EMPLOYMENT CONTRACTS, IMPLIED TERMS AND JUDICIAL LAW-MAKING

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I INTRODUCTION

It is a very great privilege to participate in a conference honouring Sir Ivor Richardson's judicial career. Over a quarter of a century, that career has been marked by conspicuous intellectual horsepower, fine prose, and extraordinary productivity. It has also been marked by a consistent and careful appreciation of the contexts and limits within which judicial work is undertaken.

There were of course earlier distinguished careers as a scholar, as an academic, and as a practitioner. Among many other things, and unlike some other judicial appointees, those earlier careers meant that Sir Ivor took up his judicial office having a close acquaintance with, and a deep understanding of, commercial activity and commercial law principles. Given the importance of those matters to wealth creation and the material well-being of our country, Sir Ivor's outstanding contribution to the coherence of our commercial law has been, and may be expected to remain, truly invaluable.

This paper relates to the topic "facilitating and regulating employment". It reflects a perspective that employment *is* a contractual arrangement, and cannot be divorced from a commercial context. It also reflects a perspective that the judicial law-making role is appropriately limited in scope. Sir Ivor's judicial contribution to our employment law suggests substantial sympathy with those perspectives.

The involvement of common law judges in employment disputes has been a matter of political controversy in the United Kingdom since the late nineteenth century, and generally avoided by industrial legislation there and in New Zealand. Many of those controversies were traversed in Wedderburn, *The Worker and the Law*[1] and Griffith, *The*

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1 Kenneth W Wedderburn *The Worker and the Law* (2 ed, Penguin, London, 1971).

Politics of the Judiciary.[2] With less obliqueness than most legal commentators, Griffith said of the House of Lords' decision in *Associated Newspapers Ltd v Wilson*:[3]

> The best that can be made of the opinions of the Law Lords is that those who were strongest in the majority (Keith and Bridge) could be fairly described as old Tories, that the dissidents (Slynn and Lloyd) resembled new Labour, and that the reluctant middleman (Browne-Wilkinson) looked like a Liberal Democrat. So there may be some hope for the future.

As discussed below, one should not underestimate the employment consequences of the "reluctant middleman", Lord Browne-Wilkinson.

For New Zealand observers of the modern judicial contribution to employment law (and more), the controversial split decision in *Brighouse Limited v Bilderbeck*[4] was a landmark. Among other things, it contributed to strong criticisms from commercial quarters of the Court of Appeal's decision-making; and it indicated that Sir Ivor Richardson's approach was different. That indication duly matured in the extraordinary reversal of *Brighouse* by six members of a seven judge court in *Aoraki Corporation Limited v McGavin*.[5]

In his dissenting judgment in *Brighouse*, Sir Ivor advanced a careful analysis of principles relevant to contemporary employment law. Although he focussed on the immediate context of redundancy, this analysis remains important. While employers generally have better things to do than read judicial prose, few employers would have failed to applaud Sir Ivor's statement that: "it is not open to the Courts to construct an extra-statutory concept of social justice applicable in redundancy situations".[6]

This paper seeks to explore some of the implications of an earlier passage from the same judgment:[7]

> In a contract of employment workers and employers have mutual obligations of confidence, trust and fair dealing. That underlies the concept of unjustifiability. But those mutual obligations do not warrant the application of any different principles in the implication of terms and collective or individual employment contracts than are applicable to other contracts.

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2 John A G Griffith, *The Politics of the Judiciary* (5 ed, Fontana, London, 1997).

3 *Associated Newspapers Ltd v Wilson* [1995] [1995] 2 AC 454 (HL)

4 *Brighouse Limited v Bilderbeck* [1995] 1 NZLR 158 (CA).

5 *Aoraki Corporation Limited v McGavin* [1998] 3 NZLR 276 (CA).

6 *Brighouse Limited v Bilderbeck*, above, 169

7 *Brighouse Limited v Bilderbeck*, above, 169.

