

## *A COMMON LAW AGENDA FOR LABOUR LAW*

The development of labour law has been such that, whilst some commentators have been able to express satisfaction at the richness of contemporary discourse by which the subject has been developed,<sup>1</sup> it has nevertheless been possible to pose fundamental questions about its very purpose.<sup>2</sup> The subject stands astride an apparent bifurcation identified by Hepple<sup>3</sup> who poses the conundrum that if labour law in a given nation state effectively continues to serve its traditional protective function multinational corporations may withdraw to more profitable low cost, low regulated economies so forcing each state to compete by "de-regulating" its employment protection. This encourages what Brandeis called the "race to the bottom".<sup>4</sup>

Globalisation is not the only concern. In the UK, governments have accepted the argument that the greater the success labour law enjoys in its traditional role the greater the number of jobs destroyed.<sup>5</sup> Employment policies have been designed to enhance employment opportunity for all types of enterprise (not just international business) by reducing labour costs. The casualisation of the workforce, fixed term contracts (buttressed by waiver clauses<sup>6</sup>), the extension of time-limits for qualifying for unfair dismissal<sup>7</sup> and redundancy payments, the abolition of wages councils, the shift to individual pay bargaining, privatisation and the promotion of a non-standard workforce, as well as policies designed to dismantle the collective bargaining system illustrate the extent to which government policy has been predicated by an assumed trade-off between high reward and high security on the one hand and employment opportunity on the other. Labour law can no longer be explained as a force designed to redress an inequality of bargaining power between employer and employee. This has lead

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<sup>1</sup> Collins, *The Productive Disintegration of Labour Law* (1997) 26 ILJ 295.

<sup>2</sup> E.g., Hepple in *The Future of Labour Law* (1995) 24 ILJ 303.

<sup>3</sup> *New Approaches to International Labour Regulation* (1997) 26 ILJ 353

<sup>4</sup> *Liggett v. Lee* [1933] US 557.

<sup>5</sup> Hepple questions this argument, *supra* n.2 at 356.

<sup>6</sup> The Employment Rights Bill 1999, cl 17, if enacted, will abolish waiver clauses in respect of unfair dismissal but not redundancy cases. At present, a recent decision of the Court of Appeal encourages resort to these clauses by upholding their validity where a fixed term contract is extended for a period of less than a year: *BBC v. Kelly-Phillips* [1998] IRLR 294.

<sup>7</sup> The Unfair Dismissal (Variation of Qualifying Period) Order 1985 SI 1985/782.

Fredman to ask whether the subject can be re-invented to accommodate the needs and rights of workers as well as a flexible low cost workforce.<sup>8</sup>

However, just as domestically inspired statutory reforms (as opposed to those originating in the European Union) have whittled away at employment rights with general consistency there has similarly been an unexpected common law extension of those rights which has undoubtedly been gathering momentum. It is through the medium of the re-contractualisation of employment law that some radically innovative reforms are being delivered. These have been of profound effect. Notable decisions which have extended the scope of terms implied by law into the contract of employment include *Malik v. B.C.C.I.*<sup>9</sup> in which the House of Lords held that here an employer conducts the business in a manner likely to destroy trust and confidence, and damage to the employee's reputation thereby ensues to the prejudice of future employment prospects, damages will lie. In *Goold (Pearmark) Ltd v. McConnell*<sup>10</sup> the EAT established a new implied duty binding the employer to ensure the employee has a reasonable and prompt opportunity to obtain redress of any grievance. And a new obligation of disclosure was imposed on employers by the House of Lords in *Scally v. Southern Health and Services Board*.<sup>11</sup> It is the purpose of this article to examine some of these developments to discover what may be the common law agenda for labour law. Four influences on the future direction of this subject may be identified.

### ***Influence 1.***

This is the traditional *laissez-faire* contractual model which understands employment contracts merely as private transactions which result from the free agreement of actors. There is an assumption that parties enter the transaction from a position of equal bargaining power. Contracts result from competitive dealing and are motivated by the self-interest of the parties. Proponents of this

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<sup>8</sup> Fredman, *Labour Law in Flux: the Changing Composition of the Workforce* (1997) 26 ILJ 337, 340. However, the economic arguments have not gone unchallenged. Ewing has suggested that the state has an interest in securing high wages and employment standards because workers participate in the economy as consumers and so create demand for goods and services, thus creating jobs: *Democratic Socialism and Law* (1995) ILJ 103. Moreover, the failure of government to advance objective evidence of the practical success of its employment policy can hardly go unnoticed: *R v. Secretary of State for Employment ex p Seymour-Smith* [1995] IRLR 464 (CA); *R v. Secretary of State for Employment ex p. Equal Opportunities Commission* [1994] IRLR 176.

<sup>9</sup> [1997] IRLR 462.

<sup>10</sup> [1995] IRLR 516.

<sup>11</sup> [1991] 4 All ER 563.

model adhere to a conception of justice which emphasises deserts and disregards need.<sup>12</sup> Judicial intervention is concerned only with rules for ensuring free competitive dealing, and for preserving and enforcing the reality of agreement.

### ***Influence 2***

This is the view that the state has a role in ensuring conditions of civilised life. Some argue that this role should be minimal. Thus individual actors should be free to conclude employment contracts, but at the margins the interests of the weaker party demand and receive protection. A considerable disparity in bargaining power would be seen as inimical to the latter consideration and the law should address this disparity. Indeed the State itself has adopted a strategy aimed at ensuring minimum employment conditions, most notably by establishing the “floor of rights”.<sup>13</sup> Others argue that there are moral claims to fair labour standards, as there are to the wider protection of human rights.<sup>14</sup> The role of the state should be to enforce those moral rights.

According to the voluntarist theory, equilibrium might best be achieved through collective bargaining which itself required the state to neutralise common law rules which would tend to undermine the activities of organised labour.<sup>15</sup> The failure of voluntarism lead the state to adopt an alternative strategy aimed at ensuring minimum employment conditions, most notably by pursuing the enactment of certain minimum standards (i.e. the "floor of rights").

### ***Influence 3***

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<sup>12</sup> However, "need" assumes a particular ideology which holds that worker benefit from and require increased employment protection . According to a different ideology the long term interest of worker is assured through a free market which is impeded by employment regulation: see, e.g., Hayek, *Law, Legislation and Liberty*, Routledge and Kegan, Paul (1982), *The Constitution of Liberty*, Routledge and Kegan, Paul (1960).

<sup>13</sup>However, the state's activities in this area might arguably have extended beyond certain minimum standards. See, for example, time off for public duties under Employment Rights Act 1996, s.50. Omissions from the "floor" suggest that not all minimum measures were included. The absence of controls on working hours and guaranteed minimum holidays are possible examples.

<sup>14</sup> See note 23 below.

<sup>15</sup> Kahn-Freund, *Labour and the Law* 3rd edit., London, (1983).

