breached the duty of fidelity. Arguably, if he had waited just one more day, until he was no longer employed, he may have avoided being in breach (although if he had taken a confidential customer list for his own use during his employment he may arguably have been in breach in relation to that action).

Duty not to entice staff

There is an implied duty during employment not to entice colleagues to leave their job, usually to work in competition with the employer. Again, there are some fine lines here and preparatory acts will not breach the duty. If an employee tells a colleague that he is going to leave and invites the other employee to come and work for him, that might only be preparatory. That was the case in *Tithebarn v Hubbard*. However in another case, *Marshall v Industrial Systems*, the employee and another colleague had drawn up a business plan and approached a third senior employee and asked them to join them. They were found in breach of the implied duty. The EAT said there was no doubt that there were concrete arrangements, not just a plan, to deprive the employer of its best client.

Duty to disclose wrongdoing

Employees do not generally have a duty to snitch on their colleagues if they find out about misconduct or a breach of contract. However, the more senior an employee is, the more likely it is that their contractual duties may require them to report the misconduct of people in their teams or even their managers. Similarly, there is no duty to disclose their own misconduct. This creates the rather odd situation where an employee has a duty not to steal a company computer but no duty to confess that he has stolen it. The contract of employment may of course impose express terms about reporting misconduct.

In terms of the duty to disclose someone else's wrongdoing, it isn't just being in a supervisory position that is important, and it doesn't mean that employees with no supervisory responsibilities will never be required to report wrongdoing. The courts have said that it will depend on the terms of the employee's contract, their duties and seniority, the nature of the wrongdoing and its potential adverse effect on the company. In *Kynixa v Hynes*, a junior manager breached the implied duty of fidelity when she failed to inform her employer that she and three other colleagues had been approached by a competitor company. The employee had misled the employer about the future plans for herself and the other members of the management team. The High Court said that a crucial concept of the duty of fidelity was loyalty, and the employee wasn't behaving loyally if she knew and failed to tell their employer that three senior managers may move to a competitor.

There are exceptions to this general rule for employees who owe a fiduciary duty to the employer, such as directors or very senior managers (whose role is similar to that of a board director). A fiduciary duty is a duty to act in the best interests of the company which would mean these individuals would have a duty to disclose wrongdoing, both their own and that of colleagues.

Confidentiality

Part of the employee's implied duty of fidelity is the duty not to give away confidential information or trade secrets to third parties or use that information for their own purposes. Once employment has ended, the implied duty remains only to protect the confidentiality of trade secrets. That means that for bog standard confidential information, employers need to have an express clause in contracts to protect confidential information after employment has terminated (and a separate one to ensure employees give back all confidential material before leaving). It's worth noting that taking or copying or even remembering information during employment will be a breach, if the intention is to use it afterwards.

Duty not to misuse company property

This includes a duty not to misuse company money. In *Sinclair v Neighbour*, a betting shop manager took money out of the till to place a bet, leaving an IOU in its place (knowing the employer would not have lent him the money). He replaced the money the next day but was dismissed without notice. The Court of Appeal said that his conduct was dishonest, went to the heart of confidence between employer and employee and justified his summary dismissal due to breach of the implied term.

It is likely to breach the implied duty if an employee copies sensitive company data – such as a company database - during employment which they then use afterwards to contact customers of the employer and offer to undercut them. Directors who do this will also breach their fiduciary duties.

Duty to account for profits

Employees must give the employer any profits they make by way of bribes or secret commissions they receive through their employment. If an employee has shares in a company, and then directs the employer's business towards that company and in doing so makes a profit, they should pay that profit back to the company. This might be the case even if the employer did not have the opportunity to make that same money for themselves. In *Boston Deep Sea Fishing and Ice v Ansell*, the managing director entered into a ship building contract on behalf of the company and took a secret commission. He also entered into a contract to supply ice with a company in which he was a shareholder and received a dividend based on a percentage of the profits from the contract with his employer. The Court of Appeal said he must account to the employer for the commission and the dividend because he was in breach of the duty of fidelity. He had to pay them the dividend even though it was money the company could never have received as it was not a shareholder in the ice company.