That comment would not have divided the *Brighouse* Court, but may well have failed to win applause from any employer readership (at least if the implications were fully understood). Clearly, the modern judicial invention of an implied obligation of mutual trust and confidence *is* the construction of an extra statutory concept of social justice. Indeed, it has been seized upon by some enthusiastic commentators as a broad and flexible constraint on employers. One of these commentators, Douglas Brodie, has described the implied obligation as the most significant common law development in this field, and capable of embracing "democratic considerations of participative communitarianism". Whatever that means, it is not advocating judicial restraint: "The open-textured nature of the term makes it an ideal conduit through which the Courts can channel their views as to how the employment relationship should operate".[8]

Much of this paper comprises a review of the case-law of the past quarter century on the implied term of trust and confidence in employment. One view might assert that the review shows the judicial role being performed in a modern and meaningful way. The judges have taken a lead from legislative intervention in rebalancing the employment relationship, recognised that such relationships are far removed from major commercial contracts, recognised also that employment is more than a contractual exchange of labour for wages, and utilised the common law tool of implied contractual terms accordingly. At the end of this incremental and progressive process, fairness has been enhanced, the potential for abuse of employer power curbed, and the sum total of human happiness increased. This, it might be asserted, is the adaptive and creative genius of the common law at work.

A less triumphalist view might assert that, in this field, the judges have failed to acknowledge the commonsense of the classical common law; that, without regard to the economic and commercial realities of the modern enterprise, they have indulged in liberal generalisations (not least English judges whose career paths are almost perfectly calculated to avoid serious contact with employment); and that they have done little but increase the costs of dismissal (and perhaps increase the level of unemployment). Perhaps most disturbing on this view is the failure of the judges to engage in addressing the numerous questions about employment and contract law that have been begged along the way of this 25 year saga.

It is appropriate to attempt to set out at this point some of the underlying premises of the latter view, which intrudes unashamedly into this paper:

8 Douglas Brodie "The Hearth of the Matter: Mutual Trust and Confidence" (1996) 25 ILJ 121, 126 quoted in Douglas Brodie "Mutual Trust and the Values of the Employment Contract" (2001) 30 ILJ 84, 85.

(1) A fundamental feature of our society is the concept of the rule of law, which in part implies that rules which are enforceable through public agencies (in particular, the courts) are accessible in advance so as to enable those expected to comply with such rules to shape their conduct accordingly;

(2) A second fundamental feature of our society is the independence of the judiciary from political pressures, which is reflected in a practical absence of political accountability of the courts for their performance in exercising judicial powers;

(3) In the context of those features, the judicial role is that of maintaining and applying the rule of law in deciding cases which fall for determination. In so doing the judiciary maintains the political legitimacy of legal rules and of the exercise of judicial power;

(4) The primary institutions engaged in changing publicly enforceable rules are the legislature; those who prepare and promote new or amending legislation; and those exercising delegated legislative power to make secondary legislation;

(5) While there are substantial areas of judge-made rules, and amendment of those by way of clarification and rational restatement is expected and legitimate, the judicial law-making role is necessarily modest; and

(6) In particular, insofar as any judicial law-making may be expected to have a range of consequences for a variety of persons not parties to the immediate dispute, the narrow focus of the adversarial process and the related limits on the information available to judges mean that judicial generalisations ought to be advanced only on a consistently precautionary basis.

In what follows, the focus on the implied employment obligation of trust and confidence permits some consideration of the nature of the employment relationship, of the modern law of contract, and of the judicial law-making role.[9]

II THE COMMON LAW OF "MASTER AND SERVANT"

For historical perspective there is some value in revisiting the common law of employment from the early part of the 20th century. A useful point of reference is the first edition of *The Laws of England*.[10]

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9 It is a narrow focus and of course in no way seeks to minimise Sir Ivor's judicial work across the board, including virtually every aspect of employment law, and in relation to four separate legislative employment regimes: the Industrial Relations Act 1973; the Labour Relations Act 1987; the Employment Contracts Act 1991; and the Employment Relations Act 2000.

10 Being a complete statement of the whole law of England, edited by the Earl of Halsbury, Lord Chancellor for three periods between 1885 and 1905. Volume 20 of this work was published in

In the first edition of *Halsbury* we find the following propositions:

(1) Any person of ordinary contractual capacity is competent to enter into a contract of hiring and service either as employer or employed;

(2) The essential feature of the relation of master and servant is the employer's power not only to direct what work the servant is to do, but also the manner in which the work is to be done (the distinction between servants on the one hand, and independent contractors or volunteers — often family — on the other);

(3) It is an implied term of the contract of service that a servant takes upon himself the risks incidental to his employment;

