

The Implied Term of Trust and Confidence and the Coronavirus Job Retention Scheme: a Reply

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Introduction

1. On 14 April 2020, our colleague Stuart Brittenden published an article arguing that the implied term of mutual trust and confidence (“the implied term”) requires employers to make use of the Coronavirus Job Retention Scheme (“CJRS”) for agency workers, zero-hour contract workers, and employees, generally.
2. In our reply to Stuart’s article, we examine the history and jurisprudential basis of the implied term; consider how it interacts with the Bermuda Triangle of employment law, the “Johnson exclusion zone”; review the permanent health insurance (PHI) cases; and conclude with our view on the potential interaction between the implied term and the CJRS. We take a different view to Stuart, although we acknowledge that there are no firm answers.

A happy accident?

3. The origins of the implied term lie in the difficulties faced by employees in establishing unfair dismissal complaints. In Western Excavating v Sharp [1978] QB 761, CA, the central legal issue was whether, in an unfair dismissal complaint, the test for a deemed/constructive dismissal was a contractual test (repudiatory breach of contract) or a reasonableness test. The Court of Appeal determined that it was the former – unwelcome news for employees treated unreasonably, but without their employer breaching an express contractual term.
4. In Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84, EAT, a manager had disingenuously said to an employee, “you can’t do the bloody job anyway”. The issue was whether this amounted to a repudiatory breach of contract. The EAT held (at §10) that “one implies into a contract of this sort such additional terms as are necessary to give it commercial and industrial validity”. It accepted the Claimant’s submission that it was an implied term of *the contract* (our emphasis added) that “the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.” It held (at §11) that a breach of such an implied term would be a fundamental breach of contract. Bearing in mind what was decided, the headnote is surprising: it generalised from “a contract of this sort” and

“the contract” to “a contract of employment”, leading to the presumption that it was within all contracts of employment in future cases.

5. In Woods v WM Car Services (Peterborough) Limited [1981] ICR 666, EAT, the Tribunal had accepted that the implied term was within the contract of employment. The EAT (at 670G-H) agreed, relying on Andrew in support of this proposition. The relevant test to be applied was whether “the employee cannot be expected to put up with” the conduct in question (670H-671A). It made clear (at 671A-B) that it regarded “this implied term as one of great importance in good industrial relations” and pointed out (at 671F-672B) the benefit of the implied term, following the decision in Western Excavating, in preventing employers “squeezing out” employees by making life so uncomfortable that they resigned, while stopping short of any “major breach of the contract”.

The refinement of the implied term

6. In the well-known stigma damages case of Malik v BCCI [1998] AC 20, HL, arising out the collapse of BCCI, the parties agreed that there was an implied term connected with the duty of trust and confidence in the contracts of employment of the two claimants. Lord Nicholls and Lord Steyn glossed the implied term in slightly different ways, leading to rival formulations in the years that followed.
7. Nearly two decades later, in Yapp v Foreign and Commonwealth Office [2015] IRLR 112, CA, Underhill LJ confirmed (at §42) that Lord Nicholls’ formulation was to be preferred: that the employer “would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.
8. In Malik, Lord Nicholls noted (at 39D) that the implied term “exists and is normally implied into every contract of employment”, but did not explore the basis for this. Lord Steyn said (at 45D) that the applicant did not rely on a term “implied in fact... [but] a standardised term implied by law, that is, on a term which is said to be an incident of all contracts of employment”. In support of this, he cited Scally v Southern Health Board [1992] 1 AC 294, HL, in which Lord Bridge (at 307B) distinguished between implied terms necessary to give business efficacy to a particular contract and a “search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship”.
9. Such a distinction can be traced back further, to Lister v Romford Ice and Cold Storage [1957] AC 555, HL. In that case, which concerned an employee’s obligations to his employer when driving the employer’s vehicles, Viscount Simonds (at 576 and 579) distinguished between an

implied term necessary to give “business efficacy” to a contract and a search, based on wider considerations, for such a term as the nature of the contract might call for, or as a “legal incident of this kind of contract”.