This is the view that employment contracts should recognise that enterprise is a co-operative venture. An employment contract, unlike a paradigm commercial contract, is not merely an exchange. Eisenberg, asserts that employment contracts create a relationship for which many contractual principles (developed for commercial contracts) are inappropriate.<sup>16</sup> He contends that relational contracts create a relationship of mutual enterprise which might result in the adjustment of orthodox contractual principles to require, *inter alia*, an emphasis upon good faith performance.<sup>17</sup> Each party is permitted to advance their own interests, but they must also have a genuine concern to promote the interests of the other party in so far as compatible with their own. This model emphasises co-operation, good faith, and disclosure. The development of implied terms in high trust roles<sup>18</sup> may have been influenced by this model, which also places an emphasis upon the manner in which parties deal with one another.

#### ***Influence 4***

The employment contract is not viewed as an exclusively private transaction but as one which ultimately concerns the wealth of society. The courts are concerned to promote the societal need for the enhancement of aggregate wealth. Where this societal need conflicts with an individual need then the former prevails. The conditions for fulfilment of this societal need will not always coincide with the employer's interest in ensuring the subordination of the employee. Societal need is not necessarily promoted by unbridled managerial power.

In this article the following argument will be proposed. Whilst the rights of the employer have been extended by the common law the judiciary has not been invariably influenced by the need to protect the weaker party. Although some new rights have been created, the judiciary has also refused to confer rights.<sup>19</sup> Where this latter course has occurred, the ultimate purpose has not been to re-inforce management power for its own sake, as would be the case if influence 1 were paramount. An analysis of the case law shows that whether the right is

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<sup>16</sup> *Good Faith and Fault in Contract Law*, eds. Beatson and Friedman, (1994)

<sup>17</sup> McKendrick in his essay, *The Regulation of Long-Term Contracts in English Law*, *ibid.*, maintains an opposing case, although conceding that there may be a requirement for greater flexibility in long-term contracts.

<sup>18</sup> See e.g., *B.T. v. Ticehurst* [1992] IRLR 219.

<sup>19</sup> See for examples *infra*- notes 99-107 and accompanying text for some instances where the common law has chosen not to confer new rights.

accorded or refused, the judiciary is influenced not only by the needs of the individual relationship but also by a view of the common law as a partner in developing a system of employment regulation which is perceived to promote enterprise and wealth creation. In essence the common law sees its contribution to labour law as a device for maximising the efficiency of the enterprise and promoting the creation of wealth for the benefit of the national economy.<sup>20</sup>

Whilst many recent decisions are more than genuflections towards the need to achieve justice<sup>21</sup> between individual employees and their employers, employment protection is accorded a priority which only determines outcomes in cases when it is complementary to wealth maximisation. However, the judiciary often recognises and gives effect to moral claims provided these are consistent with wealth maximisation. The rights of the employee are extended only when to do so is perceived to deliver a net economic benefit. A perceived loss precludes the common law extension of employment protection even if this fails to do justice in particular circumstances.<sup>22</sup>

This development poses questions going to the root of the purpose of conferring individual employment rights. There may be considerable dissent from the view that influence 4 should govern the future direction of employment policy. There is the view that a wider extension of employment rights is axiomatic and should be accorded priority, not only because of the moral claim to fair labour standards, but also because employment rights are part of a broader notion of individual citizenship, which has been identified as a

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<sup>20</sup> According to microeconomic theory, firms maximise profit. Efficiency may be defined as a state in which it is impossible to produce the same output using a lower cost combination of inputs, or one in which it is not possible to produce more output using the same combination of inputs. Government policy has been predicated upon the belief that an efficient enterprise promotes wealth. For example, greater profit leads to investment in more modern machinery and further advancements in competitiveness in global markets. However economists assume rational actors. Individuals and individual firms do not always act rationally, and economists now debate how to model diminished, as opposed to full, rationality. See Cooter and Ulen, *Law and Economics* Addison-Wesley Educational Publishers Inc., 2nd edition 1996 at pp. 10 *et seq.* Much may depend on how cost savings which accrue as profits are distributed.

<sup>21</sup> This is a version of justice which regards the establishment of rights of employees as part of a commitment to industrial morality. Its vindication exemplifies influence 2 on the development of Labour Law.

<sup>22</sup> For example, an employer may seriously damage an ex-employee's future employment prospects by refusing to provide a reference for a prospective employer. The ex-employee has no redress even if the employer's refusal is on whimsical grounds: *Spring v. Guardian Assurance plc* [1994] IRLR 596.

force for social cohesion. Others would object to an acceptance of the priority of aggregate wealth maximisation over individual justice.<sup>23</sup>

The view that influence 4 is paramount is also open to objection on other grounds. First, it is not overtly part of the rhetoric and reasoning of the courts. However, this is not in itself conclusive since the pursuit of a goal may be intuitive rather than articulated. Alternatively, the judges' reasoning may be *sub silentio*. According to a positive theory, the question is whether such an analysis can be identified as a matter of historical fact, and this is not exclusively determined by express judicial reasoning.<sup>24</sup>

A further objection questions whether, if the judiciary is engaged in such an agenda, it is venturing beyond its competence. This is not merely an issue concerning the separation of powers; it also questions whether the judicial process is equipped to engage in a polycentric exercise in which many forces beyond judicial control shape the national economy. Further, considerable controversy surrounds the ultimate validity of the theory of the economic efficiency of law. Advocates of this theory, such as Judge R A Posner<sup>25</sup> hold that the implicit goal of the common law is to promote an efficient allocation of resources. This theory has been criticised on the ground *inter alia* that it lacks sufficient empirical foundation<sup>26</sup> and that it is not value neutral.<sup>27</sup> Even proponents of the theory such as Prof. Easterbrook admit that economic

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<sup>23</sup> This is a central dilemma which concerns not only British labour lawyers, for example those whose work is cited above in notes 2, 5 and 8, but also other scholars who are concerned that an economic approach to law might signal that it is instrumental rather than moral values which matter, see e.g. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?* 98 Harv. L. Rev. 592 (1984).

<sup>24</sup> Izhak England, *The Philosophy of Tort Law*, Dartmouth, Aldershot (1993) esp p36-37.

<sup>25</sup> R A Posner, *The Economic Analysis of Law*, Boston, 4th edit., (1992), *Tort Law: Cases and Economic Analysis* Little, Brown & Co. (1982). See also Easterbrook, *infra* n. 28.

<sup>26</sup> Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, University of Chicago L. Rev. 46 No. 2 307-315 (1979); Bloustein, *Privacy is Dear at any Price: A Reponse to Professor Posner's Economic Theory*, Georgia L. Rev 12, no 3 421-495 (1978); Rizzo, *Uncertainty Subjectivity, and the Economic Analysis of Law*, in *Time, Uncertainty and Disequilibrium* ( M J Rizzo, ed.) Lexington: Lexington Books. Other objections are that in the absence of accurate information about the cost configuration the efficiency of the law cannot be judged: Goldberg, *Relational Exchange: Economics and Complex Contracts*, American Behavioural Scientist, 23 no 3 337-352 (1980).