(4) It is the duty of the servant to obey the master's lawful orders and to serve him faithfully;

(5) There is an implied term that the servant must act in good faith towards his master, extending to use of confidential information obtained from the employer during the employment;

(6) A contract of hiring and service is presumed to be for a year (citing Blackstone's reference to the "Natural Equity, that the servant shall serve, and master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not");

(7) A general hiring which operates as a hiring for a year can only be terminated with a current year, unless there is a stipulation to the contrary (but there is a custom in domestic service that a general hiring may be terminated at any time by a month's notice or payment of a month's wages);

(8) If no custom or stipulation as to notice exists, and if the contract of service is not one which can be regarded as yearly hiring, the service is terminable by a reasonable notice (citing cases holding that six months was reasonable for newspaper editors, sub-editors and foreign correspondents; three months for commercial travellers, clerks in the superior positions, governesses and school mistresses; and one month for a head gardener, a clerk in a telegraph office, and a farm bailiff);

(9) Wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal (extending to conduct outside employment of an immoral or untrustworthy nature, including fathering or mothering a bastard child);

1911, and includes the topic "Master and Servant". This topic takes up some 220 pages of text, of which some 115 pages are devoted to the liability of the master in case of accidents.

(10) Whether the summary dismissal of a servant is justified or not is a question of fact to be determined by a jury; and

(11) A servant is justified in terminating his engagement if he has a reasonable apprehension of danger to life or of personal injury as a result of continuing the work, when the master has failed to carry out his part of the contract, or where he is subjected to severe ill-treatment.

Several of those propositions seem archaic a century or so later, not least the language of "master" and "servant" itself. Yet perhaps it is too easy to write off those propositions because of the language, and the examples. Much remains the same. Notably, employers and employees are generally free to enter into employment contracts, subject to anti-discrimination and minimum conditions legislation (and collective employment agreements); and the employment contract remains distinct from partnership, agency, independent contractor and purely voluntary transactions.

Such was the legal context in which the House of Lords delivered its decision in *Addis v Gramophone Company Limited.*[11] Mr Addis was employed as the manager of the Gramophone Company's business in Calcutta, earning £15 per week as salary, and entitled to a commission on the trade done, but able to be dismissed on six months' notice. He was given six months' notice in October 1905, but the employer appointed his successor to act immediately, and took steps to prevent Mr Addis from acting further as manager, with the result that in December 1905 Mr Addis returned to England and brought an action for breach of contract. The case was heard before (the notorious) Justice Darling, and a jury. The jury awarded Mr Addis £600 for wrongful dismissal, and £340 for lost commission.

The House of Lords, by a 5:1 majority, held that there was a breach of contract in not allowing Mr Addis to discharge his duties as manager, but the damages were limited to the salary for the six months from his receiving notice, together with the commission which he would have earned had he been allowed to manage the business himself during that period. The majority rejected the proposition that the manner of dismissal could affect the damages, notwithstanding that (in the words of Lord Shaw) the employer had acted in a "sharp and oppressive" manner which was highly damaging to Mr Addis in the commercial community of Calcutta.

What became known as the "rule in *Addis v Gramophone Company*" was taken from the law reporter's headnote:

> Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for

11 *Addis v Gramophone Company Limited* [1909] AC 488 (HL).

> the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment.

It is hard to escape the conclusion that, by the late-twentieth century, Addis had become a symbol of a harshly pro-employer bias in the common law, suitable for enlightened law reform. The writer must accept a primary responsibility for one variant of this, the Law Commission's report, *Aspects of Damages*.[12]

III THE EMERGENCE OF THE IMPLIED TERM

At the risk of sweeping generalisations, but in the interest of economy of expression, it may be permissible to summarise the relevant context from the first three quarters of the twentieth century in the following observations:

(1) The predominant emphasis of employment law in New Zealand and in the United Kingdom was on collective bargaining within supportive legislative regimes;

(2) In this context, the ordinary Courts had little role to play but remained the subject of suspicion from trade unions;

(3) For most of this period, the general Courts gave great weight to the doctrine of precedent, and there was relatively little "development" or "expansion" of common law rules;

(4) The House of Lords' 1966 Practice Statement, indicating a willingness to depart from precedent when it was "right to do so" to further the proper development of the law, unleashed a potential for judicial creativity which was realised in the common law of the Commonwealth in the last quarter of the 20th century;