Duty not to act in the face of a conflict of interests

An employee with fiduciary duties – board directors or someone of equivalent standing – must not put themselves in a position where their own interests conflict with those of the

company. There is an exception if the company gives fully informed consent to the activity in question.

We have seen that the duty of fidelity only goes so far. Relying on the implied term is no replacement for express terms which both cover and go beyond the basic implied term. Terms which extend the confidentiality duties beyond employment, confirm that the duty of fidelity continues during any period of garden leave and well-drafted restrictive covenants will add extra protection. Clauses on disclosing wrongdoing and gifts/inducements are also sensible, especially for senior employees.

There are other employee implied terms which employers should be aware of:

- Duty to be ready and willing to work – although it is likely to also be breach of an express contractual term if an employee fails to do the work set out in the employment contract.
- Duty to obey reasonable orders – this implied duty is the backbone to the manager/employee relationship and express terms will often be included in contracts or non-contractual policies.
- Duty to be adaptable – this applies in relation to things like new working methods that may arise from time to time, or even the employee’s place of work, although this duty will be tempered by the implied duty of mutual trust and confidence (which we’ll look at later in this audio-seminar).
- Duty to exercise reasonable care and skill – an employer can seek an indemnity or contribution from an employee if they suffer loss as a result of the employee’s negligence, or if the employee’s negligence causes the employer to be vicariously liable to a third party.
- Implied professional obligations – these are sector specific and often will be so obvious in a profession that the employment contract will not mention them. For example, a teacher might have an implied professional obligation to cooperate in the running and administration of the school during school hours, including providing cover for a sick colleague.

4. Employer’s Implied Obligations

We’ve talked quite a lot about what you can expect from your employees in terms of implied duties. Let’s now talk about what your employees can expect from you. I’m going to talk about the ‘lesser’ implied duties first, and the big one – trust and confidence – as its own topic. The ‘lesser’ implied duties are:-

- Duty to provide work
- Duty to pay wages
- Health and safety
- Duty to provide a suitable working environment

- Duty to provide reasonable support
- Duty to give redress for grievances
- Duty to give reasonable notice
- Duty to notify when terminating without notice
- Advising employees about their rights and benefits
- Giving references

Duty to provide work

Generally speaking, there's no requirement to provide work provided the employee is paid. There is a lovely quote from an old case called *Collier v Sunday Refereeing Publishing*, from the 1940s, which says: 'provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out.' I quite agree. And that makes sense – few employees would complain about not being given work as long as they are paid. As always, there are some exceptions to this general rule.

The situation is different where depriving an employee of work also deprives them of their right to earn a commission or affects their pay, as might be the case for piece work where earnings are directly linked to work volume. The same may be true if employees who are not given work are denied an enhanced pay rate such as a shift premium.

The situation may also be different where the employee needs to work in order to keep up a public profile which is intrinsically linked to that work. For actors, the publicity involved in a performance may be just as important as the pay. Similarly, there may be an implied duty to provide work where the employee has specialist skills which need to be exercised regularly in order to keep them up. In *William Hill v Tucker*, the employee performed a unique and very skilled role of spread better, and the Court of Appeal found that the skills needed to do the job required frequent exercise. It is likely to be a rare situation. An employee's skills in more mundane roles such as a plumber or an accountant are unlikely to diminish over a short period of suspension or garden leave. Although most employees on garden leave won't complain, express contractual terms to deal with such matters - and pay during that period - are a good idea.

Duty to pay wages

I don't think this one will come as a surprise to anyone, the obligation to pay wages to an employee who is ready, willing and able to work. There are obvious contractual exceptions to this, for example in relation to people on zero hours contracts or where there is a contractual right to lay off.

If an employee's ability to perform their job is affected by a third party, it may still be necessary to pay wages. In *North West Anglia NHS Foundation Trust v Gregg*, a doctor was entitled to be paid when he was suspended by the GMC pending an investigation into a patient death. This is an unusual case and unlikely to apply to the average employee.

The employee being ready and willing is key here. If an employee wants to return from sick leave, and her return is signed off by her GP, she may have a good claim for unlawful deduction from wages if the employer won't let her return for a period of time pending their own medical report. This happened in *Beveridge v KLM*. The employee won here because she was ready, willing and able to work in the six weeks it took for the employer to get its own expert report.