10. In Malik, Lord Steyn noted with approval (at 46A-B) observations made by Lord Slynn in Spring v Guardian Assurance Plc [1995] 2 AC 296, 335B, HL, about the greater duties imposed on employers than in the past to care for the physical, financial and even psychological welfare of their employees. He therefore welcomed (at 46E) the implied term as a “sound development”. Although not bound by the agreement of the parties or the courts below as to the existence of the term, he was content to accept it.
11. Lord Nicholls’ distinction between terms implied in fact and terms implied in law was approved in Geys v Société Générale [2013] ICR 117, SC. Baroness Hale noted that terms implied in fact needed to meet the business efficacy test, while those implied into classes of contract, such as contracts between employer and employee, do not. She endorsed (at §§55-56) the idea that the existence and scope of terms implied into classes of contract “raise questions of reasonableness, fairness and the balancing of competing policy considerations”.

How far does the implied term go?

12. Delimiting the implied term is an impossible task and we will therefore restrict ourselves to three cases to illustrate its limits. In an early case, United Bank v Akhtar [1989] IRLR 507, EAT, the employee relied on the implied term to attack the employer’s use of a mobility clause. The employer had sought to move the employee from Leeds to Birmingham at short notice, despite being aware of the employee’s personal difficulties in complying. It ignored his request for leave to sort out his affairs before moving. Knox J referred back to the test in Woods and found that the Industrial Tribunal had been entitled to conclude that the bank’s conduct was such that Mr Akhtar could not be expected to put up with it and that he was entitled to treat himself as having been constructively dismissed.
13. More recently, in Stevens v University of Birmingham [2017] ICR 96, QBD, the Court held that a university employer had breached the implied term by refusing to allow a clinical academic to be accompanied by a Medical Protection Society representative (who had considerable familiarity with clinical trials) at a meeting to investigate conduct allegations relating to clinical trials. The Claimant sought a declaration that, notwithstanding the express terms of the contract, he was contractually entitled to be so accompanied by virtue of the implied term. The Court granted this declaration.

14. The Supreme Court gave helpful guidance on the limits of the implied term in James-Bowen v Commission of Police of the Metropolis [2018] ICR 1353, SC. The case concerned the duties owed by the Police Commissioner to her officers in the conduct of litigation based on their alleged misconduct. Lord Lloyd-Jones accepted (at §15) that, by analogy, the Commissioner owed such duties to her officers as an employer does to its employees by virtue of the implied term. In the absence of any contract, however, such a duty had to sound as a duty of care. Lord Lloyd-Jones noted (at §16) that the implied term was a “standardised term implied by law into all contracts of employment” and, referring to various cases including Stevens, noted that the implied term “has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship” – that is to say, in the course of disciplinary procedures.
15. Lord Lloyd-Jones endorsed Baroness Hale’s comments about the nature of the implied term in Geys. He said (at §21) that the argument that the implied term should extend to the conduct of litigation raised exactly the same question as if the claim were put in tort, under the test in Caparo Industries plc v Dickman [1990] 2 AC 605, HL: whether it is fair (just) and reasonable. Holding that a term implied in law as an incident of a standardised contract could not be wider than the duty imposed by the law of tort, he proceeded to analyse the case on the basis of tort.
16. It is therefore clear that both the existence of the implied term in a type of contract and its scope in that type of contract will need to be argued based on fairness and reasonableness and will involve a balancing of competing policy considerations.

Voyaging to the Bermuda Triangle?

17. It is easy enough to get lost in the case law arising from Johnson v Unisys Ltd [2003] 1 AC 518, HL that it bears comparison with the Bermuda Triangle. In this section, we do our best to chart a clear path through the cases and synthesise the relevant principles.
18. Long before Johnson, it was well-established that employees are not entitled to compensation, at common law, for the manner of their dismissal: Addis v Gramophone Co Ltd [1909] AC 488, HL. Addis concerned an allegedly humiliating dismissal, which made it difficult for the employee to obtain new work. He was not entitled to recover for those losses, however.
19. In Johnson, the Claimant alleged that the manner of his dismissal breached the implied term and a duty of care owed by his employers, causing his mental breakdown and ensuing inability to find work. Lord Nicholls, endorsing Addis (at §2) found that permitting the exercise of a common-law right covering the same ground as unfair dismissal would “fly in the face of the

limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims". Lord Hoffman (at §58) agreed with this reasoning. Lord Steyn (at §29) agreed on the result, but on the basis that the damages claimed were too remote.

