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## The Significance of the Implied Mutual Duty of Trust and Confidence in the Employment Relationship

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**Title:** The Significance of the Implied Mutual Duty of Trust and Confidence in the Employment Relationship

**Course:** DT567 – M.A. in Law

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**Date:** 22 May 2009

**This dissertation is submitted in partial fulfillment of the requirements for the M.A. in Law from the School of Social Sciences and Law in the Dublin Institute of Technology.**

## Declaration

I, the undersigned, declare that this dissertation which I now submit for examination for the award of M.A. in Law is entirely my own work and has not been taken from the work of others save and to the extent that such work has been fully cited and acknowledged within the text of my own work.

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Signed: \_\_\_\_\_

Katie McDermott

Dated: \_\_\_\_\_

## Abstract

### **Title:**

The Significance of the Implied Mutual Duty of Trust and Confidence in the Employment Relationship.

### **Objectives:**

1. Trace the development of the implied duty in the both the Irish and English jurisdiction.
2. Analyse the types of behaviour which will fall foul of the obligation to maintain trust and confidence.
3. Ascertain the limits of the implied duty.
4. Assess the current judicial climate following the first Supreme Court decision on the duty implied.
5. Consider the implications of the implied duty on certain areas of employment law.
6. Determine the potential for further development of the implied duty.

### **Methods:**

Qualitative and Quantitative Research

## **Conclusions:**

1. The implied obligation is critically important in relation to the interaction between the common law and statute and underpins all employment relationships.
2. The potential for damages via a claim of a breach of the implied duty has been and will continue to be restricted.
3. The judicial climate is in favour of avoiding setting too high a standard for employers.
4. A purely objective test fails to take account of the emotive nature of this area of law and contradicts the requirement to consider the parties' conduct as a whole.
5. The modern interpretation of the concept is that it is prescriptive and this narrowing has impacted on the requirements for interlocutory relief.
6. The developing law on bonus payments is being shaped by reference to the implied duty of trust and confidence.
7. The implied duty has the potential to determine the parameters of the law relating to workplace bullying.
8. A breach of the implied duty can be waived but a finding of such should necessarily require an employer to establish that an employee did so with 'actual knowledge' of his legal rights.
9. Existing inconsistencies in this area of law should be mitigated such that it will be possible to declare what the law relating to the implied duty is in forthright terms.

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## Chapter 1

### Introduction

The age when management could ‘hire and fire’ at will is gone and it is now possible to assert that the employer has a legal duty to treat his employees with due respect and consideration, mindful of their needs and problems and sympathetic to their difficulties. It is no longer possible to treat an employee as an expendable chattel, or as an object without feelings and emotions.

In *Spring v Guardian Assurance*<sup>1</sup> Lord Slynn took cognisance of:

*“...the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee<sup>2</sup>”.*

The evolution of the duty of mutual trust and confidence is a prime example of this process. It has moved from a somewhat theoretical concept of contract law used mainly to limit an employee’s actions, to a dynamic overarching term of huge potential for an employee seeking to assert their position against the inevitably more powerful employer.

Particularly strong recognition has been afforded to the role of the implied duty of mutual trust and confidence in the employment relationship in a number of contemporary High Court cases and most significantly the Supreme Court recently dealt with the issue in *Berber v Dunnes Stores*<sup>3</sup> for the first time.

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<sup>1</sup> [1994] 3 All. E.R. 129

<sup>2</sup> *Ibid* at p.161

<sup>3</sup> Unreported, Supreme Court, 12<sup>th</sup> February, 2009.

Employers must be aware of the significance of this implied duty as it is no longer enough for an employer to simply ensure compliance with the strict terms of the employment contract. They must also take account of the potentially broad reaching implications of the duty of trust and confidence that they owe to their employees.<sup>4</sup> Traditional concepts such as the entitlement of an employer not to furnish work to an employee as long as they are paid are now undermined by radical new applications of this long-standing principle.<sup>5</sup>

The purpose of this thesis is to consider in detail the development of this implied duty, in terms of how it has been expanded and restricted, the conduct of employers which has been found to breach the obligation, where the duty currently stands in this jurisdiction, the far-reaching impact this duty has had on various areas of employment law and its potential which, it is submitted, is yet to be fully realised.

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<sup>4</sup> Bolger, M. & Ryan, D., 2007. *The mutual duty of fidelity in the contract of employment: Significant recent developments*. (2007) 4(4) I.E.L.J. 112

<sup>5</sup> See Chapter 5.6 - Failing to Provide Work.

## Chapter 2

### Implied Terms in the Contract of Employment

#### 2.1 Introduction

Implied terms allow the courts to achieve justice between the parties to an employment contract where the express terms of the contract and the existing statutory code are inadequate to the task.

Terms may be implied by one of two mechanisms:

1. the ‘officious bystander’ test; or
2. by law.

#### 2.2 The ‘Officious Bystander’ Test

The first situation where the courts will, independently of statutory requirement, imply a terms which has not been expressly agreed by the parties to a contract was identified in the well-known *Moorcock* case<sup>6</sup> where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties.

The basis for such a presumption was explained by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd*<sup>7</sup> in the following terms:

*“Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes*

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<sup>6</sup> *The Moorcock* [1889] 14 P.D. 64

<sup>7</sup> [1939] 2 K.B. 206

*without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'.*"<sup>8</sup>

### 2.3 Terms Implied by Law

Secondly, terms may be implied by law. There are a variety of cases in which a contractual term has been implied on the basis, not of the intention of the parties to the contract, but deriving from the nature of the contract itself. Indeed in analysing the different types of case in which a term will be implied Lord Wilberforce in *Liverpool City Council v Irwin*<sup>9</sup> preferred to describe the different categories which he identified as no more than shades on a continuous spectrum.

Such an implication will be justified by the category of contract and by necessity. For example, in *Becton, Dickinson Ltd v Lee*<sup>10</sup>, approved in *Bates v Model Bakery*<sup>11</sup>, the Supreme Court held that an implied term should be read into every contract of employment that service of a strike notice of a length not shorter than would be required for notice to terminate the contract, does not amount to notice to terminate the contract, save for those circumstances where there is an express provision to the contrary or where a contrary provision must, by necessary implication, be read into the contract.

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<sup>8</sup> *Ibid* at p.227

<sup>9</sup> [1977] A.C. 239

<sup>10</sup> [1973] L.R. 1

<sup>11</sup> [1993] 1 I.R. 359

## 2.4 Conclusion

Implied terms have mainly developed in the context of the employer's right to dismiss an employee without notice and in the context of constructive dismissal. When determining the reasonableness of the employer's actions for purposes of unfair dismissal the ruling authority (be it the Employment Appeals Tribunal or a Court) will be influenced by the express and implied contractual terms agreed by the parties.

It is noteworthy that whichever test is used, a term will not be implied into a contract where inconsistent with the express wording of the contract or the surrounding circumstances or where it is unnecessary to the efficacy of the contract<sup>12</sup>.

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<sup>12</sup>*Sweeney v Duggan* [1997] 2 I.L.R.M. 211; *Ali v Christian Salvesan Ltd* [1997] I.C.R. 25; *Sullivan v Southern Health Board* [1997] 3 L.R. 123

## Chapter 3

### Implied Term of Mutual Trust and Confidence

#### 3.1 Introduction

In the late 1970's in the case of *Courthaulds Northern Textiles Ltd v Andrew*<sup>13</sup> the implied duty was formulated as follows:

*“It was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the confidence and trust between the parties.”*<sup>14</sup>

The House of Lords in *Mahmud & Malik v BCCI*<sup>15</sup> significantly rejected the antiquated notion of a ‘*master and servant*’ relationship and recognised the fundamental “*change in legal culture which made possible the evolution of the implied term of trust and confidence*”.<sup>16</sup>

#### 3.2 The Leading Authority: *Mahmud & Malik v BCCI*

The leading authority on the implied term of mutual trust and confidence is the decision of the House of Lords in the aforementioned consolidated appeals of *Mahmud & Malik v BCCI*<sup>17</sup>. The House of Lords was asked to consider a case in which an employer was conducting a corrupt and fraudulent business. The plaintiffs had not been involved in the corruption, but nevertheless suffered financial losses and harm to their

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<sup>13</sup> [1979] I.R.L.R. 84

<sup>14</sup> *Ibid* per Arnold J. at p.86

<sup>15</sup> [1998] A.C. 20

<sup>16</sup> *Ibid* per Lord Steyn at p.46

<sup>17</sup> *Supra*, n.15

reputations and employment prospects when the employer's fraudulent practices were eventually exposed. The existence of such an implied term of fidelity, trust and confidence was agreed between Counsel for the respective parties and arguments therefore were focused on the application of such a term and its precise scope.

The plaintiffs were long-serving senior employees. Their employment was terminated by reason of redundancy when the bank went into liquidation following allegations of corruption and dishonesty by the bank. The plaintiffs claimed that they found it extremely difficult to obtain new employment because they were tainted by their association with the bank's wrongdoing which was not due to their actions in any way. The plaintiffs sought and obtained damages for injury to reputation ('stigma damages') reflecting their loss of earnings arising from the damage to their reputations within the financial services sector.

The House of Lords held that if the employer's conduct was a breach of the duty to maintain trust and confidence which detrimentally affected an employee's future employment prospects so as to give rise to continuing financial loss, and it was reasonably foreseeable that such loss was a serious possibility, damages would, in principle, be recoverable if injury to reputation (and hence future employment prospects) could be established as being a consequence of the breach.

In considering the nature of the relationship created by the employment contract, Lord Nicholls and Lord Steyn (with whom Lords Goff, Mackay and Mustill agreed) held that, in agreeing to work for an employer, an employee cannot be taken to agree to work in furtherance of a dishonest business. Therefore, they must be entitled to leave that employment immediately when such dishonesty comes to light. In order to give effect to the right of the employee to leave without them



breaching the contract of employment, there must be a correlative obligation or term implied in the employment contract that the employer must not conduct a corrupt business. A breach of this term must accordingly be characterised as a repudiation of the employment contract that would entitle the employee to terminate the contract.

Accordingly, the House of Lords considered that an implied term that the employer not conduct a corrupt or fraudulent business was necessary in order to facilitate the proper functioning of the employment contract and to allow the parties to enjoy the rights conferred by the contract of employment. More specifically, this term was necessary to ensure that the employee could enjoy the contractual benefit of employment by an honest employer.

### 3.3 Conclusion

It is significant that for the purposes of assessing the plaintiff's claims it was assumed that the business had been run in a dishonest or corrupt fashion, and the highly unusual nature of the case was captured in the following passage of the judgment of Lord Nicholls:

*“[O]ne of the assumed facts in the present case is that the employer was conducting a dishonest and corrupt business. I would like to think that this will rarely happen in practice.”*<sup>18</sup>

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<sup>18</sup> *Supra*, n.15 per Lord Nicholls at p.42

Notwithstanding the unusual facts, the scope of the duty was articulated in broad terms. In his judgment Lord Nicholls described the implied obligation as:

*“[n]o more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.”*<sup>19</sup>

The implied term of trust and confidence is the most central implied term of the contract of employment. The breadth of the definition has spawned much litigation in recent years and generated a great deal of academic attention, having been described as: assuming a central position in the law of the contract of employment<sup>20</sup>; being undoubtedly the most powerful engine of movement in the modern law of employment contracts<sup>21</sup>; and forming the cornerstone of the legal construction of the contract of employment<sup>22</sup>.

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<sup>19</sup> *Supra*, n. 15 per Lord Nicholls at p.34

<sup>20</sup> Brodie, D., 1996. *The Heart of the Matter: Mutual Trust and Confidence*. I.L.J. Vol. 25, No. 2

<sup>21</sup> Freedland, M.R., 2003. *The Personal Employment Contract*. Oxford: Oxford University Press, 2003.

<sup>22</sup> Collins, H., 2003. *Employment Law*. Oxford Clarendon Law Series. Oxford: Oxford University Press, 2003.

## Chapter 4

### The Significance of a Breach

#### 4.1 Introduction

Employees have sought to rely on the implied term of mutual trust and confidence in order to seek greater damages than those traditionally available for breach of contract.

#### 4.2 Damages are Irrecoverable for Manner of Dismissal

In *Addis v Gramophone Co Ltd*<sup>23</sup>, the House of Lords held that an employee cannot recover damages for the manner in which a wrongful dismissal took place, for injured feelings or for any loss he or she may sustain from the fact that having been dismissed makes it more difficult for him to obtain new employment.

In *Kinlan v Ulster Bank*<sup>24</sup>, citing *Addis* with approval, then Chief Justice Kennedy stated the proposition as follows:

*“It is very clearly settled, both in this country and in England, and affirmed in many cases that in actions for breach of contract damages may not be given for such matters as disappointment of mind, humiliation, vexation, or the like, nor may exemplary or vindictive damages be awarded.”*<sup>25</sup>

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<sup>23</sup> [1909] A.C. 488

<sup>24</sup> [1928] I.R. 171

<sup>25</sup> *Ibid* at p.184

#### 4.3 Distinguishing *Addis* from *Malik*

In recent years, relying on the implied term of trust and confidence, plaintiffs have sought to escape the rule in *Addis*. They have been assisted in this by *Malik* in which, as set out above, the House of Lords held that there was an implied obligation on an employer that he would not carry on a dishonest or corrupt business and that if it was reasonably foreseeable that in consequences of such corruption there was a serious possibility that an employee's future employment prospects would be handicapped, damages would be recoverable for any such continuing financial losses sustained.

The case of *Malik* arose out of an application by the respondent to strike out the employee's Statement of Claim that it was a viable claim that the respondent had breached this term due to the corrupt and dishonest way it had operated, which had left the appellants with a stigma attached to their reputations. As detailed above, they contended that it was thus more difficult to find employment, notwithstanding the fact that they were entirely innocent of wrongdoing. Accordingly, the appellants were held to be entitled on a strikeout application to proceed to claim damages for the financial loss suffered by them, although after a full trial they failed to prove their case.