The corollary of this implied duty is that there is no right to be paid for any period where the employee refuses to work. Nor does an employer have to accept part-performance of a job. The employer can insist on the employee performing all their duties and can theoretically withhold wages for any period where the employee refuses (though I don't advise employers to do this without taking legal advice).

It's worth noting that there is also an implied duty on an employer not to act capriciously in relation to pay, although this is now considered as part of the overall duty of mutual trust and confidence.

Health and safety

An employer has an implied duty to take reasonable care of the health and safety of its employees, as well as legal duties that arise from statutes and health and safety regulations. The implied duty covers the duty to provide a safe workplace and safe systems of work too. The duty is to take reasonable steps to protect health and safety, rather than having to do everything within an employer's power to prevent injury.

A recent case looked at whether an employer was required to take reasonable care for the safety of an employee and protect them from consequential financial losses. In *Benyatov v Credit Suisse Securities*, the employee was an investment banker who said his employer had breached its duty of care not to expose him to the risk of criminal conviction and protect him from the resulting financial loss. Whilst working on a transaction in Romania, he got caught up in a case against the government's political opponents. He was convicted of criminal charges relating to economic and commercial spying. As a result of the conviction he was unable to work in his regulated profession. The High Court said that whether a duty arises will depend on the facts of the case, the foreseeability of harm and whether it is fair overall to impose a duty on the employer. Here, it was not fair – Romania was not a high-risk country, the transactions were not high risk either, there were no warning flags of the risk and there was no standard process for assessing this kind of political risk.

However, the Court left open the possibility that a separate implied employer duty - *the duty to indemnify* - might be implied in an appropriate case to cover some kinds of loss. The duty on an employer to indemnify employees usually relates to costs or expenses incurred by the employee during their job. Its scope usually depends on the nature of the employment and the scope of an employee's authority. I would advise employers to use express clauses in relation to expenses claims for contractual clarity.

Duty to provide a suitable working environment

This duty goes wider than the health and safety duty. For example, it might involve providing a workplace with a reasonable working temperature – requiring an employee to work in 9 degrees in winter was a breach of this duty in *Graham Oxley Tool Steels v Firth*. Or it might involve ensuring that workplaces are smoke free. A case called *Waltons & Morse v Dorrington*

was decided before the ban on smoking at work and found that a smoky workplace breached this implied duty.

An employer must also take reasonable steps to protect employees from the unacceptable behaviour of colleagues, for example in relation to bullying. The recent case of *Chell v Tarmac Cement and Lime* shows that this duty is limited. The employer was not liable for an injury caused by an employee playing a practical joke on a colleague by bringing in and hammering explosive pellets close to the colleague's ear. The Court of Appeal said it was common sense that this kind of 'horseplay' was inappropriate on a working site and employees were expected to carry out tasks using reasonable care and skill and not engage in dangerous horseplay.

Duty to provide reasonable support

In *Wigan Borough Council v Davies*, the EAT said that there was an implied term in an employee's contract that her employer would take reasonable steps to support her in her duties without harassment or disruption from colleagues. Employees have since tried to use this principle in relation to the facilities or tools provided by the employer to do the job, rather than any problems with co-workers. The EAT hasn't been too keen on this. In *Gibson v Dentsply*, an employment tribunal decided that an employee had been constructively dismissed when the employer failed to provide tools which would have allowed the employee to do his job to the standard he would have liked. The EAT disagreed. They said there would be a fundamental breach only if the tools provided put the employee or others in danger.

The situation may also be different if the tools or facilities provided seriously affect the employee's ability to carry out their duties. In *Whitbread t/a Thresher v Gullyes*, the employee was an off-licence branch manager. The employer breached the implied term by moving her to a branch which was known to be struggling operationally and knowing she didn't have the experience to manage the branch without significant support. They then removed the experienced members of staff as well. As you may suspect, the employer here was also in breach of the implied duty of mutual trust and confidence.

Implied duty to give redress for grievances

There is an implied duty to deal with grievances reasonably and promptly as well as giving an appropriate remedy if that grievance is upheld. If an employer does not do this, it may be a repudiatory breach which entitles the employee to resign and claim constructive dismissal. Investigations into grievances will need to meet the 'band of reasonable responses' test, in the same way that disciplinary investigations must do in unfair dismissal cases.