(5) By the 1970s a major expansion of the judicial role in reviewing administrative actions had occurred, and judges had won much academic (and some public) acclaim for redressing the imbalance between the State on the one hand and individual parties on the other, in part under the label "fairness". Some parallel developments had taken place in commercial law with the resurrection of equitable concepts to avoid perceived inequities in the application of common law rules in particular cases; and

(6) By the late-1970s the post-World War Two economic confidence of the "Western" world, and unquestioning acceptance of a liberal welfare state, had been shaken by two "oil shocks". A generation of broad political consensus was perceived by

12 New Zealand Law Commission *Employment Contracts and the Rule in* Addis v Gramophone Co R18 (Wellington, 1991). The present paper is more concerned with judicial variants, not least the House of Lords' decisions in *Malik v Bank of Credit and Commerce International SA (In Liquidation*) [1998] AC 20 [1997] 3 WLR 95 and *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 WLR 1076.

many as ending with the election of a Conservative government in the United Kingdom, led by Margaret Thatcher, in 1979, and of a Republican President, Ronald Reagan, in the United States in 1980.

IV WESTERN EXCAVATING

The story of the modern trust and confidence implied term sensibly commences with *Western Excavating (ECC) Ltd v Sharp.*[13] The issue was whether an employee asserting breach of a statutory "right not to be unfairly dismissed", by way of a "constructive" dismissal (a resignation driven by the employer's conduct) had to show that the employer's conduct was repudiatory (showing the employer no longer intended to be bound by the contract) or merely unreasonable. The Court of Appeal held that repudiatory conduct had to be shown if the employee were to succeed. Lord Denning MR observed that the "unreasonable conduct" test was "too indefinite by far".

The court's judgments indicate a lack of appellate endorsement of the Industrial Tribunal majority's "whimsical" view that the employer "ought to have leant over backwards" to help the employee. And Lawton LJ observed that:[14]

> For the purpose of this judgment, I do not find it either necessary or advisable to express any opinion as to what principles of law operate to bring a contract of employment to an end by reason of an employer's conduct. Sensible persons have no difficulty in recognising such conduct when they hear about it. ... I appreciate that the principles of law applicable to the termination by an employee of a contract of employment because of his employer's conduct are difficult to put concisely in the language judges use in court. Lay members of industrial tribunals, however, do not spend all their time in court and when out of court they may use, and certainly will hear, short words and terse phrases which describe clearly the kind of employer of whom an employee is entitled without notice to rid himself.

A Courtaulds

A little over a year later, a Mr Andrew contributed his claim to a place in legal history. In *Courtaulds Northern Textiles Ltd v Andrew*,[15] his constructive dismissal claim was upheld on the basis that, through the assistant manager telling him "You can't do the bloody job anyway" (which was not a true expression of his opinion), the employer had breached a fundamental term of the contract.[16]

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13 *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761 (CA).

14 *Western Excavating (ECC) Ltd*, above, 772.

15 *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 (EAT).

16 *Courtaulds Northern Textiles v Andrew* [1979] IRLR 84, 85-86.

> The contract, as we have already mentioned, was a contract partly expressed (though we have not dealt with the expressed terms or indeed had our attention drawn to them) and partly, as must always be the case, consisting of implied terms. The test must be, as we think, that one implies into a contract of this sort such additional terms as are necessary to give it commercial and industrial validity. One of the ways in which it is put forward in the cross-notice by the solicitors for Mr Andrew is to say that it was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. That term is really criticised on behalf of the employers only in one regard — they say that 'calculated' (in addition to 'likely') casts the net rather too wide, in that it might involve there being a breach of the implied term where the likelihood was wholly, or at any rate partly, attributable to circumstances for which the employers were not responsible. But we do not read it thus. We think that, thus phrased, the implied term (as regards 'calculated') extends only to an obligation not to conduct themselves in such a manner as is intended, although not intended by itself, to destroy or seriously damage the relationship in question. It is confined in those terms and it does not seem to us to be stated too widely.
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> Now it is of course true, applying the Court of Appeal's test, that in order to decide that the conduct is sufficiently repudiatory to justify a conclusion of constructive dismissal one has to consider whether the conduct complained of constitutes either a fundamental breach of the contract or a breach of a fundamental term of the contract: two somewhat elusive conceptions which figure in our modern contract law. But there is not much room, as we think, for that inquiry in a case in which the test, within the terms of the contractual obligation, is one which involves considering whether the consequences, or the likely consequences, are to destroy or seriously damage the relationship of confidence and trust between employer and employee; because it does seem to us that any conduct which is likely to destroy or seriously to damage that relationship must be something which goes to the root of the contract, which is really fundamental in its effect upon the contractual relationship.