*Addis* could be distinguished from *Malik*, given that the loss in *Malik* was a financial loss arising from a breach of contract independently of and prior to the fact of dismissal. However, the Court went further than simply to distinguish *Addis*. Lord Nicholls stated that *Addis* did not preclude the recovery of damages where the manner of dismissal

involved a breach of the trust and confidence term and this caused financial loss.<sup>26</sup>

Lord Steyn asserted that *Addis* did not decide that an employee may not recover financial loss for damage to his or her employment prospects caused by a breach of contract or that in breach of contract cases compensation for loss of reputation can never be awarded, or that it can only be awarded in cases falling in certain defined categories. *Addis* simply decided that the loss of reputation in that particular case could not be compensated because it was not caused by a breach of contract.

#### 4.4 Conclusion

This is a question that awaits resolution in Irish law. When the matter came before the High Court in *Cronin v Eircom Ltd*<sup>27</sup> Laffoy J. did not consider it necessary to express any view on the status in this jurisdiction of the decision in the *Addis* case.

Interestingly however, in *Carey v Independent Newspapers (Ireland) Limited*<sup>28</sup> Gilligan J. commented that it was “*of interest to note that other common law jurisdictions have rejected Addis*”.<sup>29</sup>

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<sup>26</sup> *Supra*, n.15 at p. 615

<sup>27</sup> [2007] E.L.R. 84

<sup>28</sup> [2004] 3 I.R. 52

<sup>29</sup> *Ibid* at p.82 citing the approach of the New Zealand High Court in *Stuart v Armourguard Security* [1996] 1 N.Z.L.R. 484

## Chapter 5

### Manifestations of the Implied Term in Case Law

#### 5.1 Introduction

The implied term of trust and confidence has proved to be a powerful tool for employees seeking redress against their employers. Its manifestations are various.

#### 5.2 Unwarranted Suspension

In *Gogay v Herts CC*<sup>30</sup> the issue was whether the defendant local authority acted reasonably in suspending the claimant from her post in a residential home while they investigated the circumstances surrounding a child living in that home. The investigation concluded that there was no case to answer, but the claimant suffered psychiatric illness and loss of earnings as a result of her suspension.

Hale LJ stated that the implied term of confidence and trust requires an employer, in the words of Lord Nicholls of Birkenhead in *Malik*:

*“not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages...The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously*

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<sup>30</sup> [2000] I.R.L.R. 703

*damage the degree of trust and confidence the employer is reasonable entitled to have in his employer”.*<sup>31</sup>

Hale LJ further went on to point out that Lord Steyn emphasised that the obligation applies:

*“only where there is ‘no reasonable and proper cause’ for the employer’s conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship...”*<sup>32</sup>

Hale LJ considered whether the authority’s conduct amounted to a breach of this implied term, opining that the test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. This conduct in this case was not only to suspend the claimant, but to do so by means of a letter which stated that *“the issue to be investigated is an allegation of sexual abuse made by a young person in our care”*. Hale LJ stated that sexual abuse is a very serious matter, doing untold damage to those who suffer it and further to be accused of it is also a serious matter. To be told by one’s employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The next question was therefore whether there was ‘reasonable and proper cause’ to do this.

In Lord Justice Hale’s judgment there clearly was not. The information considered by the investigator of the allegations and the strategy meeting convened by him to consider and plan that investigation was “difficult to evaluate”. The difficulty was in determining what, if anything, the child in care who had both learning and communication difficulties and who had been sexually abused by her father, was trying

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<sup>31</sup> *Supra*, n.15 at p.35A & C

<sup>32</sup> *Supra*, n.30 at p.53B

to convey. It was agreed that it warranted further investigation but to describe it as an “allegation of sexual abuse” was putting it far too high. A close reading of the records, coupled with further inquiries of the child’s therapist, was needed before it could be characterised as such. There was therefore a breach of the term and the employee was entitled to something better than the ‘knee-jerk’ reaction of suspension.

### 5.2.1 Distinguishing Types of Suspension: Punitive & Holding

It is noteworthy that if the *Gogay* line of reasoning is to be accepted in this jurisdiction, of significance would be the fact that the Irish courts have drawn a distinction between two types of suspension: punitive and holding and existing case law to this effect may exert a salient influence on whether the Irish courts would, in the context of a suspension, find the mutual duty to have been engaged.<sup>33</sup>

The distinction between the two types of suspension was explained by Barr J. in *Quirke v Bord Luthchleas na hEireann*<sup>34</sup> as follows:

*“[S]uspension...may take two different forms. On the one hand, it may be imposed as a holding operation pending the investigation of a complaint. Such a suspension does not imply that there has been a finding of any misbehaviour or breach of rules by the suspended person, but merely that an allegation of some such impropriety or misconduct has been made against the member in question. On the other hand, the suspension may be imposed not as a holding operation pending the outcome of an inquiry, but as a penalty by way of punishment of a member who has been found guilty of misconduct or breach of rules. The importance of the*

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<sup>33</sup> See *supra*, n.4

<sup>34</sup> [1988] I.R. 83



*distinction is that where a suspension is imposed by way of punishment, it follows that the body in question has found it's guilty of significant misconduct or breach of rules.*"<sup>35</sup>

The importance of this distinction was illustrated in the High Court judgment of *Morgan v Trinity College*<sup>36</sup>. The plaintiff was employed as a senior lecturer in the Department of English in Trinity College Dublin. He was suspended with pay with immediate effect on foot of a complaint made by a female colleague who alleged physical intimidation and harassment. The plaintiff applied, *inter alia*, for an interlocutory injunction restraining the Defendants from removing him from office and restraining them from embarking on a disciplinary inquiry. He contended, *inter alia*, that there was a failure to comply with natural justice in that he did not have an opportunity to challenge his accusers during the investigation, and that his suspension was invalid as it constituted a second suspension and should in any event be lifted by reason of its duration.

Kearns J. refused the relief sought and held that whether a suspension amounted to a sanction such as would invoke concepts of natural justice or give rise to an inference that the person concerned had been found guilty of significant misconduct was, in every case, a question of fact and degree. Kearns J. emphasised the importance of the distinction between a holding suspension and a punitive suspension, citing the above passage from the judgment of Barr J. in *Quirke*. Kearns J. stressed that in the context of a punitive suspension, the person affected was entitled to be afforded natural justice and fair procedures before the decision to suspend was taken; by contrast, in the latter case, the rules of natural justice might not apply.

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<sup>35</sup> *Ibid* at p.87

<sup>36</sup> [2003] 3 I.R. 157

It should be noted however that while the period of the suspension must be sufficiently reasonable to allow the investigation to take place (as pointed out by Kearns J. in *Quirke*) a suspension will not be allowed to continue for an “*inordinate and unjust*” amount time. This was held to be so in *Martin v Nationwide Building Society*<sup>37</sup> wherein Macken J. in the High Court granted an injunction allowing the Plaintiff to return to work even though he had been suspended to allow an investigation into allegations of misconduct. In order to avoid activating the implied duty in such a circumstance, employers should ensure that investigations are carried out in a prompt and efficient manner.

### 5.3 An Invitation to Resign

There was also found to be a breach in *Billington v Michael Hunter & Sons Ltd*<sup>38</sup>, which proceeded as an appeal against a Decision of the Employment Tribunal wherein, by a majority, the Employment Tribunal held that there had not been a fundamental breach of contract so that her resignation could not be construed as a dismissal. The Appellant’s case was that she had been constructively dismissed by the Respondent employer when she was told that she was likely to face dismissal on the outcome of a disciplinary investigation, but may instead resign on a generous resignation package.

The Employment Appeal Tribunal again observed that a proper consideration of this implied term may involve two separate issues. Firstly there may be the question whether an employer has conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the parties. If the answer to that question is no, that is the end of the case; but if the

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<sup>37</sup> [2001] 1 I.R. 228

<sup>38</sup> [2003] UKEAT 0578 03 1610, 16<sup>th</sup> October, 2003.

answer is yes, a second issue arises, namely whether the employer has done so without reasonable and proper cause.

As to the first question, in the judgment of the Employment Appeal Tribunal the Employment Tribunal's findings were only consistent with a conclusion that the Respondent did conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the parties. Firstly, it was noted that there was an express finding that at a final meeting, which was said by the employer not to be a continuation of the disciplinary meeting held some days earlier but did have connection with it and its intention was to examine and discuss the Appellant's performance and whether she felt able to continue this the job, the Respondent invited the Appellant to resign and offered her favourable terms if she could choose to do so.

Secondly, it was noted that the Employment Tribunal's conclusion that the Respondent was indicating on that day that it regarded itself as better off without her and that any reasonable employee on that date could have regarded the invitation to resign as being a vote of no confidence in her. Thirdly it was noted that the Employment Tribunal found the minute that that meeting to be accurate or at any rate not fundamentally to misrepresent what was said at the meeting.

On this third finding, the Employment Appeal Tribunal found that if it was so, then the minute itself betrayed a remarkable state of affairs. The Appellant was told that the meeting was not a continuation of the disciplinary meeting, but a number of further allegations were put to her and in the result it was made clear to her that if there were any further instances such as those that had already been detailed and those mentioned at this meeting, she would very likely be dismissed. The

earlier meeting had ended in a written warning. This in substance was a final warning.

That, coupled with the invitation to resign, the ‘vote of no confidence’ which the Employment Tribunal had found, and other things that were said in the minute of that meeting as well about “*sullen behaviour*” and the like, lead the Employment Appeal Tribunal to the conclusion that the Respondent certainly behaved in a manner calculated and likely to destroy or seriously damage its relationship with the Appellant.

The Employment Appeal Tribunal considered with the vote of no confidence was justified by repeated complaints and therefore the “without reasonable and proper cause” element of the implied term was unsatisfied but found that the reference to repeated complaints to be insufficient to meet the requirement of reasonable and proper cause without any further finding or investigation.

#### 5.4 Failing to Alert to a Vacancy

Perhaps one of the most interesting manifestations of this principle is to be found in the case of *Visa International Service Association v Paul*<sup>39</sup>, the English Employment Appeals Tribunal held that the employers had fundamentally breached the implied term of mutual trust and confidence entitling the claimant to claim constructive dismissal, by failing to notify her, while she was on maternity leave, of a vacancy for which she would have applied if she had been aware of it, notwithstanding that she could not have been short-listed for the post. In reference to the argument that no fundamental breach of contract by the respondent was made out in

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<sup>39</sup> [2004] I.R.L.R. 42

circumstances where the Tribunal found as a fact that the applicant was not ‘shortlistable’ for the post, Judge Peter Clarke stated,

*“That, in our view, misses the point. Her complaint was not that she had not been informed of a job opportunity which turned out to be illusory. It was that she believed that she was suitable for the post and the Respondent’s failure to notify her of that opportunity fatally undermined her trust and confidence in the Respondent after twelve years service. That case, upheld by the Tribunal, was not dependent on her losing the chance, in fact, of successfully applying for the post. The Tribunal’s conclusion is, in our judgment, consistent with the formulation of the implied term to be found in the judgment of Brown-Wilkinson P in Woods v WM Car Services [1981] ICR 666 (EAT) at 670; and by the House of Lords in Mahmud v BCCI [1997] IRLR 462...”*

## 5.5 Foul & Abusive Language

Again, in *Horkulak v Cantor Fitzgerald International*<sup>40</sup>, the English High Court held that the conduct of the defendant company’s chief executive in asserting his authority over the claimant senior managing director by the use of foul and abusive language which gave the claimant no chance to respond to any criticism, and insisting on standards of achievement which he had no grounds for believing the claimant could attain amounted to a breach of the implied term of trust and confidence. Newman J stated that:

*“The law has developed so as to recognise an employment contract as engaging obligations in connection with the self*

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<sup>40</sup> [2003] I.R.L.R. 756

*esteem and dignity of the employee. There is an obvious tension between the circumstances which have been address in this development of the law and the currency of the language in evidence in this case.*”<sup>41</sup>

Newman J referred to the following passage from the speech of Lord Steyn in *Malik*:

*“...The major importance of the implied duty of trust and confidence lies in its impact on the obligations of the employer...And the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.*

*The evolution of the implied term of mutual trust and confidence is a fact...It has proved workable in practice. It has not been the subject of an adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of trust and confidence as a sound development.*”<sup>42</sup>

## 5.6 Failing to Provide Work

In Ireland, the scope of the mutual duty of fidelity, trust and confidence was greatly expanded by the judgment of Laffoy J. in *Cronin v Eircom Limited*<sup>43</sup> mentioned above. In this case, the plaintiff had been employed

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<sup>41</sup> *Ibid* at para.17

<sup>42</sup> *Supra*, n.15 at p.45H-46D

<sup>43</sup> *Supra*, n.27

by the defendant since 1999. She was paid a salary and earned a bonus. On the 10<sup>th</sup> of April 2000 the plaintiff was seconded to Eircom UK Ltd, a subsidiary of Eircom Plc, on terms that she was to remain an employee of Eircom Plc, that her conditions of employment, except as varied by terms of a letter dated 6<sup>th</sup> April 2000, and any other contractual entitlements, were to remain unchanged and that at the end of secondment she would continue in employment with Eircom Ireland in accordance with existing terms and conditions of employment.

Later in the year 2000, and whilst on secondment, the Plaintiff was promoted to the position of Accounts Manager for Irish Accounts. Her salary increased and the introduction of a commission scheme was promised. However, all other terms, conditions and benefits were to remain unchanged. On the 26<sup>th</sup> of April 2001 the Plaintiff was informed that due to dramatic restructuring within the company, the business could no longer sustain her secondment as Account Manager for Irish Accounts and that she was to be repatriated to Eircom Plc with effect from the 31<sup>st</sup> of May 2001.

From that time until February 2005 when she was offered a position of Product Support Executive, the plaintiff had been deprived of an appropriate job by the defendant. The essence of the case was there was implied into the contract of employment a term of mutual trust and confidence which required the employer to provide the plaintiff with work which matched her skills and the achievements she had accomplished. In failing to provide such work, the defendant had thereby deprived her of opportunities which would have been available to her to be promoted and to advance her career. As a consequence, it was submitted, the plaintiff's career prospects had been damaged both within the defendant and generally.