Cases have indicated that there may also be an implied duty to conduct disciplinary hearings fairly, separate from the general implied duty of mutual trust and confidence. Either way, employers must ensure their processes are above scrutiny.

Duty to give reasonable notice

Most employment contracts these days have express notice provisions which will always take precedence over an implied term. In the absence of an express term, reasonable notice will always be at least the minimum required by statute (contained in section 86 Employment Rights Act 1996). It may be longer depending on the status and seniority of the employee, their length of service, typical notice periods in the relevant industry, the relevant pay period

(weekly, monthly etc) and the notice periods of comparable employees. For example, the EAT has implied a one-month notice period into the contract of a hospital manager (*Hal v John Randall Associates*) and three months for a company director (*Clark v Fahrenheit*). In other cases, periods of six and twelve months have been implied into the contracts of a chief marketing director and a director of international operations respectively.

Duty to notify when terminating without notice

It might seem obvious that an employer must tell an employee if their contract has been terminated, but the facts of *Societe General v Geys* explain how things can go wrong. The employee's contract said that employment could be terminated by making a payment in lieu of notice into the employee's bank account. The employer did so but didn't tell the employee. That was not enough to effect notice, even though the steps the employer took met the contractual wording. They needed to tell the employee as well.

Advising employees about their rights and benefits

There is no general duty to advise employees about their contractual rights, except in very specific circumstances which I'll come onto shortly. Employers must comply with their duties under section 1 of the Employment Rights Act 1996 regarding statements of terms and conditions, but the remedy for any failure is limited to the terms of section 11: a declaration and 2-4 weeks pay.

In very specific circumstances, an employer will be required to tell employees about a contractual right. I touched on *Scally v Southern Health and Social Services Board* earlier, where the House of Lords said the employer was required to take reasonable steps to inform employees about the right to buy enhanced pension provision that they didn't know about until it was too late. This duty only arises where the relevant terms are negotiated with someone other than the employee (i.e. a trade union), the term gives a valuable right which requires some action to obtain the benefit, and the employee can't be expected to know about the right unless it is brought to their attention.

This duty doesn't go so far as to require an employer to give general pensions advice or to take care of an employee's economic wellbeing more generally. Let's say an employee knows about early retirement pension rights and has a handbook from which they could work out any financial implications stemming from retirement. An employer would not need tell the employee that his intended date of retirement would be better delayed by a month in order to get a better pension deal. Similarly, in *Crossley v Faithful and Gould Holdings*, an employer was not required to tell an unwell senior employee, who chose to resign, that he would stop being entitled to certain payments under the employer's long term disability insurance scheme. In this case, the employee had access to an insurance broker and either knew or could easily find out the terms of the scheme and the effect his resignation would have on his financial benefits. However, the Court of Appeal said that the situation may be different for a more junior employee without access to expert advice, so that is something employers should be aware of.

There may be an implied term that stops an employer dismissing an employee where the dismissal would deprive the sick employee of benefits to which they would otherwise become entitled under a permanent health insurance (PHI) scheme. The courts will look at any express contractual terms and the intentions of the parties. It's worth saying here that the duty of

mutual trust and confidence also requires an employer to take reasonable steps to procure payment under a PHI scheme for an employee's benefit. This makes sense because the contractual relationship is usually between the employer and the insurer and can't be enforced directly by the employee.

It's worth noting that if an employer chooses (or is required, under an implied duty), to give any information or advice in this kind of situation, they must take reasonable care to ensure it is accurate. It may be even better to refer employees to an appropriate professional adviser who can help employees directly.

Giving references

We've looked at references earlier in this audio-seminar. An employer is not normally required to give a reference in relation to a former or current employee. However, where they choose to give a reference, they owe the employee a duty of care to ensure that its content is accurate, and the comments can be supported by some evidence.