20. As Malik showed, there is no bar to claiming damages arising out pre-dismissal breaches of the implied term. Following Johnson, the focus therefore turned to the demarcation between pre-dismissal breaches and breaches arising out of the dismissal itself, or, as it has sometimes been described, whether the antecedent breaches were really 'part and parcel' of the dismissal.
21. The demarcation issue arose in Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2005] 1 AC 503, HL. In both cases, the employees claimed that their employer had breached the implied term of trust and confidence prior to dismissal, causing psychiatric illness and thus loss: in Eastwood by a sustained campaign of harassment and unjustified accusations; in McCabe by an unjustified, lengthy suspension. Judgment had been given for the employer on a preliminary issue in the first case and by striking out the claim in the second. Different divisions of the Court of Appeal had construed the "Johnson exclusion zone" widely in Eastwood (including the events leading up to the eventual dismissal) and narrowly in McCabe (applying to the dismissal alone).
22. Lord Nicholls, with whom Lords Hoffman, Rodgers and Brown agreed, said (at §§28-29) that, ordinarily, the employer's failure to act fairly in the steps leading up to dismissal does not itself cause loss. In exceptional cases, though, it does – such as when a suspension, itself, causes financial loss or when pre-dismissal treatment causes psychiatric illness. On the facts, in both cases, the claimants had acquired a common law cause of action before their dismissals and their claims should therefore be allowed to proceed to trial.
23. The Supreme Court was asked to consider the demarcation issue in relation to a contractual disciplinary procedure in Edwards v Chesterfield Royal Hospital NHS Trust [2012] 2 AC 22, SC. With seven justices and five judgments, the ratio is something of an elusive beast.
24. Mr Edwards was a consultant surgeon employed by the Defendant. It was an express term of his contract that in matters of professional misconduct he would be subject to the "Disciplinary procedures for Hospital and Community Medical and Dental Staff". Following a complaint against him, a conduct hearing was held. The composition of the panel did not comply with the disciplinary policy, because it did not have a clinician from his own discipline. The panel made factual findings and, on the basis of those findings, decided that he should be summarily dismissed. He issued proceedings in the High Court claiming damages for breach of contract.

He argued that a properly-constituted panel would have made different findings and that, as a result of the findings in breach of contract, his reputation had been tarnished, causing loss.

25. All of the Supreme Court Justices, aside from Baroness Hale, affirmed that damages were not recoverable for breach of contract in relation to the manner of dismissal, even where the breach was of an express term of the contract. They held on a 4:3 majority that it was impossible to divorce the findings on which the claimant based his claim for damages from the dismissal itself.
26. Lord Mance said (at §99) that where the findings made within a disciplinary process and the dismissal were part of a single process, dividing the two was artificial. The only arguable causes of action were wrongful dismissal, unfair dismissal and defamation. Lords Dyson and Lord Walker agreed (at §57) with this approach.
27. Lords Kerr and Lord Wilson disagreed (at §§134-135), saying that if a cause of action subsists before a dismissal, it cannot be extinguished by a subsequent dismissal, even if that dismissal is caused by the same facts that gave rise to the cause of action.
28. Baroness Hale, who would have dismissed both appeals, said (at §116) that if the losses flowed from breach of contractually agreed disciplinary processes, they should be recoverable in the ordinary way. She found that the losses flowing from the breach of a contractually agreed disciplinary procedure were much more directly related to the breach of contract than those flowing from the dismissal, where an employer was entitled as a matter of contract to dismiss on notice. Baroness Hale said that there was no reason to extend the “Johnson exclusion zone” from claims arising out of breaches of the implied term to those arising out of breaches of express terms. She was puzzled (at §122) at how it was possible for an employee to enforce her contractual right to a disciplinary process in advance by injunction but not for damages after the event. Lord Kerr and Lord Wilson shared her puzzlement (at §135). (In the recent Law Commission report on Employment Tribunal Hearing Structures, there is, notably, no proposal to extend the jurisdiction of Employment Tribunals to enable them to order injunctions, so this remains the exclusive preserve of the courts.)
29. Lord Phillips decided the case on the basis of remoteness (at §80) but agreed with Lords Dyson, Lord Walker and Lord Mance (at §88) that Mr Edwards’ complaint about the panel’s factual findings could not be separated from his dismissal. He noted (at §85) that, since Addis, stigma damages could not be awarded for wrongful dismissal, and said that if the courts could exclude a claim for stigma arising out of a wrongful dismissal, it was equally open to them to exclude a claim arising out of a failure to comply with a contractual disciplinary code.