Laffoy J. found in favour of the plaintiff. In a radical departure from the traditional view that an employer was only obliged to pay remuneration rather than to provide work, Laffoy J. accepted that the plaintiff had a contractual right to be provided with work “*so that she would have an opportunity to gain experience, pursue promotion in her job and advance her career*”.<sup>44</sup>

On the facts, Laffoy J. did not consider it was an appropriate case to award stigma damages and referred to the decision in *Malik* as “*not really apposite*” in that the plaintiff in *Cronin* was still an employee of the defendant and had not been put in the position of seeking alternative employment.

## 5.7 Conclusion

As can be seen from the above, the implied duty is implicit in cases involving dismissal or disciplinary procedures and is particularly evident where the employer is alleged to have been carrying out provocative conduct.

The cases considered above demonstrate how the duty as formulated is apt to cover the diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.

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<sup>44</sup> *Supra*, n.27 at p.104



## Chapter 6

### Limits to the Implied Duty

#### 6.1 Introduction

As noted in by Gilligan J. in *Carey*<sup>45</sup> the case of *Malik* was authority for a limited right of recovery where an employee's future job prospects have been damaged by the employer. It is now proposed to consider how the common law relating to the implied obligation has been shaped by the gradual setting of boundaries on the recoverability of damages where trust and confidence is at issue.

#### 6.2 Restrictions on the Right to Recovery

The status of *Malik* was the subject of argument in the High Court case of *McGrath v Trintech Technologies Ltd and Trintech Group Plc*<sup>46</sup> wherein Laffoy J. rejected the proposition that the mutual duty of trust and confidence could imply into the contractual relationship a term that the plaintiff would not be dismissed without due cause or without reasonable notice or consultation and that the defendant would adopt fair procedures in any review or selection process for dismissal or redundancy in a manner that would suggest a consistency with the approach of the House of Lords in *Johnson v Unisys*<sup>47</sup> which case shall also be considered herein.

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<sup>45</sup> *Supra*, n.28

<sup>46</sup> [2005] 4 I.R. 382

<sup>47</sup> [2001] I.R.L.R. 279

In support of their submission that it is settled law that the employment relationship is governed by an implied term of mutual trust and confidence, Counsel on behalf of Mr. McGrath referred to Redmond's "*Dismissal Law in Ireland*"<sup>48</sup> at paragraph 2.11 wherein the evolution of the implied terms of mutual trust and confidence in a contract of employment is analysed. It is stated that the modern approach is prescriptive: the mutual duty of trust and confidence obliges the parties in the contract of employment to behave towards one another in a way which respects trust and confidence and enables it to flourish between them. On the employer's side, it is suggested his prescriptive duty not to do anything to destroy the relationship of confidence translates, *inter alia*, into a duty to provide fair procedures in disciplinary matters, a prescriptive duty already endorsed in this jurisdiction in the Constitution.

Laffoy J. narrowed the question arising in that matter as to whether that broad principle can accommodate the implication in the contractual relationship of the plaintiff and the defendant of terms that the plaintiff would not be dismissed without due cause or without reasonable notice or consultation and that the defendant would adopt fair procedures in any review or selection process for dismissal or redundancy, the breach of which would give rise to an action at common law.

In contending that it cannot do so in a manner as to give rise to an inconsistency or conflict with another contractual term governing the relationship of the parties, the defendant referred to the speech of Lord Hoffman in *Johnson*<sup>49</sup>. In his speech, having acknowledged that the contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment, the

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<sup>48</sup> Redmond M., 2007. *Dismissal Law in Ireland*, 2<sup>nd</sup> Edition. Haywards Heath: Tottel Publishing, 2007.

<sup>49</sup> *Supra*, n.47

most far-reaching being the implied term of trust and confidence, Lord Hoffman went on to say:

*“The problem lies in extending or adapting any of these implied terms to dismissal. There are two reasons why dismissal presents special problems. The first is that any terms which the courts imply into a contract must be consistent with the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed...”*<sup>50</sup>

On the facts of the *Johnson* case, Lord Hoffman stated that, in the face of the express provision in Mr. Johnson’s contract that Unisys was entitled to terminate his employment at four weeks’ notice without any reason, it was very difficult to imply a term that Unisys should not do so except for some good cause and after giving reasonable opportunity to demonstrate that no such cause existed.

Lord Steyn who dissented on the issue as to whether Mr. Johnson had a reasonable cause of action based on breach of the implied obligation of trust and confidence, took a different view. Commenting on the argument by Counsel for Unisys that to apply the implied obligation of mutual trust and confidence in relation to a dismissal was to bring it into conflict with the express terms of the contract, he said:

*“Nevertheless, relying on the notice provision, Counsel for the employers submitted that to apply the implied obligation of mutual trust and confidence in relation to a dismissal is to bring it into conflict with the express terms of the contract. He said orthodox contract law does not permit such a result. His*

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<sup>50</sup> *Supra*, n.47 at p.816

*argument approached the matter as if one was dealing with the question of whether a term can be implied in fact in the light of the express terms for the contract. This submission loses sight of the particular nature of the implied obligation of mutual trust and confidence. It is not a term implied in fact. It is an overarching obligation implied by law as an incident of the contract of employment. It can also be described as a legal duty imposed by law: Treitel, The Law of Contract, p 190. It requires at least express words of a necessary implication to displace it or to cut down its scope. Prima facie it must be read consistently with the express terms of the contract. This emerges from the seminal judgment of Sir Nicolas Browne-Wilkinson V-C in Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589. It related to an employer's express contractual right to refuse amendments under a pension scheme. The Vice-Chancellor held that the employer's express rights were subject to the implied obligation that they should not be exercised so as to destroy or seriously damage the relationship of trust and confidence between the company and its employees and former employees. The employer's blanket refusal was unlawful. The decision did not involve trust law and the employer was not treated as a fiduciary. It was decided on principles of contract law. Sir Nicolas Browne-Wilkinson V-C described the implied obligation of trust and confidence as "the implied obligation of good faith". It could also be described as an employer's obligation of fair dealing. In the same way an employer's express right to transfer an employee may be qualified by the obligation of mutual trust and confidence: see United Bank Ltd v Akhtar [1989] IRLR 507, Sweet & Maxwell's Encyclopaedia of Employment Law, vol 1, paras 1.5101 and 1.5107. The interaction of the implied obligation of trust and confidence and*

*express terms of the contract can be compared with the relationship between duties of good faith or fair dealings with the express terms of notice in a contract. They can live together.*

Lord Steyn went on to say, however, that:

*“The notice provision in the contract is valid and effective. Nobody suggests the contrary. On the other hand, the employer may become liable in damages if he acts in breach of the independent implied obligation by dismissing the employee in a harsh and humiliating manner. There is no conflict between the express and implied terms. I would therefore dismiss this argument.”*

Laffoy J. found however that the essence of Mr. McGrath’s case was that there should be implied into his contract with the defendant a term that mere compliance with the express notice provision in the contract would not validly and effectively terminate the contractual relationship at common law. The learned judge went on to say that there was no authority for such a proposition and that she was persuaded by the authorities cited by the defendant’s Counsel that the proposition is not sound in principle.

Accordingly, Laffoy J. came to the conclusion that terms in relation to dismissal and redundancy on the lines pleaded by the plaintiff could not be implied into the plaintiff’s contract of employment with the defendant so as to give rise to a cause of action at common law and in circumstances where such protection and remedies as are afforded by statute to the plaintiff regarding incidents which prevailed cannot be pursued at first instance in a plenary action in the High Court.

### 6.3 Conclusion

This proposition was been further supported in the later High Court judgment of *Pickering v Microsoft Ireland Operations Limited*<sup>51</sup> wherein Esmond Smyth J. referred to the approach of Laffoy J. in *McGrath* and concluded as follows:

*“I am satisfied that the position at common law continues to be that an employer is entitled to dismiss an employee for any reason or no reason, on giving reasonable notice, and that damages for the manner of a dismissal are confined to those damages to which an employee would be entitled for the notice period and do not include damages for the manner of dismissal. Furthermore, not can an implied term, such as for example, an implied term of mutual trust and confidence, be relied on to circumvent that principle.”*<sup>52</sup>

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<sup>51</sup> [2006] E.L.R. 65

<sup>52</sup> *Ibid* at p.114

## Chapter 7

### Psychiatric Injury Arising out of Employer's Breach of Trust

#### 7.1 The English Approach

Attempts by plaintiffs in the UK to rely upon *Malik* in an attack upon *Addis* have failed because of the existence of the statutory remedy for unfair dismissal.

In *Johnson* (followed in *Eastwood v Magnox Electric plc*<sup>53</sup>), the plaintiff was summarily dismissed and was awarded damages for unfair dismissal by an industrial tribunal. He then instituted fresh proceedings and was awarded damages for unfair dismissal by an industrial tribunal. He then instituted fresh proceedings seeking damages for psychiatric injury suffered arising out of his employer's breach of the implied term of trust and confidence in the manner in which he was dismissed. The House of Lords dismissed his claim. The majority of the House of Lords held that the contractual duty of trust and confidence did not apply to dismissal or the manner in which employment was terminated. It declined to extend the scope of the implied term of trust and confidence to the context of a dismissal. It held that to do so would be inappropriate, given the statutory remedy for unfair dismissal.

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<sup>53</sup> [2002] I.R.L.R. 447

Their Lordships also reasoned that the implied term of trust and confidence is concerned with *preserving* the continuing relationship of employment and not linked to its termination. Consequentially, Lord Hoffman opined:

*“So it does not seem altogether appropriate for use in connection with the way that relationship is terminated. If one is looking for an implied term, I think a more elegant solution is...[the] implication of a separate term that the power of dismissal will be exercised fairly and in good faith. But the result would be the same as that for which Mr. Johnson contends by invoking the implied term of trust and confidence. As I have said, I think it would be possible to reach such a conclusion without contradicting the express term that the employer is entitled to dismiss without cause.”*

While *Johnson* therefore limits the scope of the implied term of trust and confidence, the case of *McCabe v Cornwall County Council*<sup>54</sup> is authority for the fact that *Johnson* does not preclude an employee from seeking damages for psychiatric injury in respect of disciplinary proceedings arising independently of dismissal.

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<sup>54</sup> [2003] I.R.L.R. 87



## 7.2 The Irish Approach

The Irish High Court showed a similar disposition to that taken by the House of Lords in *Johnson*. Mr. Justice Smyth in *Harrington v Irish Life and Permanent plc*<sup>55</sup> dismissed the plaintiff's claim in respect of personal injuries arising out of a breach of his contract of employment in a few words:

“[The argument that] *the Plaintiff was entitled to damages for personal injuries was also advanced, but I am satisfied, on the authority of the Bliss case, in which the Court held that the defendant employer had fundamentally breached the contract of employment by requiring the plaintiff to provide a psychiatric report as a condition of return to work, that the general rule laid down by the House of Lords in Addis v Gramophone Company Limited [1909] A.C. 488 is that where damages fall to be assessed for breach of contract rather than tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance caused by the breach' is the applicable law in this jurisdiction' ”.*

Mr. Justice Smyth did not allude to *Johnson* and neither *Bliss* nor *Addis* provide authority for the proposition that a plaintiff may not obtain damages for personal injuries arising out of a breach of contract.<sup>56</sup>

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<sup>55</sup> Unreported, High Court, Smyth J., 18<sup>th</sup> June, 2003.

<sup>56</sup> Maguire, C., 2004. *Implied Terms and Conditions and the Contract of Employment* (2004) 1(5) I.E.L.J. 146

Interestingly, in *Quigley v Complex Tooling and Moulding*<sup>57</sup> the Plaintiff appeared to be seeking damages for stress and distress suffered by him during a lead up to a termination of his employment. Lavan J. expressly distinguished what had been held in *McGrath* and found that Mr. Quigley was seeking to establish that the conduct of the employer during the employment was such as to amount to a breach of an implied duty to maintain trust and confidence during the employment relationship, and caused him injury. The court accepted that this claim was separate and distinct from the claim for unfair dismissal.

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<sup>57</sup> [2005] 16 E.L.R. 305

## Chapter 8

### Assessing whether a Breach Occurred

#### 8.1 Introduction

An important consideration in regard to the nature of the duty concerns whether an objective or subjective standard is to be applied to the assessment of its alleged breach. Crucially, in *Malik* the Law Lords rejected the submission advanced on behalf of the bank that, as the employees were unaware of the bank's wrongdoing during their employment, their confidence in their employer could not have been undermined. This argument was predicated upon the acceptance of a subjective standard which the Law Lords held was inappropriate.<sup>58</sup>

As Lord Nicholls observed:

*“[T]he objective standard provides the answer to the [Respondent’s] submission that unless the employee’s confidence is actually undermined there is no breach. A breach occurs where the proscribed conduct takes place; here, by operating a dishonest and corrupt business. Proof of a subjective loss of confidence is not an essential element of the breach.”*

It is the effect of the impugned conduct, as distinct from the motivation behind that conduct, which is relevant for the purposes of assessing whether the duty of trust and confidence has been breached.

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<sup>58</sup> *Supra*, n.4

## 8.2 Case Study - The First Decision of the Supreme Court on the Implied Duty: *Berber v Dunnes Stores*

### 8.2.1 Introduction

That same objective standard has recently been expressly endorsed as forming part of Irish law by the Supreme Court on an employer's successful appeal in *Berber v Dunnes Stores Limited*<sup>59</sup>. Laffoy J. had found in the employee's favour in the High Court and her contrary findings shall be considered also. As aforesaid this is the first judgment of the Supreme Court on the implied duty and it is therefore worthy of detailed consideration.

The respondent advanced a number of causes of action in his pleadings and while two issues arose for the purposes of the Appeal, the following question considered by the Supreme Court is for present purposes, that of interest is whether the respondent was wrongfully dismissed by reason of a breach by the appellant of the implied term of the contract of employment that it would not conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee, such breach amounting to repudiation of the contract of employment which the Respondent was entitled to accept.