5. Mutual Trust and Confidence

The implied duty of mutual trust and confidence is the one we are all familiar with. It is a mutual duty, but is used most often by employees, against employers, in order to justify a resignation based on a repudiatory breach of contract. The official test from the Supreme Court in *Malik v Bank of Credit and Commerce International* is:

The employer must not, without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

The EAT in *Morrow v Safeway Stores* determined that a breach of the implied term of mutual trust and confidence will always be a repudiatory breach – one which goes to the root of the contract and entitles an employee to resign and claim constructive dismissal.

The employer's motives aren't crucial here, although calculated conduct is one of the two ways that can damage trust and confidence. There doesn't need to be any malice if the conduct is *likely* to seriously damage the employer/employee relationship. The question is whether, when looking at the employer's overall conduct, the employee cannot reasonably be expected to put up with it. Good faith isn't relevant either – an employer can make an honest mistake and still breach the implied term.

The breach can consist of a series of actions which, taken together, breach the implied term even though individually they may not. The 'last straw' act itself does not need to be a breach of contract either.

As well as showing that the employer's actions have destroyed or seriously damaged trust and confidence, the employer must have had no reasonable or proper cause for their conduct (you might want to go back and listen to the wording of the *Malik* test again here). An employer might, for example, demote an employee as part of a disciplinary process if they believe they are guilty of misconduct. That demotion is likely to damage trust and confidence. However, the employer might have reasonable and proper cause for the demotion if they believed the employee was guilty of misconduct.

Let's have a look at the sort of actions by the employer might breach the implied term of trust and confidence. I'm going to cover:-

- Negative comments about the employee
- Changes to job and status
- Making the job impossible
- Management prerogative
- Employment benefits
- Bullying and aggressive behaviour
- Discrimination
- Running a corrupt business
- Grievance and disciplinary processes
- Asking an employee to resign
- Conduct during litigation
- Fire and rehire
- Employee breaches of mutual trust and confidence

Negative comments about the employee

Whether there is reasonable and proper cause for negative comments will depend on the comment itself, the context and who the comment was made to. For example, referring to an employee as 'a bit dim' in an email to board members might be evidence of the company 'thinking aloud'. Conversations between high level managers about employment matters affecting employees will usually give rise to reasonable and proper cause. Comments would have to go well beyond what is reasonable and proper in order for there to be no reasonable and proper cause.

It might also be reasonable and proper for a manager in a business to have discussions about an employee with external advisers to tell them about matters involving an employee that fall within their area of expertise – again, as long as the comments don't go beyond what is reasonable and proper in the circumstances.

Comments made to the media, however, are likely to be different, especially if the employee thinks the comments are untrue and damaging, or true but personal and private. In *RDF Media v Clements*, the employee was a public figure in the media industry who was being poached by a rival business. The employer talked to a journalist about him, saying 'if you take the money you do the bloody job, it's just so dishonourable', which the High Court found were a serious attack on the employee's character, went beyond what was reasonable and proper, and was calculated or likely to destroy or seriously damage the employment relationship.

Companies should also consider that the actions of their employees, making negative comments about other employees in the course of employment, may result in the employer being vicariously liable. The message that should be given to all staff is to be careful about making any comments about employees, perhaps by asking whether they would mind those comments being read out in public or even in court. There are certainly better and more constructive ways of feeding back about an employee than describing them as 'a bit dim'.

Changes to job and status

If there is no express term which allows changes to an employee's job or duties, then any permanent change to an employee's job, duties or responsibilities might breach the implied term. The bigger the change, and the more impact it has on things like pay and status, the more likely it is to breach the term.

Making the job impossible

It might seem obvious, but if an employer instructs an employee to do something they know is impossible to achieve then this will breach the implied term. It is likely to seriously damage trust and confidence even if it is not intentional. In *Hellman International Forwarders v Cooper*, mutual trust and confidence was breached when an employer told an employee to clear an impossibly large work backlog in two weeks or lose her job. No surprise there.

The same is true for other unfair behaviour by an employer. In *French v Barclays Bank*, the employer exercised its right under a mobility clause to ask the employee to relocate. They gave the employee an interest-free bridging loan so he could buy a house in the new area while he was selling his old property. When the property proved difficult to sell, the bank changed the terms of the loan and started charging interest, saying the employee could instead sell his old house to the bank at an undervalue. The Court of Appeal said this was a breach of the implied term of trust and confidence as well as a breach of the express terms of the loan agreement.