<sup>27</sup> According to Tribe economic analysis of law "assumes unfettered contract, consumer sovereignty, social Darwinism and perfect markets. It "exalts" possessive individualism, "efficient" resource allocation and maximum productivity as against respect for distributive justice, procedural fairness and the irreducible and inalienable values associated with personal rights and public goods." Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?* 98 Harv. L. Rev. 592, at p. 597 (1984).

98 Harv L. Rev

influences on judicial reasoning cannot be proved by deductive reasoning.<sup>28</sup> Easterbrook's analysis, in common with that pursued in this article, offers only illustrative examples of cases in which the formation of legal rules may have been influenced by the judicial perceptions of the most efficient outcome. However, the disquiet concerning whether or not the law can be judged scientifically in terms of economic efficiency is not central for present purposes.<sup>29</sup> The key question is whether the case law can be interpreted so as to suggest that particular legal rules may be shaped in the intuitive belief that they will both influence the behaviour of employers and employees alike and that this will maximise aggregate wealth.

The principal focus of this paper is the emerging line of authority amplifying the duty to act in good faith. Good faith in this context is widely construed; it is not restricted to decisions overtly founded upon that doctrine. This is so because the idea of good faith is manifested in many guises: in particular, it may appear within the more established duty to maintain trust and confidence, or the duty to co-operate or, indeed, within other decisions which may be consistent with the orthodox conception of good faith but within which good faith is not expressly invoked as part of the reasoning.<sup>30</sup> Nomenclature is not conclusive in this context. We are concerned with what has influenced the development and application of these implied terms. In order to achieve this it is essential that there should be an understanding of the relationship between these developing implied terms and managerial prerogative.

### ***THE PURPOSE OF MANAGERIAL PREROGATIVE***

Orthodox analysis of the duty to co-operate and, to a certain extent, the duty to maintain trust and confidence emphasises a unitary model of employment relations<sup>31</sup> As Fox and Davies and Freedland indicate,<sup>32</sup> however, a unitary

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<sup>28</sup> F Easterbrook, *Forward: The Court and the Economic System*, 98 Harv L Rev 4 (1984).

<sup>29</sup> An expression of this disquiet can be found, for example, in Tribe's objections to the economic analysis of law. He condemns, *inter alia*, Easterbrook's ex ante analysis in which the courts are less interested in doing justice than in creating rules to adjust the behaviour of the world beyond the court room. Tribe *loc. cit.*

<sup>30</sup> E.g., *Goold (Pearmark) Ltd v. McConnell* [1995] IRLR 516.

<sup>31</sup> E.g., Fox, Research Paper to Royal Commission on Trade Unions and Employer's Associations, Industrial Sociology and Industrial Relations HMO 1966, Napier, *Judicial Attitudes to the Employment Relationship* (1977) 6 ILJ 1; and see the critical discussion of this issue in Davies and Freedland, *Labour Law* Weidenfeld & Nicholson, 2nd edition, (1984) at pp. 310-311 and pp. 316-318.

model which assumes a single source of authority and a single claim upon loyalty within an enterprise is unconvincing. The dynamics of the work place are more complex and sophisticated. For example, the matrix of individual loyalties may encompass loyalty to profession or trade, loyalty to work-place culture and loyalty to the team or department, as well as to the employer. Moreover, groups within the work-place may exert competing claims to benefits: demarcation disputes and comparability claims have typically exemplified such frictional pressures.

The problem of management is to harmonise and direct these competing energies according to the strategy set by management. A multiplicity of tools have been employed to achieve this. Human resource management methods have been designed to unify and direct competing or self-interested forces. Working methods (for example, team working) have been developed which promote co-operation and the inter-relation of tasks, so that concern for the whole is emphasised. Other examples are found in initiatives, such as Investors in People, which emphasise staff development to meet and promote organisational goals. "Empowerment" seeks to harness individual initiative within planned targets and so, by maximising the talent and seeking the fulfilment of the individual worker, contributes to the efficiency of the enterprise. Profit-related pay is designed to reward commitment to the strategic plan.

Where common purpose cannot be achieved by persuasive means, greater coercive power has been conferred to ensure ultimate compliance. This has been assisted by the state which has weakened the interests of otherwise powerful trade unions. The means by which trade unions can deploy economic power to counter-balance the subordination of the worker to the employer have been emphatically blunted.<sup>33</sup> The economic burden of organised conflict has been further shifted onto the individual worker.<sup>34</sup> Industrial action has become increasingly risk bearing for the participants.<sup>35</sup> Thus, the state has

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<sup>32</sup> *Id.*

<sup>33</sup> A seminal discussion of the principal developments can be found in Auerbach, *Legislating for Conflict*, Clarendon Press (1990) and Davies & Freedland, *Labour Legislation and Public Policy*, Clarendon Press (1992).

<sup>34</sup> See e.g., *Wiluszynski v. Tower Hamlets LBC* [1989] ICR 493.

<sup>35</sup> Under ss 237 and 238 of the Trade Union and Labour Relations (Consolidation) Act 1992 the employer may dismiss all those taking part in industrial action. Selective dismissal in the case of unofficial action is also legitimated unless the dismissed employee belonged to a trade union which had authorised or repudiated the industrial action by the time of the dismissal. This is so provided, of course, that none of the employees taking part are members of a trade union.



acknowledged that the duty and the right of management is to direct the competing and diverse energies within the enterprise towards the achievement of management goals. The ability of others to organise effective dissent from these goals has been severely weakened. The state's interest in this agenda lies in its view that a successful national economy is achieved where the sum of these individual managers' efforts coalesces to generate a myriad of competitive and successful business ventures.

Thus it can be argued that the enhancement of managerial prerogative since 1979 was designed to serve this end: overriding coercive power was bestowed to secure management's ability to strive towards maximum profit,<sup>36</sup> not only in the interest of the individual enterprise, but also in the belief that the national economic interest would thereby be advanced. The corollary is that employers bear a responsibility which is thought to resonate in a public as well as a private arena; it is a responsibility to the national economy as well as to shareholders and investors. Thus managerial power must be exercised rationally not only to support the individual enterprise, but also the wider economic interest. According to current economic orthodoxy if all individual enterprises are optimally managed, provided other economic conditions are favourable, aggregate wealth should be increased.

But this does not conclude the issue. Coercive power may be fundamental but cannot comprise the sole motivational strategy. Workers achieve more when they are valued rather than simply coerced. In the modern working environment it is insufficient if employees are expected merely to conform to a management prescription of how their work should be performed. More effective strategies also ensure that employees enhance productivity by their own initiative. A successful management should create a working environment which promotes dignity, consultation, fairness, persuasion, prompt response to perceived grievances, and redress of justifiable grievances.<sup>37</sup> This can be called the "environment interest". Absenteeism, bad time-keeping, high levels of staff turnover, poor performance, indiscipline and low morale threaten to impede the fundamental management objective of high productivity and often occur where the employer neglects this interest. The case law, to which we shall refer, demonstrates that implied terms have forced employers to address the "environment interest", and it is argued that this is so because the resultant

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<sup>36</sup> Profit is used in the context of this article to mean economic activity.