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<sup>59</sup> *Supra*, n.3

## 8.2.2 The Facts

In examining the Supreme Court's approach to the implied term of trust and confidence, it is essential to set out the factual background of this case. The respondent commenced employment with the appellant as a Trainee Manager in April 1980 at the age of 19. On completion of his training he was employed as Store Manager at various locations until 1988. From 1988 until November 2000 he transferred from store management to the position of Buyer being successively Group Footwear Merchandiser, Men's Footwear Buyer and Men's Readymade Buyer. On his last management performance review in February 2000 his performance was generally rated at the level of "effective contribution". The assessment provided for four performance standards in descending order – excellent, effective contribution and below standard. The review contained a comment "colour issue". Some years prior to that review the appellant had a colour blindness test carried out on all buyers and the respondent was reported as colour blind. Notwithstanding this he had been moved to a position as Men's Readymade Buyer. From February 2000 onwards the plaintiff's evidence was there was a change of attitude towards him evinced by the following: -

- (a) Unlike previous years as a buyer when he spend as many as 50 days abroad during 2000 he was sent abroad only once; and
- (b) There was an increased interest in the state of his health notwithstanding an excellent work attendance record. He had been diagnosed with Crohn's disease in 1978. He had a recurrence of his disease in 1995 and again in Spring 2000. In the years 1995, 1996 and 1999 he missed one day

through illness. He had no absences in 1998. He was absent for five days in 1997 and five days in 1997 and seven days in 2000 up to the 23<sup>rd</sup> of November 2000.<sup>60</sup>

In July 2000 he was told that he was not being sent on a trip to the Far East because Mrs. Heffernan was concerned that he might get ill on account of his Crohn's disease and he considered this "bizarre". In October 2000 the respondent was informed that he was to be transferred from buying back to store management and his colour blindness was averted to at this time. He was informed on the 22<sup>nd</sup> of November 2000 that he was to be moved to the appellant's store in the ILAC Centre Dublin as either Department Manager of Menswear or Ladieswear. The respondent considered this demotion and sought a meeting with Mrs. Heffernan and a meeting took place on the 23<sup>rd</sup> of November 2000. At the meeting it was agreed that the respondent would return to store management initially at the Appellant's store in Blanchardstown Shopping Centre, which was regarded as the flagship store, where he would undergo training with a view to being fast-tracked for appointment as Store Manager or Regional Manager within 6 – 12 months.

The respondent's understanding was that he would commence work in the Ladieswear Department in Blanchardstown on Blanchardstown on the 4<sup>th</sup> of December 2000. On the 27<sup>th</sup> of November 2000 the respondent was directed to report for duty that day to Blanchardstown and take up a position in the Homewares Department. He considered this a variation of his agreement with Mrs. Heffernan and he tried to contact her without success as she was abroad. He did not go to

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<sup>60</sup> The relevance of this date will appear hereafter.

Blanchardstown on the 27<sup>th</sup> of November 2000 but was contacted the next day by the Director of Store Operations Mr. McNiffe.

On the 28<sup>th</sup> & 29<sup>th</sup> of November 2000 the Respondent had three meetings with Mr. McNiffe. At the meeting on the 28<sup>th</sup> of November 2000 the respondent refused to go to Blanchardstown until such time as he had spoken with Mrs. Heffernan. There were two meetings on the 29<sup>th</sup> of November 2000. At the first meeting the respondent read out a statement which he had prepared but refused to furnish a copy to Mr. McNiffe and maintained his refusal to go to Blanchardstown. At the second meeting the Respondent maintained this position and Mr. McNiffe suspended him from work with pay. Thereafter the respondent's communications to the appellant were largely through his solicitors.

The first solicitors' letter dated 7<sup>th</sup> December 2000 made it clear that the Respondent would go to Blanchardstown on the terms which he had agreed with Mrs. Heffernan. The matters raised on his behalf were that the transfer was taking place seven days earlier than agreed, a plan to fastrack him was not yet prepared and that the position was in Homewares. In the letter the Respondent's solicitors said in relation to the Respondent's suspension: -

*“The effect of this quite extraordinary conduct on the part of the company towards our client and the stress generated by it, has resulted in our client becoming ill and he attended his doctor on 1 December and again today, 7 December, who has ordered him to rest and certificates to this effect have been delivered to the company.”*

The letter threatened proceedings if the suspension was not lifted. In a short report of the 31<sup>st</sup> of January 2001 the Respondent's treating surgeon had this to say: -

*“Over the last while he has had an exacerbation of symptoms (of Chron's disease) and I have no doubt the recent wrangle has exacerbated his symptoms and has resulted in him having to increase his medication.”*

In a reply of the 12<sup>th</sup> of December 2000 the Appellant's solicitors gave as the reason for the respondent's suspension his attitude at the meetings with Mr. McNiffe, his persistence in seeking to speak to Mrs. Heffernan and his refusal to explain his issues to Mr. McNiffe which they categorised as unreasonable. The letter indicated that the Appellant was prepared to overlook the incident provided that the respondent reported to work in Blanchardstown as soon as certified fit to do so by his doctor.

Having considered this evidence Laffoy J. in the High Court categorised the attitude of each of the parties. The respondent considered that Mrs. Heffernan was intent on ousting him from his employment. He attributed this to jealousy of the respondent's brother who had achieved remarkable commercial success. Mrs. Heffernan had alluded to this at the meeting on the 23<sup>rd</sup> of November 2000. The learned trial judge found that the appellant was motivated by sound management considerations in deciding to transfer the respondent from buying to store management. However the respondent's solicitors' letter of the 7<sup>th</sup> of December 2000 should have sounded alarm bells with the respondent's senior management as to the respondent's state of health.



On the other hand the appellant inferred from the respondent's conduct that he had an ulterior motive in that he was attempting to orchestrate a situation in which he could get a severance payment or compensation: the learned trial judge held that this an incorrect inference. Laffoy J. concluded that while some of the respondent's behaviour might be characterised as unreasonable, it was attributable to his trust in the appellant's senior management executives having been shattered. The learned trial judge noted that responses from Mr. McNiffe to the respondent solicitor's letters were sent directly to the Respondent at his home address sometimes by courier and sometimes on Saturday, and, while the appellant was entitled to communicate directly with the respondent, this course heightened the respondent's distrust of the appellant and increased the stress he was under.

The respondent reported for work in Blanchardstown on the 28<sup>th</sup> of December 2000 having been cleared to do so by his doctor. There was an incident that day. He was dressed casually in the manner in which he dressed while working as a buyer in Head Office. He was informed by Mr. Sills, the Store Manager, that the dress code for managers was a conservative coloured suit and formal footwear. The respondent asked Mr. Sills to put that in writing and Mr. Sills did so on the 29<sup>th</sup> of December 2000.

The respondent explained that he was on the defensive at this time because of the cumulative effect of the problems which he was having. He ceased work again for four days on account of his ill health. He contended that his treatment at Blanchardstown in this period exacerbated his ill health. He particularised two matters: -

- (a) A document entitled "Draper Management Analysis" widely circulated included his name under the heading of "New

Trainees” which he considered humiliating, defamatory and vindictive. The document is a manuscript duty roster for the particular store for a particular week; and

- (b) A personalised 12-week Homewares training plan which was furnished to him on his arrival was appropriate to a newly joined trainee and failed to take account of his 21 years experience.

These complaints were contained in a letter of the 11<sup>th</sup> of January 2000 from the respondent’s solicitors in which it was alleged that these matters were a continuation of a course of treatment which began the preceding February designed to sideline him out of management and out of his employment. The letter demanded the withdrawal of the Drapery Management Analysis and the preparation of an appropriately devised training plan. There was a measured and conciliatory response from Mr. McNiffe by reply dated the 12<sup>th</sup> of January 2000. Mr. McNiffe explained the mid-description in the roster as an oversight and sought flexibility on the respondent’s part in giving the training programme a chance to work. He explained that in the 12 years since the respondent had been in store management much had changed and that it was important that the respondent re-learn the business from the ground up. The respondent was requested to return to work the following Monday.

By letter dated 21<sup>st</sup> February 2001 the respondent’s solicitors advised the Appellant that the respondent’s treating surgeon had indicated that the respondent might return to work but that before doing so the respondent required confirmation in relation to the training programme and his future career path and that a communication be circulated to all management and staff within Head Office and all stores to correct the mis-description in the Drapery Analysis Management Analysis.

There was further correspondence but ultimately a meeting was arranged for the 7<sup>th</sup> of March 2001 between the respondent and his solicitor and Mr. McNiffe and the appellant's solicitor and at which a stenographer retained by the respondent attended. Following the meeting Mr. McNiffe wrote to the respondent setting out the matter which he considered to have been agreed and this gave rise to further disagreement and further correspondence. The first matter in issue was the length of time before the Respondent would proceed to a position as Store Manager or Regional Manager. Mr. McNiffe suggested that this could take 18 months with an initial position as No.2 before progressing to a position of No.1 in store management. The respondent was insisting on a time scale of three to six months rather than the twelve months mentioned by Mrs. Heffernan at the meeting of the 23<sup>rd</sup> of November 2000 notwithstanding that he had only attended for work in Blanchardstown for four days since that meeting. The second related to the training programme and the extent to which the respondent should be involved in its preparation.

The first matter was not resolved prior to the respondent leaving his employment. On the second matter, while a training programme was produced on the 8<sup>th</sup> of March 2001, the respondent's solicitors raised in correspondence a number of points in relation to same with which Mr. McNiffe was not prepared to agree. A third matter was in relation to the Drapery Management Analysis and concerned the text of an announcement made. The announcement as circulated was not in the terms agreed.

The learned trial judge held that the substance of the announcement was as agreed and she did not consider the variations to be of significance. The circulation was narrower, Laffoy J. held, than the respondent was entitled to expect.

The Respondent returned to work towards the end of April 2001. His solicitors continued to raise issues on his behalf in correspondence. He continued to work until the 15<sup>th</sup> of May 2001. On the 15<sup>th</sup> of May 2001 the respondent was rostered for duty from 10.00am to 8.30pm but incorrectly believed that he had been rostered for duty from 8.30am to 6.00pm. He attended at 8.30am. During the morning Mr. Sills the Store Manager made it clear to the respondent that he was required to attend until 8.30pm and there were heated exchanges. Mr. Sills made it clear that he was the respondent's superior and the respondent's reply was that Mr. Sills could deal with his solicitor. He did not work until 8.30pm. The learned trial judge found that in relation to this incident the respondent was in the wrong and that Mr. Sills' conduct was understandable.

By letter dated 30<sup>th</sup> May 2001 the respondent's solicitors wrote to the appellant's solicitors as follows: -

*“We refer to our letters of 1 May and 9 May, neither of which have received a response. Our client has kept us closely advised of the developments at his place of employment which have had a severely adverse effect on his health. We have advised our client that the company has repudiated its obligations towards him as an employee. Our client has written the enclosed letter to Mrs. Margaret Heffernan.*

*We have been instructed to seek damages against the company in relation to the company's repudiation of the contract of employment and to the reckless imposition by the company of physical and emotional suffering on our client including an abusive verbal attack on our client by a senior manager in the presence of other members of management and staff. Unless we receive from the company within seven days of the date of this letter, adequate proposals to compensate our client, proceedings will issue without any further notice. In that event we shall be obliged for your confirmation that you have authority to accept service of such proceedings on behalf of your client."*

The letter from the respondent enclosed therewith complained that the appellant had failed to honour his understanding of the meeting of the 7<sup>th</sup> of March 2001. He complained of the altercation with Mr. Sills on the 15<sup>th</sup> of May 2001. Finally, he complained that his working environment was hostile to his health and in consequence he had been advised by his Consultant to cease working in that environment.

Thereafter the respondent was out of work for a period of approximately 8 months. At the end of January 2002 he obtained a position as a buyer with another retail group on terms no less favourable than those which he had enjoyed with the appellant.

### 8.2.2 The Findings of the High Court

On the evidence Laffoy J. in the High Court made, *inter alia*, the following findings: -

- (1) It was an implied term of the plaintiff's contract of employment that the defendant s acting reasonably could assign him from one work location to another and from one management function to another appropriate management function.
- (2) It was an implied term of the plaintiff's contract of employment that both the employer and employee would maintain mutual trust and confidence. The defendant was in breach of that term after the 23<sup>rd</sup> of November 2000 since the manner in which the defendant dealt with the plaintiff in the knowledge of the precarious nature of his physical and psychological health viewed objectively amounted to oppressive conduct. It was likely to seriously damage their employer/employee relationship and it did so.
- (3) A breach by an employer of its implied contractual obligation to maintain the trust and confidence of an employee is a breach which goes to the root of the contract.

The learned trial judge did not think it would be proper to draw the inference suggested by the defendant from the plaintiff's conduct that the plaintiff had no real intention of giving the change to store management a chance to work. Laffoy J. stated that: -

*"...some of his behaviour might be characterised as unreasonable, but I think this is attributable to the fact that his trust in the defendant's senior management and executives had been shattered rather than to any grand design to leave the defendant with a severance package or compensation."*

Also, in relation to the defendant solicitors' responses to the plaintiff's solicitors correspondence being send directly to his home, sometimes by courier and sometimes on Saturday, the learned trial judge was of the view that there was no doubt that this course adopted heightened the distrust of the plaintiff.