Management prerogative

The employee is required to be ready and willing to work and has a duty to be flexible, but the employer also has a right to manage its employees. However, that management prerogative is restricted by the term of mutual trust and confidence. The potential clash of rights can come into play when an employer exercises its right to require employees to be flexible, for example in relation to mobility clauses. Any exercise of those flexibility rights must be reasonable. If an employer uses an express mobility clause to require an employee to relocate, it must act reasonably in doing so, for example by giving sufficient notice. Asking an employee to move from Leeds to Birmingham, on six days' notice, was a breach of the implied term in *United Bank v Akhtar*. Reasonable notice should have been given. The courts have also found a breach of the implied term where a husband and wife were placed on opposite shifts, so they were rarely at home together and the employer refused to change the arrangements. In *UB (Ross Youngs) v Elsworthy*, the EAT said that the employer could have avoided that 'intolerable' situation with a little extra thought.

Employment benefits

The implied term requires an employer to treat employees even-handedly. That means not treating one person differently from the rest for no good reason. In a case called *Transco v*

O'Brien, the employer failed to offer one out of eight employees a contract with enhanced redundancy terms because they had mistakenly not realised he was a permanent employee. That honest belief – or good faith – didn't matter, it was a clear breach of the implied term to single him out for different treatment.

Bullying and aggressive behaviour

Unsurprisingly, abusive behaviour can breach the implied term of trust and confidence. The test is an objective one. An employer will not get away with an argument that the industry is one where all employees are treated badly, such that bad treatment can't breach the implied term. A robust factory floor, where swearing and poor treatment by management is the norm, presents a real risk of claims that the implied term has been breached. That this is still acceptable in some workplaces is an outdated and incorrect assumption.

If bullying or abusive behaviour comes directly from a manager in the performance of his duties, the employer is treated as having breached the implied term. If it is treatment by a peer or colleague, the employer may be liable if they have failed to take appropriate steps to address it. Allowing bullying or mistreatment could be both a breach of trust and confidence and also a breach of the implied duty to provide a suitable working environment. Employers must be alive to the risk of workplace bullying, have clear policies that address it, and deal with any allegations promptly and properly. If an employer knows about the bullying, it won't be a defence to say that the employee hasn't complained – the employer must deal with it, or mutual trust and confidence is at risk.

Discrimination

Discrimination can also be a breach of the implied term, and often will be if the treatment is meted out by a manager (for whom the employer is vicariously liable) or the employer was aware of the risks but did nothing to address them. If an employer fails to make reasonable adjustments for their disabled employee, that might breach the implied term if that treatment was intended, or likely, to damage trust and confidence. Failing to pay equal pay – a breach of the implied equality clause – is likely to seriously damage trust and confidence because the sex equality clause lies at the heart of trust and confidence.

However, the legal tests are different, so it isn't necessarily so. In *Ahmed v Amnesty International*, an employer refused to allow an employee of Northern Sudanese ethnic origin to take up a research role in the Sudan because it worried that the employee's ethnic origin would damage perceptions of impartiality. That was discriminatory because the decision had been taken on grounds of race and could not be justified (as it was direct discrimination). However, the employer's reasons were genuine and serious, and they had followed a thorough process in arriving at their decision which revealed no racial prejudice. As such there was reasonable and proper cause for the treatment and the implied term was not breached in spite of the finding of discrimination.

Running a corrupt business

An employer owes its employees a duty to run an honest business rather than a corrupt or dishonest one. If an employee finds out that their employer is running a dishonest business then this will breach the implied term and the employee can consider themselves constructively dismissed. In *Malik v Bank of Credit and Commerce International* (the case which set out the wording for the duty of mutual trust and confidence, which I referred to

earlier on), BCCI ran a dishonest business and the House of Lords said that breached the implied term. What is more, the employees' damages weren't just limited to loss of earnings for premature termination. They could also claim 'stigma losses' if they could show that they were unable to get another job because of their association with the dishonest bank (subject to the normal rules of foreseeability and mitigation of losses). The House of Lords said there was a duty on employers not to do things which damaged an employee's future employment prospects.