<sup>37</sup> It is submitted that that which is justified must depend upon the reasonable opinion of the employer.

efficient management of enterprise promotes the societal need for the enhancement of aggregate wealth.

Fulfilment of this public need dictates a different course where the working relationship has degenerated into conflict. Implied terms, in this context, have been fashioned to contribute to the subordination of the employee and the rapid defeat of organised resistance. Thus, it will be seen that the growth of employees' implied contractual rights has occurred exclusively in the context of the "environment interest". This is apparent in the emerging jurisprudence in this broadly defined area of good faith and trust and confidence.

## ***THE EMERGING JURISPRUDENCE***

### ***(i) The Nature and Scope of a Duty of Good Faith***

The primary focus of this article is to examine how and why the courts are developing an implied duty of good faith.<sup>38</sup> It has already been explained that for present purposes good faith is widely construed to include developments in the implied duties of co-operation and the duty to maintain trust and confidence. The new duty may, however, connote obligations wider than the aggregate of these duties.<sup>39</sup> At a fundamental level it recognises the obligation to perform promises. Fidelity to promises is an essential pillar of justice, and one the courts respect even if this entails the departure from the express formal contents of a bargain. Although at present the courts seem to be using this principle to enforce the reality of agreement this controversial strand of authority might develop into a principle that the spirit of the bargain is more important than its strict letter.<sup>40</sup>

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<sup>38</sup> The duty to act in good faith, as construed in this article, is a distinct obligation extending beyond the employee's acknowledged implied obligations to serve the employer faithfully and not to act contrary to the employer's interest since it (inter alia) imposes significant obligations on the employer. See, e.g., *per* Lord Steyn in *Malik v. B.C.C.I.* [1997] IRLR 462, 468. For a discussion of the orthodox duty of loyalty see Smith & Wood, *Industrial Law*, 6th edition (1996) pp120 *et seq.*

<sup>39</sup> Brodie advances a similar argument in *The Heart of the Matter: Mutual Trust and Confidence* (1996) 25 ILJ 121 where he argues that the idea of trust and confidence is wider than the courts' rhetoric suggests. He notes that in *Goold (Pearmark) Ltd v. McConnell* [1995] IRLR 516 and *Scally v. Southern Health and Services Board* [1991] 4 All ER 563 the terms implied performed a similar function to the duty to maintain trust and confidence since they demanded that employees be treated with respect and dignity. These ideas are central to the trust and confidence duty.

<sup>40</sup> See below under the heading *The Reality of Agreement*.

At a different level good faith appears to have a meaning of its own distinct from the more recognised implied duties to co-operate, to maintain trust and confidence and to serve faithfully. The jurisprudence on this point remains, however, to be coherently developed. One difficulty is that there are cases in which good faith and the implied duty to maintain trust and confidence appear to be treated as synonyms. This was so in the recent case of *Adin v. Sedco Forex International* where Lord Coulsfield in the Court of Session, Outer House formulated one of the issues in the case as follows: "whether the general obligation, often referred to as the obligation of trust and confidence *or of good faith*, which has been held to be implied in contracts of employment, was implied in this contract..."<sup>41</sup> (emphasis supplied). However, there are indications that this approach might overlook the distinct and separate existence of a doctrine of good faith. In *Imperial Group Pension Ltd v. Imperial Tobacco Ltd.*,<sup>42</sup> whilst the court appeared to treat good faith and the duty to maintain trust and confidence as synonyms, in relation to the former employees, whose pensions were now in payment, it is difficult to understand how the relationship of trust and confidence could be said to endure when the relationship of employer and employee had ceased. It would be contradictory to assert that trust and confidence could survive once the employment relationship had ended. This means that the duties owed by the employer to the former employees were rooted in a wider and distinct obligation of good faith.

A distinction between trust and confidence and bad faith also informs the reasoning in *Post Office v. Roberts*<sup>43</sup> where bad faith was held to be unnecessary to a finding that trust and confidence had been breached. This suggests that a breach of the duty to maintain trust and confidence is not inevitably a breach of good faith. Conversely, in *B.T. v. Ticehurst*<sup>44</sup> a breach of good faith may take place even if trust and confidence is unaffected by the conduct impugned. This can be identified in the court's ruling on the facts that the threat of all out strike action would not breach trust and confidence although, of course, actual strike action would breach the duty to serve loyally.

(ii) ***The Environment Interest***

*The Environment Interest and Managements' Objectives*

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<sup>41</sup> [1997] IRLR 280, 283.

<sup>42</sup> [1991] IRLR 66.

<sup>43</sup> [1980] IRLR 347.

<sup>44</sup> [1992] IRLR 219.

It has been argued that successful employee relations result when management nurtures an environment which promotes dignity, consultation, and fairness. Unjust, dishonest or disrespectful treatment of employees or the ignoring of their concerns prompts disharmonious and unproductive relations to which employees are likely to respond in a number of ways damaging to the efficient operation of the enterprise. These may constitute the withdrawal of the worker (in the form of absenteeism, bad time-keeping, or higher levels of staff turnover) or poor performance, indiscipline and low morale. Each of these tends to undermine the achievement of management goals, and so operate contrary to the public interest in ensuring that enterprise is efficiently managed. To address this the emerging doctrine of good faith has been developed so as to juridify aspects of the environment interest. Thus the promotion of the environment interest is no-longer a matter to which effective managers can merely aspire; it is infused with legally binding obligations which do not serve an exclusively private function.

#### *Prompt Action to Dispel the Causes of Conflict and Inefficiency*

A breach of the implied duties associated with the environment interest arise when management fails to recognise and address the early indications of distress in the working environment. An early sign of this development was evident in *British Aircraft Corporation v. Austin*<sup>45</sup> where the employer committed a fundamental breach by failing promptly and sensibly to investigate the employee's complaint about safety.<sup>46</sup> This development was placed upon a more general footing in the seminal decision in *Goold (Pearmark) Ltd v. McConnell*<sup>47</sup> where it was held that employers must afford a reasonable and prompt opportunity to obtain redress of any grievance. An extreme example occurred in *Smith v. Croft Inns Ltd*.<sup>48</sup> where, despite the finding that the employers would not have been in breach in failing to take measures to protect the employee from terrorist threats, they committed a fundamental breach in showing a complete lack of sympathy and concern for the plight of the employee. This finding is arguably designed to remove the causes of

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<sup>45</sup> [1978] IRLR 332.

<sup>46</sup> Note also that in *Bracebridge Engineering Ltd. v. Darby* [1990] IRLR 3 the employee was entitled to resign when the employer failed to treat her allegation of sexual harassment seriously.

<sup>47</sup> [1995] IRLR 516.