In relation to the claim for breach of contract as pleaded and pursued before the High Court by Counsel on behalf of the plaintiff, the essence of this aspect of his claim being that the plaintiff was constructively and wrongfully dismissed by the defendant , the learned trial judged stated that, in her view:

*"[T]he plaintiff's submission that there was a series of breaches of contract on the part of the defendant and that the accumulation of those breaches resulted in a repudiation by the defendant of the plaintiff's contract is not correct. The correct interpretation of what happened is that the manner in which the defendant dealt with the plaintiff in the knowledge of the precarious nature of his physical and psychological health viewed objectively amounted*

*to oppressive conduct. It was likely to seriously damage their employer/employee relationship and it did so. Accordingly, the defendant breached its obligation to maintain the plaintiff's trust and confidence."*

### 8.2.3 The Approach of the Supreme Court

Finnegan J., delivering the Judgment of the Supreme Court, adopted the test as set out in *Malik* wherein Lord Steyn had considered the correct approach to the question of whether the implied obligation had been breached and said:

*"...given the existence of an obligation of trust and confidence, it is important to approach the question of a breach of that obligation correctly. Mr. Douglas Brodie of Edinburgh University, in his helpful article to which I have already referred put the matter succinctly, at pp. 121-122:*

*'In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Moreover, the impact will be assessed objectively'.*

*Both of Mr. Brodie's reservations seem to me to reflect classic contract law principles and I would gratefully adopt his statement."*<sup>61</sup>

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<sup>61</sup> *Ibid* at p.622



Elaborating on the objective nature of the test Lord Steyn went on to say:

*“The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. It may well be, as the Court of Appeal observes, that the decided cases involved instances of conduct which might be described as*

*‘conduct involving rather more direct treatment of employees’*

*[1996] ICR 406, 412, so be it but Lord Justice Morritt held that the obligation:*

*‘may be broken not only by an act directed at a particular employee but also by conduct which, when viewed objectively, is likely to seriously damage the relationship of employer and employee.’*

*That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employee’s claims for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may arise.”*

In relation to the test, the Supreme Court in *Berber* stated that the following matters are to be noted: -

1. The test is objective.
2. The test requires that the conduct of both employer and employee be considered.
3. The conduct of the parties as a whole and the accumulative effect must be looked at.
4. The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it.

#### 8.2.4 The Findings of the Supreme Court

Applying the appropriate test to the conduct of the respondent in the *Berber* case, the Supreme Court focused only on the events which occurred after the 23<sup>rd</sup> of November 2000.

The Supreme Court found that in circumstances where the appellant was first notified that stress was exacerbating the respondent's Crohn's disease on receipt of the solicitor's letter of the 7<sup>th</sup> of December 2000, there was no evidence to justify a conclusion the appellant was aware of the respondent's mental condition during the events prior to this date (such as on the 27<sup>th</sup> of November 2000 when he was instructed to report to Blanchardstown and did not do so). The Supreme Court went on to

conclude that on application of an objective test to the suspension of the respondent with pay, it could not be said that the same was unreasonable and found that the appellant acted *bona fide* and within its rights in deciding to move the respondent.

Further, in the view of Finnegan J., the respondent's refusal to cooperate until such time as he should speak to Mrs. Heffernan was unreasonable. The following passage of law as stated by Smyth J. in *Harrington v Irish Life and Permanent Plc*<sup>62</sup> was affirmed:

“(a) *The following basic principles are applicable: -*

1. *the employer impliedly contracts to obey the lawful and reasonable orders of his employer (or his employee's delegate) within the scope of the employment he contracted to undertake. Chitty on Contracts (24<sup>th</sup> ed. Vol. 2 para. 37 – 050); and*
2. *it has long been part of our law that a person expudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his Master. Such a refusal fully justifies an employer in dismissing him summarily.*

*(Per Karminski L.J. in Pepper v Webb [1969] 2 All ER 216 at 218, cited with approval and adopted by Hamilton J. as he then was in Brewster v Burke & Anor [1985] 4 JISLL 98 at p.100).”*

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<sup>62</sup> *Supra*, n 55

Finnegan J. viewed the suspension with pay to be significantly less draconian than seeking to dismiss the respondent following his refusal to comply with the direction given to him and objectively considered the respondent's conduct as unreasonable. The learned judge highlighted the fact that on hearing from the respondent's solicitor by letter dated 7<sup>th</sup> December 2000 the appellant gave an unequivocal assurance of willingness to overlook the incidents provided the respondent returned to work as soon as his doctor should certify him as fit to do so.

Finnegan J. viewed the exchange in relation to the dress code for managers as one which would justify concerns in the appellant as to the course of future interaction with the respondent. It is submitted that while the respondent's request to have the dress code put into writing could be seen as further evidence of the employee's loss of trust and confidence in the employer and its subordinates, it was concluded by the Supreme Court that the occurrence "*is neutral for present purposes neither party having acted unreasonably.*"

In dealing with the matter of the training plan, Finnegan J. understood Laffoy J. findings that the appellant was aware of the respondent's vulnerability at the date of preparation of same, to mean the normal anxiety and concern which any employee might feel on a significant change in his employment taking place and did not consider the appellant's course of conduct to the training plan to be unreasonable or oppressive.

The final matter dealt with by the Supreme Court under the breach of contract element of the Appeal was what occurred on the 15<sup>th</sup> of May 2001 when the respondent incorrectly believe that he had been rostered for duty from 8.30am to 6.00pm. Finnegan J. viewed the respondent's failure to work beyond 6.00pm and his final salvo to Mr. Sills that he

could deal with his solicitor as being part of a consistent pattern of conduct in circumstances where the respondent objected to written communications to him being sent to him directly and the requirement he had that all such communications be sent to his solicitor.

On this point of appeal, Finnegan J. concluded:

*“...I am satisfied that the conduct of the appellant judged objectively was not such as to amount to a repudiation of the contract of employment. The conduct judged objectively did not evince an intention not to be bound by the contract of employment. On the other hand the conduct of the respondent was in the instances mentioned above unreasonable or in error and the employer’s conduct must be considered in the light of same. In these circumstances the purported acceptance of repudiation of the contract of employment by the respondent was neither justified nor effective. The respondent must fail on his claim under this heading.”*

### 8.3 Conclusion

It is clear that the critical factor in persuading Laffoy J. that the employer was guilty of “*oppressive conduct*” was the employer’s knowledge that the respondent was suffering from stress as a result of the dispute between him and his employer however the judgment of the Supreme Court is authority for the proposition that evidence of an employee’s loss of trust and confidence in his/her employer will now necessarily require a high standard of proof.

It is unfortunate that, while the test is objective, the opinion of the presiding Judges in these types of cases is inevitably subjective. For example, while Finnegan J. viewed the respondent's failure to work beyond 6.00pm and his final salvo to Mr. Sills that he could deal with his solicitor as being part of a consistent pattern of conduct which was in the instances mentioned above unreasonable or in error and the employer's conduct must be considered in the light of same, such a pattern of conduct by the respondent could equally be viewed as further evidence of an absence of trust and confidence in his employer.

While there is remains a limited amount of guidance in these or any other authorities as to what constitutes a breach of the implied obligation of trust and confidence, the approach adopted by Laffoy J. in the *Berber* case was possibly seen by the Supreme Court as posing unique difficulties for an employer and perhaps setting too high a standard for those who are dealing with employees who are claiming to be stressed as a result of an employment dispute, particularly where the essential matter in dispute relates to the issue of a lawful instruction, an entirely commonplace allegation in the context of employment law.

## Chapter 9

### Repudiation, The Last Straw & Constructive Dismissal

#### 9.1 Repudiation

As to whether conduct amounts to a repudiation of the contract the ordinary law of contract applies: the cumulative effect of the acts complained of must be such as to indicate that a party had repudiated its contract.<sup>63</sup>

By reference to McDermott *Contract Law*<sup>64</sup> the test as to whether a breach of contract amounts to repudiation is whether the breach goes to the root of the contract. A breach by an employer of its implied contractual obligation to maintain the trust and confidence of an employee is a breach which goes to the root of the contract.

It had earlier been held in *Woods v W.M. Car Services (Peterborough) Limited*<sup>65</sup> by Browne-Wilkinson J. following *Courthaulds Northern Textiles Limited v Andrew*<sup>66</sup> that any breach of the implied term that the employers will not, without reasonable and proper cause, conduct themselves in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee was a fundamental breach amounting to a repudiation since it necessarily went to the root of the contract.

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<sup>63</sup> *Brown v Merchant Ferries Limited* [1998] I.R.L.R. 682

<sup>64</sup> McDermott, P.A., 2001. *Contract Law*. Dublin: Buttersworths, 2001.

<sup>65</sup> [1981] I.R.L.R. 347

<sup>66</sup> *Supra*, n.13

This statement was not accepted by the Court of Appeal in *Bliss*<sup>67</sup> and neither was it accepted by Douglas Brodie in his aforementioned article<sup>68</sup> which was referred to with approval in both *Malik* and *Browne v Merchant Ferries Limited*<sup>69</sup>.

Where the repudiatory breach alleged is of the trust and confidence term:

*“The misconduct of the employer amounting to breach must be serious indeed since it amounts to constructive dismissal and as such entitles the employee to leave immediately without any notice on discovering it. The test is whether the employer’s conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and can walk out of his job without prior notice.”*<sup>70</sup>

It is accepted that an employer may engage in conduct which is ‘out of order’ without thereby repudiating the contract, although repeated behaviour of that kind may be a different matter.<sup>71</sup>

As considered above, the test to be applied is not subjective. The employee’s actual perception is not material. The test is an objective one; this is whether viewed objectively, the employer’s conduct so impacted on the employee that the employee could properly conclude that the employer was repudiating the contract. In other words, a Court must be satisfied that the conduct of the employer judged objectively did not evince an intention not to be bound by the contract of employment

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<sup>67</sup> *Bliss v South East Thames Regional Health Authority* [1985] I.R.L.R. 308

<sup>68</sup> *Supra*, n.20

<sup>69</sup> *Supra*, n.63

<sup>70</sup> *BCCI v Ali (No. 2)* [2000] I.C.R. 1354 at p.1376H

<sup>71</sup> *Cantor Fitzgerald v Bird* [2002] I.R.L.R. 867



and therefore a purported acceptance of repudiation of a contract of employment by an employee is neither justified nor effective.

## 9.2 The Last Straw

In *Lewis v Motorworld Garages Limited*<sup>72</sup>, it was seen to be perfectly proper for Counsel for the employee to:

*“...accumulate the breaches to found the submission that the totality of the wrongful course of conduct entitled the employee to claim that the employer had evinced an intention no longer to be bound by the contract of employment.”*<sup>73</sup>

This was in circumstances where some of the acts or incidents, which formed part of a course of conduct, when viewed in isolation, seemed “*quite trivial*”.

It was held in *Omilaju v Waltham Forest London Borough Council*<sup>74</sup> that the quality that a “last straw” had to possess was that it was an act in a series whose cumulative effect amounted to a breach of the implied term. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence.

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<sup>72</sup> [1986] I.C.R. 157

<sup>73</sup> *Ibid* at p.165

<sup>74</sup> [2005] 1 All. E.R. 75

### 9.3 Constructive Dismissal

Mr. Justice Finnegan on delivering the Judgment of the Supreme Court in *Berber v Dunnes Stores*, adopted the law on constructive dismissal as summarised by Mr. Justice Browne-Wilkinson in *Lewis* as follows: -

- “1. *In order to prove that he has suffered constructive dismissal an employee who leaves his employment must prove that he did so as a result of a breach of contract by his employer, which shows that the employer no longer intends to be bound by an essential term of the contract: see Western Excavating (E.C.C.) Limited v Sharp*<sup>75</sup>.
  
2. *However, there are normally implied in a contract of employment mutual rights and obligations of trust and confidence. A breach of this implied term may justify the employee in leaving and claiming that he has been constructively dismissed: see Post Office v Roberts*<sup>76</sup> *and Woods v W.M. Car Services (Peterborough) Limited*<sup>77</sup>.
  
3. *The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the*

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<sup>75</sup> [1978] I.C.R. 221

<sup>76</sup> [1980] I.R.L.R. 347

<sup>77</sup> *Supra*, n.65, at 670 per Browne-Wilkinson J.

*implied term. See Woods W.M. Car Services (Peterborough) Limited*<sup>78</sup>. *This is the ‘last straw’ situation.”*

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<sup>78</sup> *Supra, n.65*

## Chapter 10

### The Mutuality of the Duty

#### 10.1 Introduction

The obligation of fidelity is plainly mutual: as Laffoy J. described it in the *Berber* case, this reciprocal duty is “*a two-way street*”. Thus it also imposes duties on the employee including to obey lawful and reasonable instructions.

Indeed, it has been successfully used by an employer to limit ‘work to rule’ as a tool of industrial action. In *Secretary of State v ASLEF (No.2)*<sup>79</sup>, it was held that an employee must not frustrate the commercial objectives of the employer by seeking to carry out instructions in an unreasonable way.

#### 10.2 The Relevancy of the Cumulative Conduct of the Parties

With regard to the application of the implied term to both the employer and the employee, Mr. Justice Finnegan in delivering the Judgment of the Supreme Court in *Berber* referred to the case of *Woods v W.M. Car Services (Peterborough) Limited*<sup>80</sup> and quoted the following passage of Browne-Wilkinson J.:

*“In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a*

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<sup>79</sup> [1972] Q.B. 455

<sup>80</sup> *Supra*, n.65

*manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see British Aircraft Corporation Limited v Austin [1978] IRLR 332 and Post Office v Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed; Post Office v Roberts."*

### 10.3 Conclusion

While it is accepted that the obligation is a "two-way" street, the greater interest in the term lies in the impact that the duty of mutual trust and confidence has had on the employer's obligations.

It is submitted that the weight of this principle of mutuality is in the consideration of parties' conduct as a whole and the consequent assessment of impact on a cumulative basis. This is a practical approach as it takes into account human nature in terms of how one's reaction will naturally be correlative to one's treatment. It is contended however that such a principle again appears to allow for an element of subjectivity in what is supposed to be an objectively tested area of law. If the conduct of the parties as a whole is considered relevant then it cannot be said that the test is an objective one as this necessarily takes into account the relationship of the parties who are the subject of the proceedings and not merely the reasonable man. Rather, it is the reasonable man in light of

the particular relationship and this, it is contended, is not a wholly objective test. Additionally, as was seen in the *Berber* case, what is reasonable to one Judge may not be reasonable to another and it is respectfully suggested therefore that the existing approach of the judiciary to such matters is overly susceptible to variability which leads to a lack of guiding precedence and tremulous litigation.