Dishonesty might also breach the implied term in other situations. If an employer gives false information in a redundancy consultation process, keeps the real reason for proposed changes from employees, and does not keep an open mind during the process, that might breach trust and confidence. Information provided must be true and given in good faith. Dishonest behaviour completely undermines the purpose of any consultation process so it's logical that this kind of deliberate dishonesty could breach the implied term.

Grievance and disciplinary processes

Failing to deal fairly and properly with an employee's grievance may breach the implied term. This is true if the grievance is handled in an unfair way as well as if a grievance is rejected unfairly. The test will be whether the employer had reasonable and proper cause for acting as it did if conduct seriously damages trust and confidence.

Similarly, an employer's actions in a disciplinary situation can breach the implied term. Giving unfair warnings for minor incidents, reprimanding an employee publicly, or even just getting things muddled - by starting a process for one allegation and then taking into account and punishing the employee for another - can all breach trust and confidence. Unreasonable or irrational findings may also breach the implied term, as may giving a penalty which is disproportionate to the offence.

Suspension is a tool which must be used carefully even where there is an express term and should only take place if there is reasonable and proper cause. The need to investigate is not enough. Alternatives should be considered such as a transfer or a short period of leave. Demotion as a penalty may breach the implied term where there is no good reason for it and could well breach express contractual terms relating to job and duties. Failing to deal with an appeal properly, in good faith or within a reasonable period could also breach the implied term. Remember that an appeal cannot 'correct' a previous breach of the implied term, even though it can present an opportunity to correct elements of a previously unfair dismissal process for the purposes of an unfair dismissal claim.

Asking an employee to resign

Asking an employee to resign on favourable terms where their conduct or capability is in issue has been found to potentially breach the implied term. In *Billington v Michael Hunter*, the EAT said that such an invitation amounted to a vote of no confidence that was calculated or likely to destroy or seriously damage trust and confidence if there was no reasonable and proper cause for the treatment. The situation is somewhat different now that we have the statutory framework for pre-termination discussions which reduces the risk of this kind of conversation resulting in constructive dismissal claims.

Conduct during litigation

Litigation will always involve one party being at odds with another. However, conducting litigation with an employee in a hostile way may breach the implied term. This might arise, for example, if the employer tries to weaken an employee's discrimination claim by pressurising colleagues to give false witness statements. That conduct might seriously damage trust and confidence and it is difficult to see how asking an employee to lie could ever give rise to 'reasonable and proper cause'. The natural corollary is that conducting litigation fairly and reasonably will usually fall under 'reasonable and proper cause'.

Fire and rehire

This is a tool used by employers who need to bring about contract changes but where employee don't agree those changes. The employer will terminate contracts on notice and offer to reengage on the new terms. It was previously thought that a threat to serve notice on employees who wouldn't agree to a change could be an anticipatory breach of contract. However, in *Kerry Foods v Lynch* the EAT came to a different conclusion, saying that dismissal on notice – i.e. in accordance with the employment contract – and an offer of reemployment on new terms could not itself amount to breach the implied term of mutual trust and confidence.

Employee breaches of mutual trust and confidence

Just before we finish, I just want to touch on the mutuality element of the implied duty of mutual trust and confidence. It is a mutual duty, so the obligations apply equally to an employee as to an employer. However, employee wrongs that might breach trust and confidence are more often categorised as breaches of express terms of the employment contract or as a breach of one of the other implied terms such as the implied duty of fidelity. That said, a breach of mutual trust and confidence could be used to justify dismissal for gross misconduct, which has been described as conduct that so undermines the relationship of trust and confidence that the employer should no longer be required to retain the employee in his job. In reality, most employers faced with a serious breach of trust and confidence by an employee will follow their own fair procedures to assess whether dismissal is a fair sanction in the round.

6. Conclusion

That's all for now on implied terms. I hope this audio seminar has been useful and has given you some insight into how implied terms affect contracts of employment. If you have anything to say on the issue, post your comments on the HR Inner Circle Facebook page and see what others have to say. If you're not in the Facebook group, email Nina at nina.douglas@hrinnercircle.co.uk to be added.

Next month's audio seminar is on Conflict at Work. I hope you found this audio seminar useful and thank you for listening.