<sup>48</sup> [1996] IRLR 84.

disillusionment and disappointment and so to enhance the possibility that the employee will not be forced to resign. Thus in each of these examples respect for the implied duty would have promoted a more efficient outcome for the employer than the resignations which actually occurred.

Reasons of efficiency also explain the ruling that a lack of support to a supervisor under warning was repudiatory conduct since it rendered the purported opportunity to improve nugatory, thus wasting the potential of the employee to respond to the warning and forcing the employer to incur unnecessary training and induction costs.<sup>49</sup> A different manifestation of the same principle occurred where an employer failed to take appropriate action to prevent the harassment of an employee and disruption of her work by fellow employees.<sup>50</sup> After *Burton v. De Vere Hotels*,<sup>51</sup> where the employer was liable<sup>52</sup> because he could control whether the harassment occurred, it may now be argued that the ability but failure to prevent abusive conduct by third parties could constitute a fundamental breach of the contract of employment. A rational employer evaluating the risk of this new potential liability should adjust management policies to prevent such abuse and so contribute to the maintenance of a stable, efficient and productive workforce.

### *Ethics*

Good faith has also been deployed to enforce management ethics: dishonesty in itself is a fundamental breach of contract because dishonesty almost inevitably produces a breakdown in working relations.<sup>53</sup> In *Courtaulds Northern Textiles v. Andrews*,<sup>54</sup> for example, the employer expressed a strong opinion on the employee's incompetence which the employer did not believe. It was the employer's dishonesty that constituted the breach of contract.<sup>55</sup> Since honesty would not have incurred any cost, (unlike dishonesty which provokes

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<sup>49</sup> *Associated Tyre v. Waterhouse* [1976] IRLR 386.

<sup>50</sup> *Wigan Borough Council v. Davies* [1979] ICR 411.

<sup>51</sup> [1997] ICR 1

<sup>52</sup> Under ss. 1 and 4 of the Race Relations Act 1976.

<sup>53</sup> *Fyfe & McGrouther Ltd v. Byrne* [1977] IRLR 29; *Courtaulds Northern Textiles Ltd v. Andrews* [1979] IRLR 84; *Mihlenstedt v. Barclays Bank* [1989] IRLR 522.

<sup>54</sup> *Supra*.

<sup>55</sup> See also the remarks of Lord Denning MR in *Woods v. W M Car Services (Peterborough) Ltd.* [1982] IRLR 413 at 415.

resignation) the economically efficient solution was clearly to develop a legal rule requiring it.

In *Malik v. B.C.C.I.* the House of Lords similarly held that the operation by the employer of a corrupt and dishonest business constitutes a breach of the duty to maintain trust and confidence.<sup>56</sup> Significantly, the employer's conduct does not have to be directed at the employee concerned who may even be unaware that the conduct is taking place. Lord Nicholls observed:

"the objective standard provides the answer to the (respondents) 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." <sup>57</sup>

This means that the employer's obligation to operate according to minimum ethical standards is an important dimension of this implied duty. The fact that this obligation is imposed even though the employee need not have suffered any actual loss of confidence in the employer demonstrates that trust and confidence in this context is as much about the the public interest in corporate standards as it is about protecting the employees' individual interests in their economic livelihood. <sup>58</sup> Moreover, the fate of the Bank illustrated the detrimental societal consequences of corruption.

### *Dignity*

The environment interest encompasses cases where employers fail to respect the dignity of their employees. In *Wilson v. Racher* <sup>59</sup> it was held that a duty of mutual respect is imposed upon the parties to a contract of employment.

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<sup>56</sup> [1997] IRLR 462. If such a breach prejudicially affects an employee's future employment prospects so as to give rise to continuing financial loss, and it is reasonably foreseeable that such loss is a serious possibility, in principle damages would be recoverable if injury to reputation (and so damage to future employment prospects) could be established.

<sup>57</sup> at p. 464.

<sup>58</sup> The reasoning in *Malik* emphasises that employees cannot be taken to have agreed to work in furtherance of a corrupt and dishonest business. The same might equally be said of employees employed in a business operated recklessly or with gross incompetence, but their lordships did not extend the employer's duty to embrace minimum standards of competence.

<sup>59</sup> [1974] ICR 428.

Accordingly, in *Palmanor Ltd v. Cedron*<sup>60</sup> verbal abuse directed at an employee was held to be capable of constituting a fundamental breach of contract. The employer is not excused if the remarks are addressed to a third party.<sup>61</sup> In *Hilton International Hotels (UK) Ltd v. Protopapa*<sup>62</sup> a long serving employee reprimanded in a location where others might overhear in a manner which was humiliating, intimidating, degrading and unmerited in the circumstances was entitled to terminate her contract of employment.

### *The Safety and Comfort of the Working Environment*

Implied terms can also be linked to efficiency arguments in the context of health and safety cases.<sup>63</sup> The employer's obligations have been extended beyond the orthodox duty to take reasonable care for the safety of their employees.<sup>64</sup> Implied duties now require employers to provide, as far as is reasonably practicable, a working environment which is reasonably suitable for the performance of the employees' duties. This transcends issues of safety so as to include such issues as reasonable comfort - a development which importantly suggests a concern with working efficiency. This is most evident where the EAT in *Waltons & Morse v. Dorrington*<sup>65</sup> reached an express finding that the term was breached even though there was no evidence of damage to the complainant's health caused by the smoking of other workers. In this case it is clear that the only rationale of the implied duty was to provide a comfortable working environment to assist in ensuring the productivity of a majority of the workforce.<sup>66</sup>

### *The Reality of Agreement*

The honouring of contractual promises is fundamental to good management. Certainty, fairness and the avoidance of conflict are promoted where promises are duly honoured. Good faith demands no less than *pacta sunt servanda* since

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<sup>60</sup> [1978] ICR 1008.

<sup>61</sup> *Isle of Wight Tourist Board v. Coombes* [1976] IRLR 413.

<sup>62</sup> [1990] IRLR 317.

<sup>63</sup> *Walker v. Northumberland County Council* [1995] IRLR 35.

<sup>64</sup> Under *Wilson & Clyde Coal Co Ltd v. English* [1938] AC 57 an employee is owed a threefold duty by the employer: (i) to select proper staff; (ii) to provide adequate materials; and (iii) to provide a safe system of working. See further *McCafferty v. Metropolitan Police* etc. [1977] 2 All ER 756.

<sup>65</sup> [1997] IRLR 488 the starting point for the implication of the term was the duties under the Health and Safety at Work Act 1974, s2 (2) (e).

<sup>66</sup> This is so because a smoking ban could arguably impede the efficiency of workers addicted to tobacco.

the doctrine derives, in its most basic form, from a fundamental moral obligation to perform promises. One difficulty is to determine which promises to enforce. This is most acute where an informal agreement conflicts with later inconsistent arrangements contained in a formal document, such as the written statement of particulars of employment or the contract itself.