## Chapter 11

### Implications of the recognition of the Implied Duty in the context of the Employment Injunction

#### 11.1 Introduction

Traditionally, the courts have been reluctant to grant an injunction which would involve an element of ongoing supervision and in service or trading contracts because it is very difficult to assess whether such orders are being obeyed. A further reason for the courts' reluctance to grant injunctions specifically in relation to contracts for personal services is that as a matter of policy it is undesirable to force individuals to work together where a relationship of trust and confidence no longer exists between them. So, it is generally accepted that in the context of contracts for personal services, an injunction should not be granted where this would indirectly provide for specific performance of the positive terms of the contract.<sup>81</sup>

As Kelly J stated in *Reynolds v Malocco*<sup>82</sup>:

*“Normally courts will not grant an injunction to restrain breaches of a covenant in a contract of employment if that would amount to indirect specific performance of such contract or would perpetuate a relationship based on mutual trust which no longer exists”.*<sup>83</sup>

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<sup>81</sup> Delany, H., 2006. *Employment Injunctions: The Role of Mutual Trust and Confidence* (2006) 28 D.U.L.J. 363

<sup>82</sup> [1999] 2 I.R. 203

<sup>83</sup> *Ibid* at p.209

Kenny J. had put the principle more rigidly when in *Yeates v Minister for Posts and Telegraphs*<sup>84</sup> he stated, “*it is settled law that the courts never specifically enforce a contract for personal services.*”<sup>85</sup>

However, it has also been acknowledged that this rule “*is plainly not absolute and without exception*”.<sup>86</sup>

The courts have developed a realistic attitude towards the question of whether an injunction is appropriate in such cases. In *Page One Records Ltd v Britton*<sup>87</sup> Stamp J. refused to grant an injunction which as a practical matter would have forced the defendants to employ the plaintiffs in a fiduciary capacity in circumstances where they “*for reasons good, bad or indifferent*” had “*lost confidence*” in them.<sup>88</sup>

This approach was further developed by the Court of Appeal in *Warren v Mendy*<sup>89</sup> where the court declined to grant an injunction to restrain the defendant from inducing a breach of contract where its effect would arguably have been to force an individual to perform his agreement with the plaintiff. Nourse LJ said that an injunction would less readily be granted where there are obligations of mutual trust and confidence and the servant’s confidence in his master has genuinely gone. This will also be true where an employer has lost trust and confidence in his employee.

It is a well-established principle that a limited exception exists however to the normal rule of no intervention by way of an injunction, namely where a relationship of mutual trust and confidence persists. Therefore, the continuing presence or absence of such a relationship can be of

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<sup>84</sup> [1978] I.L.R.M. 22

<sup>85</sup> *Ibid* at p.24

<sup>86</sup> *CH Giles Co. v Morris* [1972] 1 WLR 307 at p.319

<sup>87</sup> [1968] 1 W.L.R. 157

<sup>88</sup> *Ibid* at p.168

<sup>89</sup> [1989] 1 W.L.R. 853



particular significance to a court in determining whether to consider making an order which would have the effect of obliging parties to continue working together.

## 11.2 Tracing the Limited Exception

The starting point in tracing the limited exception to the general principle that employer and employee should not be forced to work together in the English jurisdiction is the decision of the majority of the Court of Appeal in *Hill v CA Parsons & Co Ltd*<sup>90</sup> where an injunction was granted against an employer to restrain an alleged wrongful dismissal after the employer had reluctantly been forced to terminate the contract of employment of an engineer who had refused to join a trade union. Lord Denning MR stated:

*“If ever there was a case where an injunction should be granted against the employers, this is the case.”*<sup>91</sup>

The majority of the court justified its decision on the basis that a relationship of mutual trust and confidence still existed between the parties.

The importance of establishing continuing mutual confidence if a court is to intervene in an employment dispute is also clear from the decision of Taylor J in *Hughes v London Borough of Southwark*<sup>92</sup> where he granted an interlocutory injunction restraining the defendant s from seeking to enforce an instruction to the plaintiffs that they should carry out duties other than their normal work. Taylor J stated that:

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<sup>90</sup> [1972] Ch. 305

<sup>91</sup> *Ibid* at p.316

<sup>92</sup> [1988] I.R.L.R. 72

*“the important criterion is as to whether there is mutual confidence, the point being that it would be inappropriate to grant an injunction against an employer requiring him to keep on in service on certain terms a servant who has lost the confidence of that employer.”*<sup>93</sup>

He said that the defendant s continued to have “great confidence” in the plaintiffs and added that it would be quite strong to assume that simply because there is a dispute between an employer and employee that mutual confidence has gone.

The concept of a continuing relationship of mutual trust has been overstretched in some cases<sup>94</sup> and it is submitted that a realistic approach to the concept is that adopted by Morland J in *Robb v Hammersmith and Fulham London Borough Council*<sup>95</sup> wherein the learned judge granted an interlocutory injunction restraining the Defendant s from giving effect to a dismissal notice made against him. In this view the submission made by Counsel for the Defendants that unless trust and confidence between the employer and employee remains, an injunction to preserve the contract of employment should never be granted, was “*far too sweeping*”.

Morland J. acknowledged, however, that if an injunction is sought to reinstate an employee dismissed in breach of contract, clearly trust and confidence are highly relevant as without the confidence of his employer in his ability to do his job, an employee’s position would be untenable. In his view “*the all important criterion is whether the Order sought is*

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<sup>93</sup> *Ibid* at p.73

<sup>94</sup> See *Irani v Southampton and South-West Hampshire Health Authority* [1985] I.R.L.R. 203 and *Powell v London Borough of Brent* [1987] I.R.L.R. 466

<sup>95</sup> [1991] I.C.R. 514

*workable*”<sup>96</sup> and he concluded that despite “the very cogent evidence of loss of trust and confidence,” the balance of convenience required him to grant the relief sought which was effectively confined to ensuring a resumption of the appropriate disciplinary procedure initiated against the Plaintiff.

The effect of the relief sought was fundamental to the court’s decision. The Plaintiff was essentially seeking to ensure that fair procedures were followed in the conduct of disciplinary proceedings rather than reinstatement. As Redmond has commented in reference the case of *Jones v Lee*<sup>97</sup> where the Court of Appeal had granted an injunction to restrain the dismissal of a Plaintiff without a hearing even in circumstances where his employers appeared to have lost trust and confidence in him: “*Trust and confidence in the Plaintiff’s ability to do the job had no relevance to the workability of the disciplinary procedure if ordered by the court*”.<sup>98</sup>

### 11.3 The Limited Exception in Ireland

The courts in this jurisdiction have traditionally accepted that as a general principle, a plaintiff will not be entitled to an interlocutory injunction which would amount to an indirect order of specific performance in respect of a contract of employment.<sup>99</sup>

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<sup>96</sup> *Ibid* at p.520

<sup>97</sup> [1980] I.C.R. 310

<sup>98</sup> *Supra*, n.48

<sup>99</sup> *Evans v IRFB Services (Ireland) Ltd* [2005] 2 I.L.R.M. 358

This principle was set out in the following terms by Costello P in *Phelan v BIC (Ireland) Ltd*<sup>100</sup>:

*“There is a general principle that the courts do not grant injunctions in cases of termination of employment on the principle in the old law reports and text books that a contract of employment is a contract of personal service. But there has been a strong body of judgment and authorities that this old rule should be subject to qualifications and in a number of cases the courts have granted interlocutory relief where it is in the interests of justice to do so.”*

In *Becker v Board of Management of St Dominic’s Secondary School*<sup>101</sup> Clarke J went on to say that there may be exceptions to the general proposition such as a case where an employer has failed to make out any arguable basis for a suspension, or has been guilty of an inordinate and unjust delay in concluding an investigation, as in *Martin v Nationwide Building Society*<sup>102</sup>.

The classic starting point in this jurisdiction in terms of the establishment of exceptions to the general principle is the judgment of Costello J. in *Fennelly v Assicurazione Generali S PA*<sup>103</sup> wherein he said that he accepted that the court should not require an employer to continue working with an employee where serious difficulties have arisen between them or where there is no work for the employee. However, in the serious case before him he was satisfied that the parties continued to have “*the highest regard for one another*” and he made an order that the defendant should continue to pay his salary until the trial,

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<sup>100</sup> [1985] I.L.T. 73

<sup>101</sup> [2005] 1 I.R. 561 at p.570

<sup>102</sup> *Supra*, n.37

<sup>103</sup> [1985] 3 I.L.T.R. 73

leaving it to the defendant to decide whether to require the latter to carry out any duties he might be given or to grant him leave of absence.

In *Moore v Xnet Informations Systems Ltd*<sup>104</sup> it was confirmed that the courts will be unwilling to grant an interlocutory injunction requiring an employee's reinstatement pending trial at any rate where relations between the parties have broken down to a significant degree. While O'Sullivan J. was satisfied that the Plaintiff had made out a fair argument that he had been wrongfully dismissed, having regard to the fact that relations between the parties had irretrievably broken down, the learned judge stated that the balance of convenience did not favour an order directing the defendant to reinstate the plaintiff pending the hearing of the case. O'Sullivan J. concluded that the balance of convenience favoured granting an order directing the defendant to continue to pay the plaintiff's salary and other benefits until the trial subject to an undertaking by the Plaintiff to do any work he was required to do.

Smyth J. in *Hennessy v St. Gerard's School Trust*<sup>105</sup> came to a contrary conclusion to that reached by O'Sullivan J. in circumstances where neither reinstatement nor an order restraining the defendant from giving effect to a purported dismissal were granted. Smyth J. stated that the "mutuality of respect and trust" had been fractured by the events which had taken place and that if damages were to be awarded they would be capable of ascertainment and calculation. In the circumstances he was satisfied that the plaintiff's application for interlocutory injunctions restraining the defendant from dismissing her or from appointing anyone else to a particular position in the school must be refused.

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<sup>104</sup> [2002] 2 I.L.R.M. 278

<sup>105</sup> Unreported, High Court, Smyth J., 30<sup>th</sup> July, 2003.

## 11.4 Conclusion

It appears that while orders restraining the implementation of a purported dismissal or termination of appointment may be obtained, even where the relationship of mutual trust and confidence between the parties has broken down, such orders will be made on limited terms. In the absence of a continuing relationship of trust and confidence it is generally accepted however there is no basis on which to make an order requiring parties to continue to work together even on a temporary basis or conditional upon certain undertakings from the plaintiff.

It can be said that the significance of the relationship of trust and confidence will largely depend on the type of interlocutory relief being sought, of which it could broadly be said there are four which tend to arise in these situations:

1. Orders to ensure the continued payment of salary;
2. Orders to ensure the continuation of other benefits pending trial;
3. Orders restraining the implementation of a purported dismissal;  
and
4. Orders requiring the Plaintiff's reinstatement.

As to the first and second type, as was seen in *Fennelly*<sup>106</sup> above, a good relationship continued between the parties however this requirement was subsequently viewed as disposable in all but a few cases where an order for payment of a plaintiff's salary was sought.<sup>107</sup>

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<sup>106</sup> *Supra*, n.103

<sup>107</sup> For example: *Orr v Zomax Ltd* [2004] 1 I.R. 486, *Carroll v Dublin Bus* [2005] E.L.R. 192

Similarly, orders restraining the appointment of another person to a position which the plaintiff claims is effectively his, are now fairly consistently granted even where the relationship between the parties appears to have broken down.<sup>108</sup>

There is more a lack of consistency of approach in relation to the last two categories. There is evidence in some of the decisions made by the courts in England such as *Irani v Southampton and South-West Hampshire Health Authority*<sup>109</sup> and *Powell v London Borough of Brent*<sup>110</sup> of claiming that the employer had not lost confidence in the employee where working relationships were clearly extremely strained. It is submitted that the correct approach is that taken by Laffoy J. in *Courtenay v Radio 2000 Ltd*<sup>111</sup> where she simply made an order restraining the implementation of the Plaintiff's purported dismissal pending trial and there was no question of determining whether mutual trust remained as she declined to make an order reinstating the Plaintiff which would have required the parties to continue to work together.

A distinguishing feature of many of the decisions made is that the courts often appear to be acting in order to ensure compliance with the rules of natural justice and the proper application of disciplinary procedures.<sup>112</sup> There is therefore no need to establish an ongoing good relationship between the parties as it is not contemplated that they would continue to work together pending trial. To this extent it is arguable that the concept of the importance of a continuing relationship of mutual trust and confidence in cases where interlocutory injunctive relief is sought in an

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<sup>108</sup> *Powell v London Borough of Brent* [1987] I.R.L.R. 466, *Supra*, n.99

<sup>109</sup> [1985] I.R.L.R. 203

<sup>110</sup> *Supra*, n.108

<sup>111</sup> Unreported, High Court, Laffoy J., 22<sup>nd</sup> July 1997.

<sup>112</sup> For example *Maher v Irish Permanent plc* [1998] E.L.R. 77

employment context could now in many instances be described as something of a red herring.<sup>113</sup>

It is becoming increasingly clear that the modern interpretation of the concept of mutual trust and confidence is that it is prescriptive in nature and it effectively obliges the parties to a contract of employment to behave in a manner which will preserve the relationship between them. This is a shift away from the traditional view of a relationship of trust and confidence as an essential prerequisite to the effective functioning of the employer/employee relationship and previously in considering whether interlocutory relief might be granted on an exceptional basis the court would seek to determine whether this relationship was still intact.