30. The effect of the majority's judgments is that employees cannot rely on breaches of express terms as to the conduct of disciplinary procedures. They can only claim damages for breaches of the implied term if the breach is properly separable from any ensuing dismissal, such as in Eastwood and McCabe, although they can seek injunctive relief as per Edwards.

The Permanent Health Insurance cases

31. As described in Stuart Brittenden's article, there is a line of cases, beginning with Aspden v Webbs Poultry & Meat Group [1996] IRLR 521, QBD, in which the courts have been willing to imply terms into contracts of employment to allow employees to make proper use of PHI policies, which pay employers when their employees suffer from long-term incapacity. In those cases, there are tripartite contractual arrangements: the employer enters into an insurance contract with an insurer for the benefit of an employee or class(es) of employee. The insurance contract does not survive the termination of employment insofar as the terminated employee is concerned.
32. In Aspden, while the Claimant's contract of employment was silent about the company's PHI scheme, it was found to be a contractual benefit. The Claimant was given notice of dismissal while on long-term sickness absence and brought a claim for wrongful dismissal. The Court accepted the Claimant's contention that there was an implied term that, save for summary dismissal, the employer would not terminate the contract while the employee was incapacitated for work. This was necessary to avoid frustration of the PHI scheme and gave effect to the undoubted mutual intention of the parties as to the operation of the scheme when the contract was signed.
33. In Villella v MFI Furniture Centres [1999] IRLR 468, QBD, there was a mismatch between the PHI benefits promised under the contract of employment and the risks insured by employer. When the insurer stopped payments, a dispute arose between the employer and employee and MFI purported to terminate Mr Villella's employment by issuing him with a P45. The Claimant's primary case was that he had a subsisting contractual right to benefits, payable until his recovery, death or retirement. In the alternative, if his entitlement hinged on whether he had been dismissed or not, he said he had not been. Further or alternatively, he said that the (purported) termination breached an implied term that MFI would not terminate his contract save for cause other than ill health in circumstances that would deprive him of continuing entitlement to disability benefit.
34. The Court accepted the Claimant's primary case, finding that MFI had a continuing obligation to pay him PHI benefits as a matter of a contractual interpretation, irrespective of what was

reimbursed by the insurer. It also accepted his alternative case – that the contract subsisted in any event. As to the further alternative case, the Court held that, as a matter of business efficacy, there was an implied term that the employer would not terminate the employee’s contract save for cause other than ill-health in circumstances that would deprive him of continuing entitlement to disability benefit. The Court approved broadly of Aspden, but felt that the implied term in that case was too wide.

35. In Briscoe v Lubrizol [2002] IRLR 607, CA, Lord Ward found (at §107) that the relevant implied term was that the employer would not terminate the employment as a means to remove the employee’s entitlement to PHI benefit but could dismiss for good cause, whether for gross misconduct or, more generally, some repudiatory breach by the employee. Neither Potter LJ (§21) nor Bodey J (§64) felt that the exact nature of the implied term mattered on the facts of the case. Ward LJ held (at §135) that there is no doubt an implied duty on the employer “to take all reasonable steps to obtain the benefits... if action has been requested by the employee”.
36. In Marlow v East Thames Housing Group Ltd [2002] IRLR 798, QBD, Cooke J held (at §55) that if there is a contractual term that an employer makes available to an employee the proceeds of a PHI policy, the employer has a duty flowing from the implied term, or the duty of good faith, to take all reasonable steps to secure that the insurance benefits are paid and the employee thus benefits from the payment. Such steps may or not may not involve litigation, if requested by the employee, but that is a question of fact in the particular case. This obligation arose out of the fact that the employee could not sue the insurer directly (because she was a third party) and could not sue the employer for payment (because it was only obliged to pay her what it received from the insurer).
37. In each of the above cases, PHI was a contractual benefit and there was a debate about the fetters on the employer’s right to terminate and the extent of its obligation to enable to employee to make use of the benefit.

Extending the PHI cases to the CJRS

38. Stuart Brittenden relies on the PHI cases as being analogous to the CJRS. We think it is a fundamentally different beast. The PHI cases are about making use of contractual benefits; the CJRS is not a contractual benefit but a means of providing emergency funding to employers who may otherwise be forced to make staff redundant in light of the COVID-19 pandemic. Even if it were a contractual benefit, there is no realistic scope for implying a term in fact. The CJRS was announced on 20 March 2020. Putting TUPE-transfers to one side, the HM Treasury

Direction restricts eligibility to those who were paid earnings in the 2019/20 tax year on or before 19 March 2020. A term implied in fact must be implied, as a matter of business efficacy, at the point of contract formation. A term concerning the use of the CJRS cannot be implied into a contract formed before the existence of the CJRS.