In resolving this difficulty the courts apply the contemplation standard under which effect is given to obligations falling within the contemplation of the parties at the time of contract. It is the true agreement of the parties which is enforced and not some formal but incorrect expression of it. Accordingly, the courts can disregard even the express words of contracts where these conflict with other inconsistent promises. *Aspden v. Webbs Poultry and Meat Group (Holdings) Ltd.*<sup>67</sup> offers an example of this in so far as an express power to dismiss by reason of prolonged incapacity alone could not be enforced so as to prevent an employee enjoying rights under a permanent health insurance scheme introduced at an earlier date which depended on continued employment.<sup>68</sup>

Formal indications of consent to arrangements which do not reflect the real agreement between the parties are thus not conclusive. Even the signature of the employee indicating apparent consent to the later inconsistent arrangement can be disregarded where there is clear evidence that a prior promise was still intended to be binding. This was so in *Hawker Siddeley Power Engineering Ltd. v. Rump*<sup>69</sup> where the employee's signature on the subsequently issued statement of particulars of employment was insufficient to denote his consent to its terms because there was evidence that the employee would not actually have agreed to them (notwithstanding the contrary indication represented by his signature). This development also is also explicable in efficiency terms. The security and reliability of contracts is a pre-requisite of a prosperous economy; their absence has been thought to paralyse economies in the Far East and Eastern Europe.<sup>70</sup>

However, the problem raised by these decisions is the practical one that if the courts are to give effect to the contractual contemplation of the parties (the

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<sup>67</sup> [1996] IRLR 521.

<sup>68</sup> See also *Adin v. Sedco Forex International* [1997] IRLR 280.

<sup>69</sup> [1979] IRLR 425.

<sup>70</sup> Cooter and Ulen, *Law and Economics*, Addison-Wesley Educational Publishers Inc., 2nd edition 1996 at p. 7.



reality of agreement) it must be possible to identify what this is. This is no easy task where an alleged informal promise conflicts with the express words of the contract. First there is a certain danger of revisionism in so far as one party may seek to evade express obligations by alleging either prior or subsequent promises of contrary effect. These issues will have to be resolved as a matter of evidence. Secondly there may be problems where the courts give priority not to what the parties actually agreed outside the formal document but what they might have agreed had they considered the matter. This is considered further below.<sup>71</sup>

### (iii) *The Management of Conflict*

Where conflict breaks out the common law agenda is clear: it insists on the subordination of the employee to the interests of the employer. There are few correlative obligations on the employer. The loyalty of the employee is owed exclusively to the employer, notwithstanding that they may be resisting even reasonable wage demands. Accordingly, any outward defiance by the employee to the employer's orders in order to show collective solidarity with other workers participating in industrial action is a fundamental breach of contract.<sup>72</sup> The development of the duty of good faith in this context has been pivotal. One well-known example of this occurs in *Secretary of State v. ASLEF No.2*<sup>73</sup> in which it was decided that an employee who places a literal and exacting interpretation on the employer's instructions with the purpose of injuring the employer's business so as to secure a wage increase breaches the implied duty to act in good faith.<sup>74</sup>

Although it has been sought to explain this decision from a unitary perspective<sup>75</sup> its true significance can only be appreciated if this model is rejected. This is so even if, at one level of reasoning, the employees were contractually obliged to co-operate in the commercial success of the venture by subordinating their own economic claims to their employer's interest in a commercially successful railway. The deficiency in this analysis is, however, fundamental. The courts did not progress to construct the doctrine of good faith so as to establish a

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<sup>71</sup> Under heading *The Use of an Express Power for a Purpose Outside the Contemplation of the Parties*.

<sup>72</sup> *Bowes v. Press* [1894] 1 QB 202.

<sup>73</sup> [1972] 2 All E.R. 949.

<sup>74</sup> Although this is not so clear in the judgment of Roskill L.J. whose reasoning tends to emphasise the effect of the industrial action. ([1972] 2 All E.R. 949 at p. 980).

<sup>75</sup> Napier, *Judicial Attitudes to the Employment Relationship* (1977) 6 ILJ 1.

correlative obligation on employers to have reasonable regard to the just economic claims of employees in concluding annual pay negotiations.<sup>76</sup> This suggests that the decision satisfies only one of Fox's criteria by which the unitary model is judged: that the employees should subscribe to a single focus of loyalty (the employer).<sup>77</sup> It ignores a further important criterion which is that those engaged in the enterprise are part of a team. Fox's version of the unitary model describes mutual loyalty and esteem which the *ASLEF* decision necessarily lacks.

*B.T. v. Ticehurst*<sup>78</sup> arguably extends this one-sided version of the duty of co-operation by emphasising that employees commit a breach of contract regardless of whether or not the industrial action they take is actually effective to advance their claim.<sup>79</sup> The employer is entitled to lock them out without pay even if disruption is minimal. In these decisions the common law tightens the restraints on the ability of workers to organise and to deploy economic sanctions against employers. In upholding the withdrawal of the wage the courts permit the employer to strike at employees precisely where they are often most vulnerable in order to encourage early capitulation.

Resort must be had to utilitarian considerations to explain the apparent harshness of these decisions. This is because, so framed, the implied term can be interpreted as addressing the possible impact of wage rises on counter-inflationary policies. One crucial lesson of the voluntarist period demonstrates that where employees wield effective economic sanctions to enforce wage demands the national economy is set upon a path which leads to inflation and the loss of competitiveness in international markets.<sup>80</sup> The systematic erosion of the power of the trade unions to target real economic power against employers bears witness to the extent to which successive governments have accepted this argument. *ASLEF* and *Ticehurst* contribute to the employer's

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<sup>76</sup> *Murco v. Forge* [1987] IRLR 50, although the implied duty not to destroy trust and confidence entails an obligation not to treat the individual employee arbitrarily capriciously or inequitably in remuneration matters: *Gardner v. Beresford* [1978] IRLR 63; *Pepper & Hope v. Daish* [1980] IRLR 13. See generally, Hough, *Asking for More: The Legal Status of the Annual Pay Review*. (1991) 41 Northern Ireland Legal Quarterly 245

<sup>77</sup> Alan Fox, Research Paper to Royal Commission on Trade Unions and Employer's Associations, Industrial Sociology and Industrial Relations HMO 1966.

<sup>78</sup> [1992] IRLR 219.

<sup>79</sup> The breach of contract was the employee's failure to sign an undertaking to work normally, and so motive by itself made what would otherwise be lawful a breach. The decision removes any doubt remaining after *ASLEF* that the employee is only in breach of contract where the industrial action is actually effective in causing harm.

<sup>80</sup> Davies & Freedland, *Labour Legislation and Public Policy*, Clarendon Press (1992).

armoury by encouraging the defeat (as rapidly as possible) of the disaffected workforce using powerful economic means.<sup>81</sup> In conclusion, the common law implied duties of fidelity and co-operation are utilised to demand the sacrifice of the employee's short-term interests for the sake of the national economy. The latter is a paramount consideration to which the interests of individual employees have been made to yield.