Professor Delany opines that the growing acceptance of the principle that the relationship of mutual trust and confidence between employer and employee gives rise to rights and obligations on both sides should undoubtedly make it easier for an employee to obtain interlocutory injunctive relief to ensure that for example an employer observes accepted standards of natural justice in pursuing disciplinary proceedings against him. She considers that it would therefore be ironic if the absence of a continuing relationship of mutual trust and confidence in the traditional sense of that term were to work against an employee who might be refused an injunction on the grounds that this relationship no longer existed between the parties.<sup>114</sup>

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<sup>113</sup> See *supra*, n.81

<sup>114</sup> *Supra*, n.81



Bolger & Ryan submit that given the increasing tendency to see injunctions restraining disciplinary proceedings<sup>115</sup> which is probably encouraged by the difficulty in now obtaining injunctive relief to restrain a dismissal, this is an area where further analysis of the implied duty of trust and fidelity may be seen in the future.<sup>116</sup>

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<sup>115</sup> A recent example being the case of *Minnock v Irish Casing Company Ltd and Robert Stewart*, Unreported, High Court, Clarke J., May 24, 2007.

<sup>116</sup> *Supra*, n.4

## Chapter 12

### **Implications of the Recognition of the Implied Duty on the Development of the Law Relating to Discretionary Bonuses**

#### 12.1 Introduction

There have been some interesting recent developments in recognising an employee's right to payment of a bonus, even where the employer has attempted to restrict the entitlement to payment on the exercise of the employer's discretion, thereby leaving the employee who might be out of favour with their employer or former employer in a very vulnerable position.

It is proposed to consider the circumstances in which the courts will find that the mutual duty of trust and confidence between employer and employee has implications for claims relating to bonus payments in light of recent Irish and English case law involving discretionary bonus payment schemes.

#### 12.2 Obligation to Explain a Failure to Pay

It is submitted that requiring an employer to give reasons for non-payment of a bonus is consistent with the fulfilment of the obligation of trust and confidence which underlies the employment relationship. As recently observed by Mummery LJ in the English Court of Appeal in *Commerzbank AG v Keen*<sup>117</sup>:

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<sup>117</sup> [2006] E.W.C.A. Civ. 1536; [2007] I.R.L.R. 132

*“If the parties have agreed that an employer should have a discretion to decide, by reference to certain factors, whether an employee should be paid an additional remuneration by way of bonus for work done under the contract of employment and, if so, how much, the employer is under an obligation to treat his employee fairly in explaining the situation.”*

Therefore, if a bonus is refused in circumstances where an employee might reasonably have expected to receive one, an employer should provide an explanation to the employee as to why the bonus has not been paid. Such an explanation should include the factors which have influence the decision, the name of the person who took the decision (if this is unclear) and the reasons for the decision taken.

### 12.3 *“Please Sir, may I have some more?”*

Alternatively, if the employee claims to have been awarded a bonus which was irrationally small, the employee must show that the amount paid by way of bonus is less in amount than the sum that would have been paid by another rational and reasonable employer. In *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No.2)*<sup>118</sup> Leggatt LJ read into a contractual discretion the requirement:

*“Not only must the discretion be exercised honestly and in good faith but, having regard to the provisions of the contract, by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.”*<sup>119</sup>

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<sup>118</sup> [1993] 1 Lloyd’s Rep. 397

<sup>119</sup> *Ibid* at p.404

It can be seen from the foregoing that transparency is key in order to avoid potential claims where a bonus scheme is operated. Assessments should be articulated in rational and objective terms so as to show that the decisions were made in good faith and that they were in now way arbitrary, capricious or unreasonable.<sup>120</sup>

#### 12.4 Exercising the Discretion

The recent High Court judgment of *Finnegan v J&E Davy*<sup>121</sup> is significant in this context. The case concerned a stockbroker who sued his former employer for €260,000 in deferred bonus payments earned in 1998 and 1999. The plaintiff worked for Davy between 1990 and 2000. His bonuses were tied to the firm's profitability and his own performance, with the amounts being decided at a yearly meeting with his superiors, where his performance was assessed. He did not receive a bonus in 1992, but in every other year between 1990 and 1997, he earned bonuses of between £3,000 and £30,000. The entire sum was paid shortly after the annual review.

In 1997, the firm began deferring part of the payments. The timeline of events here is significant. At the beginning of 1998, it was agreed that the plaintiff's bonus for 1997 would be £100,000. He was paid £60,000 immediately, but £40,000 was deferred for a year. Its payment was conditional on his remaining with the firm. The plaintiff objected to this, particularly, the condition that he stay with the company, but was told that Davy's biggest shareholder, Bank of Ireland, stipulated tat bonuses be paid in this way. It was, however, agreed that he would receive the interest earned on the money. A year later, his bonus for 1998 was set at

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<sup>120</sup> Ryan, R., & Ryan, D., 2007. *Employers' discretion in the determination of bonus payments* (2007) 14(8) C.L.P. 166

<sup>121</sup> [2007] 18 E.L.R. 234 Note: This decision was initially appealed to the Supreme Court but was subsequently withdrawn.

£200,000, payable in three instalments, the first immediately, the second a year later, and the third a year after that. His 1999 bonus was fixed at £210,000, payable in three equal instalments over two years. All deferred payments depended on his remaining with the company. The plaintiff left Davy's to join a rival firm in September 2000. As a result, he did not receive one instalment of his 1998 bonus and two-thirds of his 1999 payment, a total equivalent to just over €260,000. He argued that the attempt to change the terms of the bonus scheme was:

1. a unilateral attempt by the Defendant to alter the terms of the employment contract which was not accepted by the Plaintiff and which was ineffective;
2. in breach of the employment contract as being an irrational exercise of the employer's discretion; and
3. an unenforceable term as being in restraint of trade.

On behalf of the defendant employer, it was argued that such a deferred payment scheme was a legitimate means of 'incentivising' employees and an attempt to generate loyalty. For present purposes, then, the question of whether the duty of fidelity of the employee could be invoked by the employer to justify its approach to the bonus scheme in this case is relevant. Smyth J. emphatically rejected the argument that the deferral acted to 'incentivise' employees and instead found as a fact that the real reason for the deferral was "*to create a financial and practical restriction on employees who wished to continue to act as stockbrokers going to another firm of stockbrokers*".

The plaintiff argued that in circumstances where bonus payments were calculated by reference to profitability of the firm in a calendar year and the individual performance of the plaintiff during that year, it was arbitrary and irrational to seek to make the payment of that bonus conditional upon the plaintiff remaining in the employment of the defendant for the following two years. The effect of this stipulation would be to change the criteria for the awarding of the bonus from one of profitability and performance to one of loyalty in the future. Smyth J. accepted this argument and deemed the provision which amounted to a restraint of trade to constitute an improper exercise of discretion. Another significant finding of fact in this regard was that those employees who left the firm when outstanding elements of bonuses were unpaid, but did not go into competition, were paid the outstanding monies. This finding of fact supported the conclusion that if the deferral provision was part of a contract it was part of a contract in restraint of trade.

In concluding that the discretion had been improperly exercised, Smyth J. had regard to a number of English authorities including *Horkulak v Cantor Fitzgerald*<sup>122</sup> wherein the Court of Appeal laid down the principles as to how disputes relating to discretionary bonuses should be assessed. Potter LJ accepted that the employee was entitled “*to a bona fide and rational exercise [by the employers] of their discretion as to whether or not to pay him a bonus and in what sum*”.<sup>123</sup>

He further accepted that, although the particular contract did not contain any particular formula or point of reference for the calculation of the bonus, the obligation was to consider the question of bonus as a rational and bona fide exercise when taking into account the criteria adopted for

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<sup>122</sup> *Supra*, n.40

<sup>123</sup> *Supra* n,40 at p.46

the purpose of arriving at a decision. Significantly, Potter LJ considered that to do otherwise would be to “*fly in the face of the principles of trust and confidence which have been held to underpin the employment relationship*”.<sup>124</sup>

Therefore in assessing the exercise of discretion by the employer regarding the bonus at issue in *Horkulak* the Court of Appeal expressly attached weight to the “*principles of mutual trust and confidence which have been held to underpin the employment relationship*”.<sup>125</sup>

## 12.5 Putting Targets beyond Reach

In the case of *Takacs v Barclays Services Jersey Ltd*<sup>126</sup> the implied duty of trust and confidence was again seen to exert influence over a dispute in relation to a discretionary bonus. Mr. Takacs, an investment banker, had failed to meet his targets and was dismissed shortly before he was entitled to his bonus for the current bonus year. Importantly, the terms of his contract expressly provided that to qualify for the bonus he had to meet certain targets. The contract also provided that to be eligible for a bonus payment one had to be an employee of the bank on the date for payment of the bonus and not working out a notice period at the time the award was due.

Mr. Takacs brought a claim for breach of contract. He argued that Barclay’s was in breach of the implied duty of mutual trust and confidence, the implied duty of “co-operation” and an implied term of “anti-avoidance”. Mr. Takacs alleged that the bank had prevented him from achieving the targets he needed in order to qualify for the bonus,

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<sup>124</sup> *Supra*, n. 40 at p.47

<sup>125</sup> *Supra*, n.40 at p.47

<sup>126</sup> [2006] I.R.L.R. 877

since the bank had recruited a team of specialists who took over the deal that he was involved in and forced him out. This, he argued, constituted a breach of the implied duty of co-operation which requires employers to co-operate with colleagues in the achievement of their targets. He also argued that an implied term of “anti-avoidance” meant that employers should be prevented from terminating the employment of their staff to avoid paying them their substantial bonus entitlements.

Barclays Bank brought a summary judgment application before the Queen’s Bench Division of the English High Court. The court held however, that Mr. Takac’s claim of breach of the implied terms had a real prospect of success and should proceed to a full trial. Whilst it must be emphasised that this does not amount to a final ruling, the approach taken is significant and provides a clear reminder that the implied duty of trust and confidence may influence courts in their assessment of bonus disputes.

## 12.6 Conclusion

In light of the English cases considered above together with recent Irish case law which has shown strong support for the role of the implied duty of trust and confidence in the employment relationship, it appears that increased recourse to the implied duty will exert considerable influence on the development of the law relating to bonuses in this jurisdiction, particularly perhaps in assessing the propriety of the exercise by an employer of discretion in relation to such bonuses.



## Chapter 13

### Implications of the recognition of the Implied Duty in the context of the Workplace Bullying

#### 13.1 Introduction

While bullying in this jurisdiction is a health and safety issue and it relies on the general duties and obligations employers owe, under both common law and the safety and health legislation, to protect their employees from injury at work, it also raises the implied contractual term of mutual trust and confidence which is often accompanied by the principle of vicarious liability.

#### 13.2 Definition of Workplace Bullying

Bullying has no direct basis in legislation and thus the term has no statutory definition. The Task Force on the Prevention of Workplace Bullying recommended the following definition in its Report in 2001, “*Dignity at Work – the Challenge of Workplace Bullying*”:

*“Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual’s right to dignity at work.”*

*An isolated incident of behaviour described in this definition may be an affront to dignity at work but as a once off incident is not considered to be bullying.”<sup>127</sup>*

Examples of the type of bullying behaviour set out in the Task Force Report include:

- Undermining an individual’s right to dignity at work;
- Humiliation;
- Intimidation;
- Verbal abuse;
- Victimisation;
- Exclusion and isolation;
- Intrusion by pestering, spying and stalking;
- Repeated unreasonable assignments to duties which are obviously unfavourable to individual;
- Repeated requests giving impossible deadlines or impossible tasks; and
- Implied threats.<sup>128</sup>

### 13.3 Vicarious Liability

Where bullying is perpetrated by a supervisor or manager against a subordinate then it will represent a breach of an employer’s duty to maintain his employee’s trust and confidence. It is well settled that employers are liable for the wrongdoings of their employees if committed “within the scope of this employment” by virtue of vicarious liability. In many cases the employer the employer will neither be

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<sup>127</sup> Report of the Task Force on the Prevention of Workplace Bullying, 2001. “*Dignity at Work – The Challenge of Workplace Bullying*”. Dublin: Government Publications.

<sup>128</sup> *Ibid* at p.2

involved in the bullying nor even aware that such bullying is taking place, especially with technology making the victims all the more accessible to discrete yet effective bullying.<sup>129</sup>

#### 13.4 Conclusion

The breach of the employer's implied duty to maintain trust and confidence in respect of workplace bullying is usually claimed as part of a personal injury claim and/or constructive dismissal.

Whether creating or condoning an organisational culture that permits perpetration of bullying in the workplace would be deemed by the courts to be operating the business in a dishonest and corrupt manner along the lines of that found in *Malik*, remains to be seen.<sup>130</sup>

It is submitted however, that with the significant expansion of the scope of the implied term of trust and confidence, employers will be acting in breach of this term where they are discourteous, intimidatory or insulting, behaviours which are all characteristic of bullying.

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<sup>129</sup> O'Connell, A., 2005. *Bullying in the Workplace*. (2005) 2(4) I.E.L.J. 119

<sup>130</sup> Middlemiss, S. & Hay, O., 2003. "Legal Redress Against Employers for Victims of Workplace Bullying – Part 1". (2003) 21 I.L.T. 287

## Chapter 14

### Waiving a Breach of the Duty

#### 14.1 Introduction

It is possible to waive a breach of the duty of mutual trust and confidence. This was evidenced in the *Bliss* case wherein, while the employee was held on the facts not to have done so, such a conclusion would have been wholly permissible.

In *Malik* Lord Steyn stated that the implied term of trust and confidence operated as a default rule, and that the parties were free to exclude it or modify it.<sup>131</sup> This analysis is entirely consistent with the decision of the House of Lords in *Johnson*.

#### 14.2 Limits to the Doctrine of Contracting Out

Of course there are limits to the doctrine of contracting out. For example, the argument in *Horkulak* that the size of an employee's remuneration and benefits package written into their contract of employment justified the disapplication of the duty of trust and confidence was not upheld.

For an employer to establish that an employee has waived a breach, however, it would appear necessary to show that this was done with "actual knowledge" of one's legal rights. In the *Bliss* case, Dillon LJ imported the following dictum from *Peyman v Lanjani*<sup>132</sup>:

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<sup>131</sup> *Supra*, n.15 at p. 45

<sup>132</sup> [1985] Ch 457 at p.494

*“...[I] do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the precondition of his right to choose, but also of the fact that in the circumstances which exist he does have that right to make that choice which the law gives him”.*

### 14.3 Conclusion

There could be considerable repercussions in employment law if this line of reasoning was to be followed and as stated by Dillon LJ in *Bliss*, it is a formidable argument. Obviously, it would be more difficult for an employer to establish that an employee had waived a breach if it had to be shown that this was done with ‘actual knowledge’ of his legal rights.