39. If relying on the implied term (a term implied in law), then one has to grapple with whether it applies to agency workers or zero-hour contract workers at all. Agency workers are not, generally, employees of the agency, due to the lack of control exercised by agencies, although they are deemed employees by virtue of Sections 44-46 of the Income Tax (Earnings and Pension) Act 2003. Zero-hour contract workers generally lack the mutuality of obligation necessary to found a contract of employment. Such workers would have to establish that the implied term is a necessary incident of their relationship with their employer, based on considerations of reasonableness, fairness and the competing policy demands of labour market flexibility and worker protection.
40. Putting that obstacle to one side, would it be “nonsensical” for an employer of agency workers or those on zero-hours contracts (there being, in both cases, no obligation on the employer to offer work) to simply “shrug its shoulders”? Would doing so frustrate the inherent purpose of the CJRS and amount to a failure to complete what is simply “an administrative exercise”, thus breaching the implied term?
41. In our view, employers are under no obligation to further the purpose of the CJRS. We also disagree with the characterisation of using the CJRS as simply an administrative exercise. Employment agencies often survive on thin margins. If they are receiving no income from clients and pay the full amount of the CJRS grant to their workers, as they must, it is far from clear who funds the administrative exercise. On a practical level, it is likely that agencies will themselves have made use of the CJRS to furlough their own staff, and may therefore not have the capacity to respond to queries from agency staff about the CJRS and to facilitate payments. The same arguments apply, by analogy, to organisations employing zero-hour contract workers. Added to these factors, given the complexity of paragraph 7 of the Treasury Direction, there is the obvious risk of getting the calculation of pay wrong. In short, there are valid business reasons for employment agencies and those engaging zero-hour workers to want to avoid making claims under the CJRS when there is no obligation to do so.
42. The analysis can be simplified by focusing on “typical employees”, as Stuart Brittenden contemplates at the end of his article. Could an employee argue that making them redundant rather than making use of the CJRS (in circumstances where they were willing to limit their

wages to what was reimbursed) was a breach of the implied term? One hurdle such an employee may face, depending on how any resulting claim is framed, is the “Johnson exclusion zone”, as developed in Edwards. If the employer decides that it does not want to use the CJRS and therefore must make its employee redundant, can it be said that there are two separate decisions or would dividing the two be artificial, as in Edwards? The arguments clearly go both ways, but there is at least a reasonable chance of falling foul of Johnson.

43. In any case, would the courts/tribunals support an extension of the implied term in this manner? As with the extension of the implied term to “atypical workers”, the Court would have to consider reasonableness, fairness and the competing policy demands of labour market flexibility and worker protection. Should an employer which knows it will have to make its employees redundant when the CJRS stops (or, in August, when employers will be required to make a greater contribution towards the costs of the CJRS) be prevented from reducing the amount of redundancy payments and limiting the number of employees reaching qualifying service by terminating redundant employees sooner rather than later? We do not agree that such delay is “far from onerous”. For some businesses, the level of redundancy payments may be the difference between solvency and insolvency. In any case, we believe this kind of micro-management is the same as that deprecated by the appellate courts when Tribunals assess the genuineness of redundancy as a potentially fair reason for dismissal.
44. In light of the foregoing, it will be clear that we disagree with Stuart’s conclusion. In our view, the most that can be said for the implied term is that it may require employers to give genuine consideration to using the CJRS if employees indicate their willingness to limit their wages to what is reimbursed by the CJRS. If employers decline to do so, we think any resulting claim for breach of contract would face an argument that damages would be zero unless it could be shown that the discretion *would* have been exercised in the employee’s favour. Difficulties may also arise in respect of the “Johnson exclusion zone”. We think that a claim for breach of contract, where the employer had given genuine consideration to using the CJRS would likely fail at the first hurdle, because not making use of the CJRS is not, of itself, a breach of the implied term.
45. The limits of these arguments are yet to be explored and there will be no firm answers until the rival contentions are determined by the tribunals and courts. In the meantime, we look forward to a continuation of this debate with our colleagues inside and outside of Chambers.