(iv) ***Modernisation and Competitiveness***

It is not only in the field of industrial conflict that implied terms are deployed to subordinate employees to the management strategy. A similar development can be identified in the context of strategies to modernise and improve competitiveness.

The employer is precluded from seeking modernisation or enhanced competitiveness by a unilateral variation of contract.<sup>82</sup> Nevertheless, implied terms within the existing contract ensure that the employee is expected to adapt to new methods and techniques of working.<sup>83</sup> The corollary is an obligation binding the employer to provide reasonable training.<sup>84</sup>

Further, the employer may demand increased productivity which the implied duty to co-operate obliges the workforce to accept.<sup>85</sup> Similarly the employee is not entitled to determine what is an appropriate standard of work, even if the work delivered is of a standard which was once acceptable.<sup>86</sup> In an era of rapid technological change this implied term ensures efficiency since, in its absence, there would be a greater need to re-negotiate contracts. It is in the national economic interest that this should be so: improved standards help to ensure the continued marketability of goods and services; staff turnover is minimised, thereby reducing burdens on welfare and re-training; and the competitiveness of the economy through the adoption of technological innovation should enhance margins and generate investment and wealth.

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<sup>81</sup> See also *Wiluszynski v. LB of Tower Hamlets* [1989] ICR 493.

<sup>82</sup> *Rigby v. Ferodo* [1987] IRLR 516.

<sup>83</sup> *North Riding Garages v. Butterwick* [1967] 2 QB 56.

<sup>84</sup> *Cresswell v. Board of Inland Revenue* [1984] ICR 508.

<sup>85</sup> Provided the increase is otherwise within the scope of the contract.

<sup>86</sup> *North Riding Garages v. Butterwick* [1967] 2 QB 56.

(v) *Controls on Managerial Discretion*

The common law has not shied from asserting limits on the substance of management power. The purpose of these limits lies only partly in the private domain. There is a value in protecting the employee from an unjustified, arbitrary exercise of management power in the interests of justice and fairness. Where there are no rational and overriding interests of the employer to be served by disregarding the interests of the employee, efficiency arguments also favour the limitation of managerial prerogative. This is so in part because the arbitrary exercise of management power will only randomly ensure economic success. It can be seen from the examples offered below that the courts test the rationality of management decision-making since its converse tends to detract from the efficient implementation of legitimate and reasonable management objectives.

First, as has been shown, the honest belief in the propriety of a decision is itself fundamental to its lawfulness.<sup>87</sup> But an honest belief in the desirability of a course of conduct is insufficient to justify it where that conduct is otherwise irrational. Three types of cases can be identified: (i) an irrational use of an express contractual discretionary power; (ii) the use of a power for a purpose outside the contemplation of the parties; (iii) otherwise acting capriciously or without reasonable grounds.

(i) *The Abuse of an Express Contractual Power*

Employers are required to show that they have reasonable grounds for exercising an express contractual discretionary power. This was so in *McLory v. Post Office*<sup>88</sup> where it was held that the employer's express power to suspend, with or without pay, could only be exercised on reasonable grounds and last only for so long as those grounds endured. It is interesting that the court so ruled even though the employees were actually suspended on full basic pay. Whilst the implied terms serve the interests of the employees in not depriving them of the opportunity to earn overtime payments for a longer period than was reasonably necessary, an alternative reading suggests that employees should not be paid to kept idle in order to prevent an unwarranted drain on the resources of the enterprise.

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<sup>87</sup> See above the discussion of ethics.

<sup>88</sup> [1992] ICR 758.

In substance, limitations based on reasonableness were also implied on efficiency grounds in *United Bank Ltd. v. Akhtar*.<sup>89</sup> Here the junior and poorly paid employee was ordered to transfer to a distant location at very short notice with no re-location assistance from the employer (a matter which the contract expressly reserved to the discretion of the employer). The EAT implied terms precluding the employer from exercising the contractually reserved discretion in such a manner as to make performance of the contract by the employee impossible.<sup>90</sup>

(ii) *The Use of an Express Power for a Purpose Outside the Contemplation of the Parties*

The implied duty to act in good faith can also preclude the use of an express contractual power for the pursuit of purposes collateral to the contract.<sup>91</sup> The courts examine the purpose of the discretion exercising party and inquire whether that purpose is within the reasonable contemplation of the parties. This may mean the rejection of a literal construction of express contractual powers where a literal reading would violate the reality of the inter-partes agreement. This remains an expression of the idea of sanctity of contract, but it is a version which emphasises substance over form.<sup>92</sup> If however the courts reject express terms which the parties ostensibly *would not have agreed* (as opposed to terms to which they did not agree) they would be venturing towards the application of a different model of contract. The purpose of rejecting express terms might be for redistributive reasons to ensure that the outcomes of the contracting process are as nearly equal as is possible. Alternatively, it might be to remove barriers to efficiency. This latter interpretation is possible in *United Bank Ltd. v. Akhtar*<sup>93</sup> where, on the facts, the bank could not respect the duty to maintain trust and confidence and yet exercise its express discretion not to pay travelling expenses. Terms were implied so as to make the contract workable.

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<sup>89</sup> [1989] IRLR 507.

<sup>90</sup> After *White v. Reflecting Roadstuds Ltd.* [1991] IRLR 331 and *McLory v. Post Office* [1992] ICR 758 the courts formally adhere to the principle that there is no general implied requirement of reasonableness in a contract of employment.

<sup>91</sup> *Imperial Group Pension v. Imperial Tobacco Ltd* [1991] IRLR 66.

<sup>92</sup> *Aspden v. Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521.

<sup>93</sup> [1989] IRLR 507.

### (iii) *Otherwise Acting Irrationally*

There are also other examples where irrational decisions constitute a breach of contract even where they are not ostensibly founded upon an express discretionary power. For example, the lack of reasonable cause in requiring an employee to undergo a psychiatric examination would par excellence exemplify a breach of trust and confidence.<sup>94</sup>

Many of the developments in the doctrine of good faith have occurred in the context of unfair dismissal where the common law has had a profound influence on the scope of the statutory framework.<sup>95</sup> There is a synergy between statutory interpretation and the development of the common law in the influence of good faith as an instrument for enhancing efficiency. For example, before using the statutory power to dismiss for misconduct, an employer is not obliged to prove that misconduct beyond all reasonable doubt, but tribunals insist upon an honest belief in guilt which can be sustained on reasonable grounds.<sup>96</sup> Similarly, the honest belief that a re-organisation involving a unilateral variation of contract is in the interest of the enterprise will not of itself justify the dismissal of an employee who resists that change.<sup>97</sup>

## **CONCLUSION**

The common law has been instrumental in extending protection to employees at a time when contemporary government is generally quiescent towards the interests of business. Terms implied by law into all contracts of employment have afforded the judiciary with the means of juridifying new employment standards. Controversially, this work is not, however, solely dedicated to the exclusively private purpose of redistributing economic power within the employment relationship. It is also intended to address the public interest in

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<sup>94</sup> *Bliss v. South East Thames Regional Health Authority* [1985] IRLR 308.