## Chapter 15

### An Emerging Overarching Principle?

#### 15.1 Introduction

There exists a view that the implied term of trust and confidence may evolve to engulf the more ‘traditional’ implied terms, such as the implied duty to take reasonable care for the employee’s welfare, health and safety. Professor Freedland in *The Personal Employment Contract*<sup>133</sup> stated that:

*“almost any particular implied term of the contract of employment could in theory be placed under...[the] umbrella [of the general obligation of mutual trust and confidence]; it remains to be seen how far this framework approach will lead to the swallowing up of existing, hitherto distinct, implied terms.”*<sup>134</sup>

Similarly, Brodie has argued that if any rationalisation of the normative content of each of the implied terms of the contract of employment is to be made, such an exercise may be conducted by grouping them under an all-embracing principle of mutual trust and confidence.

He opines that as the number of reported cases on mutual trust and confidence steadily increases it may not be fanciful to suggest that the obligation will come to be seen as the core common law duty which dictates how employees should be treated during the course of the employment relationship. In this regard the embryonic nature of the

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<sup>133</sup> *Supra*, n.21

<sup>134</sup> *Supra*, n.21 at p.159

obligation is important because the courts and tribunals can expand its scope relatively unrestricted by precedent. The open-textured nature of the term makes it an ideal conduit through which the courts can channel their views as to how the employment relationship should operate.

## 15.2 Implied Duties are Inherently Distinct

Following detailed analysis of the viability of the emergence of an overarching principle by David Cabrelli, Lecturer in Law, University of Dundee, a fundamental point was made that all of the implied duties are inherently distinct and that, on balance there is no evidence of the implied duty of mutual trust and confidence as an umbrella principle. The trends in the recent case law have emphasised the distinctiveness of the duties to take reasonable care and mutual trust and confidence. He demonstrates that both duties are separate, free-standing duties (of equal importance) and to rationalise one and/or all of the traditional employer-orientated duties, as one of the means by which the super-principle of trust and confidence is, or may be expressed, is to a large extent 'aspirational'<sup>135</sup>.<sup>136</sup>

## 15.3 Conclusion

In considering whether Ireland might allow the general obligation of trust and confidence to develop into an umbrella principle, it is submitted that existing inconsistencies are slowly being mitigated in this area of development and the path through the law which may be followed is steadily being made clearer.

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<sup>135</sup> As described by Professor Freedland in *The Personal Employment Contract*, *supra*, n. 21 at p.161

<sup>136</sup> Cabrelli, D., 2005. *The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?* I.L.J. Vol. 34, No.4

It is submitted that the current approach of the judiciary in Ireland and in the UK in cutting through previously equivocal precedent and declaring in forthright terms is more favourable. Permitting the development of such an umbrella principle would, if anything, bring the law on this area into a vague and capricious realm.



## Chapter 16

### Conclusions

The implied term of trust and confidence is an example of how the common law has changed to recognise a person's employment is usually one of the most important things in his or her life as it gives not only a livelihood but an occupation, an identity and sense of self-esteem.

The Courts have used principle of trust and confidence imaginatively to try to balance the unequal distribution of power in the employment relationship, so that the implied duty now "*certainly seems to extend beyond a precise formulation to a normative approach or framework of standards for employing entities and employees elaborated in particular contexts*".<sup>137</sup>

While the question of whether *Addis* will be followed in this jurisdiction awaits resolution, it is submitted that it is probable that the finding of the House of Lords will be followed such that an employee will not be able to recover damages for the manner in which a wrongful dismissal took place or for injured feelings.

The position at common law, therefore, continues to be that an employer is entitled to dismiss an employee for any reason or no reason, on giving reasonable notice, and that damages for the manner of a dismissal are confined to those damages to which an employee would be entitled for the notice period and do not include damages for the manner of dismissal.

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<sup>137</sup> *Supra*, n. 48

The Supreme Court decision in *Berber* displays that evidence of an employee's loss of trust and confidence in his/her employer will now necessarily require a high standard of proof. It is considered that the judicial climate is in favour of avoiding the potential for the duty to set too high a standard for those who are dealing with employees who are claiming to be stressed as a result of an employment dispute.

It is contended that the application of a purely objective test is one of the methods used to achieving this aim and that this is too narrow an approach to what is an area of employment law which necessarily involves emotive relationships. Further, it is submitted that such a contention contradicts the requirement to consider the parties' conduct as a whole and the impact of behaviour of a cumulative basis.

The considerable potential which remains in this area can clearly be seen in the emerging law on bonus payments and increased recourse to the implied duty will continue to exert considerable influence on the development of this area of law, particularly in assessing the propriety of the exercise by an employer of discretion in relation to such bonuses.

There is an opportunity for the law relating to workplace bullying to be guided by the operation of the implied obligation to maintain an employee's trust and confidence. It is suggested that creating or condoning an organisational culture that permits perpetration of bullying in the workplace should be deemed by the courts to be operating the business in a dishonest and corrupt manner along the lines of that found in *Malik* and further employers who act in an intimidatory or insulting behaviour (i.e. bullying) should be seen to be acting in breach of this term.

The potentially far-reaching detrimental consequences of a finding that an employee has waived a breach of the implied duty should be balanced with a requirement that an employer must establish that an employee had waived a breach while having ‘actual knowledge’ of his legal rights.

As regards whether Ireland should allow the general obligation of trust and confidence to develop into an umbrella principle, it is suggested that it would be preferable in the interests of clarity that existing inconsistencies should continue to be mitigated and previously equivocal precedent should be dealt with such that it will be possible to declare what the law relating to the implied duty is in forthright terms and in terms of the route to achieving such an objective, the development of the duty into an overarching principle would a step in the wrong direction.

## Bibliography

### Cases

*Abu Dhabi national Tanker Co v Product Star Shipping Limited (The Product Star) (No.2)* [1993] 1 Lloyd's Rep. 397

*Addis v Gramophone Limited* [1909] A.C. 488

*Ali v Christian Salvesan Limited* [1997] I.C.R. 25

*Bates v Model Bakery* [1993] 1 I.R. 359

*BCCI v Ali (No. 2)* [2000] I.C.R. 1354

*Becker v Board of Management of St Dominic's Secondary School* [2005] 1 I.R. 561

*Becton, Dickinson Ltd v Lee* [1973] L.R. 1

*Berber v Dunnes Stores* Unreported, Supreme Court, 12<sup>th</sup> February, 2009.

*Billington v Michael Hunter & Sons Limited* [2003] UKEAT 0578 03 1610, 16<sup>th</sup> October, 2003.

*Bliss* [1985] I.R.L.R. 308

*Brewster v Burke & Anor* [1985] 4 J.I.S.L.L. 98

*British Aircraft Corporation Limited v Austin* [1978] I.R.L.R. 332

*Brown v Merchant Ferries Limited* [1998] I.R.L.R. 682

*Cantor Fitzgerald v Bird* [2002] I.R.L.R. 867

*Carey v Independent Newspapers (Ireland) Ltd* [2004] 3 I.R. 52

*Carroll v Dublin Bus* [2005] E.L.R. 192

*CH Giles Co. v Morris* [1972] 1 WLR 307

*Commerzbank AG v Keen* [2006] E.W.C.A. Civ. 1536; [2007] I.R.L.R. 132

*Courtenay v Radio 2000 Ltd* Unreported, High Court, Laffoy J., 22<sup>nd</sup> July 1997.

*Courthaulds Northern Textiles Ltd v Andrew* [1979] I.R.L.R. 84

*Cronin v Eircom Limited* [2007] E.L.R. 84

*Eastwood v Magnox Electric plc* [2002] I.R.L.R. 447

*Evans v IRFB Services (Ireland) Ltd* [2005] I.L.R.M. 358

*Fennelly v Assicurazione Generali S PA* [1985] 3 I.L.T.R. 73

*Finnegan v J&E Davy* [2007] 18 E.L.R. 234

*Gogay v Herts County Council* [2000] I.R.L.R. 703

*Harrington v Irish Life and Permanent Plc* Unreported, High Court, Smyth J., 18<sup>th</sup> June, 2003.

*Hennessy v St. Gerard's School Trust* Unreported, High Court, Smyth J., 30<sup>th</sup> July, 2003.

*Hill v CA Parsons & Co Limited* [1972] Ch. 305

*Horkulak v Cantor Fitzgerald International* [2003] I.R.L.R. 756

*Hughes v London Borough of Southwark* [1988] I.R.L.R. 72

*Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 W.L.R. 589

*Irani v Southampton and South-West Hampshire Health Authority* [1985] I.R.L.R. 203

*Johnson v Unisys* [2001] I.R.L.R. 279

*Jones v Lee* [1980] I.C.R. 310

*Kinlan v Ulster Bank* [1928] I.R. 171

*Lewis v Motorworld Garages Limited* [1986] I.C.R. 157

*Liverpool City Council v Irwin* [1977] A.C. 239

*Maher v Irish Permanent plc* [1998] E.L.R. 77

*Mahmud & Malik v BCCI* [1998] A.C. 20

*Martin v Nationwide Building Society* [2001] 1 I.R. 228

*McCabe v Cornwall County Council* [2003] I.R.L.R. 87

*McGrath v Trintech Technologies Limited and Trintech Group Plc* [2005] 4 I.R. 382

*Minnock v Irish Casing Company Ltd and Robert Stewart*, Unreported, High Court, Clarke J., 24<sup>th</sup> May, 2007.

*Moore v Xnet Informations Systems Limited* [2002] 2 I.L.R.M. 278

*Morgan v Trinity College* [2003] 3 I.R. 157

*Omilaju v Waltham Forest London Borough Council* [2005] 1 All. E.R. 75

*Orr v Zomax Ltd* [2004] 1 I.R. 486

*Page One Records v Britton* [1968] 1 W.L.R. 157

*Pepper v Webb* [1969] 2 All. E.R. 216

*Peyman v Lanjani* [1985] Ch 457

*Phelan v BIC (Ireland) Limited* [1985] I.L.T. 73

*Pickering v Microsoft Ireland Operations Limited* [2006] E.L.R. 65

*Post Office v Roberts* [1980] I.R.L.R. 347

*Powell v London Borough of Brent* [1987] I.R.L.R. 466

*Quigley v Complex Tooling and Moulding* [2005] 16 E.L.R. 305

*Quirke v Bord Luthchleas na hEireann* [1988] I.R. 83

*Reynolds v Molocco* [1999] 2 I.R. 203

*Secretary of State v ASLEF* [1972] Q.B. 455

*Shirlaw v Southern Foundries (1926) Limited* [1939] 2 K.B. 206

*Spring v Guardian Assurance* [1994] 3 All. E.R. 129

*Stuart v Armourguard Security* [1996] 1 N.Z.L.R. 484

*Sullivan v Southern Health Board* [1997] 3 L.R. 123

*Sweeney v Duggan* [1997] 2 I.L.R.M. 211

*Takacs v Barclays Services Jersey Limited* [2006] I.R.L.R. 877

*The Moorcock* [1889] 14 P.D. 64

*United Bank Ltd v Akhtar* [1989] I.R.L.R. 507

*Visa International Service Association v Paul* [2004] I.R.L.R. 42

*Warren v Mendy* [1989] 1 W.L.R. 853

*Western Excavating (E.C.C.) Limited v Sharp* [1978] I.C.R. 221

*Woods v W.M. Car Services (Peterborough) Limited* [1981] I.R.L.R. 347

*Yeates v Minister for Posts and Telegraphs* [1978] I.L.R.M. 22

## **Journals**

Bolger, M. & Ryan, D., 2007. *The mutual duty of fidelity in the contract of employment: Significant recent developments*. (2007) 4(4) Irish Employment Law Journal 112

Brodie, D., 1996. *The Heart of the Matter: Mutual Trust and Confidence*. Industrial Law Journal Vol. 25, No. 2

Cabrelli, D., 2005. *The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?* Industrial Law Journal Vol. 34, No.4

Delany, H., 2006. *Employment Injunctions: The Role of Mutual Trust and Confidence* (2006) 28 Dublin University Law Journal 363

Maguire, C., 2004. *Implied Terms and Conditions and the Contract of Employment* (2004) 1(5) Irish Employment Law Journal 146

Middlemiss, S. & Hay, O., 2003. “*Legal Redress Against Employers for Victims of Workplace Bullying – Part 1*”. (2003) 21 Irish Law Times 287

O’Connell, A., 2005. *Bullying in the Workplace*. (2005) 2(4) Irish Employment Law Journal 119

Ryan, R., & Ryan, D., 2007. *Employers’ discretion in the determination of bonus payments* (2007) 14(8) Commercial Law Practitioner 166

## **Government Publications**

Report of the Task Force on the Prevention of Workplace Bullying, 2001. “*Dignity at Work – The Challenge of Workplace Bullying*”. Dublin: Government Publications.



## **Books**

Chitty, J. et al, 1977. *Chitty on Contracts*. 24<sup>th</sup> Edition. London: Sweet & Maxwell, 1977.

Collins, H., 2003. *Employment Law*. Oxford Clarendon Law Series. Oxford: Oxford University Press, 2003.

Freedland, M.R., 2003. *The Personal Employment Contract*. Oxford: Oxford University Press, 2003.

McDermott, P.A., 2001. *Contract Law*. Dublin: Buttersworths, 2001.

Peel, E., 2007. *Treitel on the Law of Contract*. 12<sup>th</sup> Edition. London: Thomson Sweet & Maxwell, 2007.

Redmond M., 2007. *Dismissal Law in Ireland*, 2<sup>nd</sup> Edition. Haywards Heath: Tottel Publishing, 2007.

Upex, R. & Hardy, S., 1989. *Sweet & Maxwell's Encyclopaedia of Employment Law*. United Kingdom: Sweet & Maxwell, 1989.