<sup>95</sup> E.g., *Western Excavating (ECC) Ltd. v. Sharp* [1978] ICR 221 concerning the scope of constructive dismissal under the Employment Rights Act 1996, s. 95 (1) (c). Other examples, include cases in which the frustration of the contract negates a dismissal: *Notcutt v. Universal Equipment Ltd.* [1986] IRLR 218, and where illegality in performance may prevent employees enforcing their statutory rights: *Hewcastle Catering v. Ahmed* [1991] IRLR 473 (noted, Honeyball (1992) 21 ILJ 143).

<sup>96</sup> *British Home Stores Ltd. v. Burchell* [1978] IRLR 379.

<sup>97</sup> *Evans v. Elementa Holdings Ltd.* [1982] ICR 233.

a successful economy. The traditional *laissez-faire* model of contract is unsuited to these developments, and many judges are no longer influenced by it.<sup>98</sup> Rhetoric aside, the judiciary do recognise that the state has an interest in the content of the contract of employment.

However, the judiciary is not bound (or fettered) by the view that the state should extend minimum standards of employment rights to employees. If it were the courts might have been expected to address obvious gaps in protection left by the inequality of bargaining power. For example, the common law has not developed an implied right to a holiday or to rest periods during working hours.<sup>99</sup> Implied rights to health and safety may yield to conflicting express terms.<sup>100</sup> In *McLory v. Post Office*<sup>101</sup> it was re-emphasised that the rules of natural justice would not be imported into a purely contractual relationship.<sup>102</sup> No automatic right to sick pay is as yet implied into a contract of employment.<sup>103</sup> And the courts have not established a general right for the employee to be provided with work.<sup>104</sup> Nor is there any general duty to give a reference to a prospective employer.<sup>105</sup> Most recently in *Malik v. B.C.C.I.*<sup>106</sup> it was held that there is no common law duty to take steps to improve an employee's job prospects notwithstanding that this would be a matter of central importance to employees. The court have also refused to

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<sup>98</sup> *Ali v. Christain Salvason Food Services Ltd.* [1997] IRLR 17 is perhaps an exception. However, the crucial facts were that the contract derived from a collective agreement negotiated across a broad range of issues for a substantial workforce.

<sup>99</sup> The Working Time Directive 93/104 aims to remove risks to health which result from long working hours. It also confers a right to a paid annual holiday.

<sup>100</sup> *Johnstone v. Bloomsbury Health Authority* [1991] ICR 269

<sup>101</sup> [1993] 1 All. E.R. 457.

<sup>102</sup> *Ridge v. Baldwin* [1964] AC40.

<sup>103</sup> *Mears v. Safecar Security Ltd.* [1983] ICR 626.

<sup>104</sup> *Collier v. Sunday Referee Publishing Co. Ltd.* [1940] 2 KB 647; cf *Langston v. AUEW* [1974] 1 All ER 980 in which the court may have begun to recognise the importance of employees maintaining and improving their skills- a matter of considerable importance in the modern working environment. *Langston* could be developed to require skilled workers to be given work.

<sup>105</sup> *Gallear v. J. F. Watson & Co.* [1979] IRLR 306. However, in *Spring v. Guardian Assurance plc* [1994] 2 All E. R. 129 Lord Woolf observed *obiter* that it may be necessary to imply a term that the employer will provide a reference to a prospective employer where the contract of employment relates to an engagement of a class where it is the normal practice to require a reference from a previous employer before employment is offered and the employee cannot be expected to enter that class of employment except on the basis that his employer will, on the request of another prospective employer made not later than a reasonable time after the termination of a former employment, provide a full and frank reference to the employer. (at p. 179) Lord Slynn also stated that contracts may exist in which it necessary to imply a duty to give a reference. (at p.165)

<sup>106</sup> [1997] IRLR 462.

imply a right to an annual pay increase even to preserve the real value of the wage after inflation.<sup>107</sup>

It also seems evident that the development of good faith has not been solely influenced by a desire to re-fashion the employment relationship as a co-operative and mutually supportive endeavour. Decisions which subordinate the employee in cases of organised conflict discredit any unitary explanation of the development of the new implied obligations. " Although influences 2 and 3 can be recognised in the common law, the courts extend minimum rights to employees in the interests of justice where to do so is conceived to be compatible with the enhanced efficiency of the enterprise. Thus influence 4 is paramount. Employees are unlikely to benefit where the courts perceive that an asserted implied right will be unduly financially onerous<sup>108</sup> or otherwise unduly burden the efficient working of the employer's undertaking.<sup>109</sup> Yet the promotion of the "environment interest" demonstrates that some implied rights not only recognise the moral claims of employees to fair treatment but also tend to promote optimal efficiency. This interest provides one context in which future developments are likely.

Recent statutory extensions of employees' rights have been made by the regulations on working time.<sup>110</sup> There is also the imminent introduction of the national minimum wage and the statutory implementation of the Parental Leave Directive 96/34 and Part-time Workers Directive 97/81.<sup>111</sup> It should not be forgotten that most of the development of implied terms followed the re-contractualisation of the employment law in the context of unfair dismissal after *Western Excavating (ECC) Ltd. v. Sharp*.<sup>112</sup> These directives may provide causes of action the resolution of which might depend upon further

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<sup>107</sup> *Murco v. Forge* [1987] IRLR 50.

<sup>108</sup> Such as a general right to disclosure. This is analysed by Collins in *Implied duty to Give Information During Performance of Contracts* (1992) 55 MLR 556.

<sup>109</sup> E.g., by importing the rules of natural justice into a contract of employment, *supra*.

<sup>110</sup> Working Time Regulations 1998 SI 1998/1833 which came into force 1st October 1998.

<sup>111</sup> Although the White Paper, *Fairness at Work*, Cm 3968, May 1998 proposes, further reforms including the reduction of time limits for qualifying for unfair dismissal, the abolition of waiver clauses in unfair dismissal cases, the abolition of maximum compensation limits in unfair dismissal cases, and the compulsory recognition of trades unions where a majority of the workforce supports it. See now the Employment Relations Bill 1999.

<sup>112</sup> [1978] ICR 221.



development of implied terms.<sup>113</sup> It remains to be seen whether future developments will follow the themes we have endeavoured to identify. If the resilience and creativity of the common law in interpreting and supplementing unfair dismissal is a guide, there will be some scope to the judiciary's struggle to reconcile rights with efficiency.

10207 words

Barry Hough, Associate Professor Southampton Institute,  
Ann Spowart-Taylor, Principal Lecturer, University of Sunderland

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<sup>113</sup> E.g., The derogations from the Working Time Regulations under which some classes of workers are permitted to work longer hours. The issue also arises in relation to the general innovation which seeks the humanisation of the working environment: art. 13 of the Working Time Directive 93/104.