Courtaulds did not proceed to the Court of Appeal, and several questions remain unanswered. Why was the term "necessary" to give "commercial and industrial validity" to employment contracts? Was there any credible evidence as to such necessity? Why did the employer's lawyers essentially accept the implied term asserted by the employee's lawyers? What does the term actually mean? How is it any less "indefinite" than that rejected in *Western Excavating*?

B The Woods *case*

Although not the first formulation, the standard citation for the implied term is *Woods v W M Car Services (Peterborough) Ltd*.[17] Lord Denning MR explained the facts of the case as follows:

> Mr Todd built up a successful garage business at Deeping St James near Peterborough. He was 63 and decide to retire. He arranged to sell it to an up-and-coming company in the same line. The price was £220,000. The new management said they would take over the staff on the same terms as with Mr Todd. The price was fixed on that basis. But then Mr Todd — without telling the purchasers — increased the pay of some of the staff. One of them was his personal secretary, Mrs Woods. She had been with him for 28 years and was described as 'Chief Secretary and Accounts Clerk'. She earned £68.68 gross for a 35-hour week.
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> The takeover took place on 14.1.80. The new management got on well with most of the staff. They had no complaints. But they thought that Mrs Woods was rated too highly and that she was being paid too much for the work she did. So they tried to persuade her to take less or to work longer hours. She resented this. She refused. They gave in. Much friction arose. She went to solicitors. They told her to keep a note of anything untoward that took place. She did so. Over the next four months there were several incidents. It would be tedious to go through them. They seem trivial to an outsider but both parties magnified them out of all proportions. All trust and confidence was lost on both sides. Finally, only four months after the takeover, on 14.5.80, her solicitors advised her to leave.
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> So the case went before the Industrial Tribunal. The question was whether she had been 'dismissed' by her employers. The statutory definition of dismissal includes constructive dismissal. It says in s55(2)(c) of the Employment Protection (Consolidation) Act 1978 that an employee shall be deemed to be dismissed by his employer if, and only if,
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> > 'the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct'.

The Industrial Tribunal rejected Mrs Woods' claim on the basis that the work she was being required to do was within the terms of her contract, and that none of the employer's actions taken in isolation amounted to a repudiatory breach of the employment contract. That Tribunal also held that the cumulative effect of the employer's actions did not amount to a breach of an implied term that the employers would 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.

17 *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666 (EAT); [1982] ICR 693, 697 (EWCA).

The matter then went before the Employment Appeal Tribunal, presided over by Browne-Wilkinson J (as he then was), sitting with two lay members. The judgment, delivered by the judge, dismissed the appeal, but expressed reservations as to whether the first instance tribunal had, as a matter of fact, got the right answer on the implied term. As to the implied term itself, the judgment said:[18]

> In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
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> We regard this implied term as one of great importance in good industrial relations. Quite apart from the inherent desirability of requiring both employer and employee to behave in the way required by such a term, there is a more technical reason for its importance.
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> … Experience in this Appeal Tribunal has shown that one of the consequences of the decision in the Western Excavating case has been that employers who wish to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had resort to methods of "squeezing out" an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal.
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> It is for this reason that we regard the implied term we have referred to as being of such importance. In our view, an employer who persistently attempts to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee's terms of service does act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such employer has therefore breached the implied term.

Although the Employment Appeal Tribunal felt unable to interfere with the Industrial Tribunal's rejection of Mrs Woods' claim, it stated expressly that, if the matter were for it to decide, it would have held that there was breach of this implied term: the employer's

18 See *British Aircraft Corp v Austin* [1978] IRLR 332 (EAT) and *Post Office v Roberts* [1980] IRLR 347. (EAT). The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts* para 50.

actions "were directed to inducing Mrs Woods to accept a change in her terms of service". In other words, the employer's breach involved persistence, rather than unscrupulous conduct.

When the matter went to the Court of Appeal, Mrs Woods' appeal was dismissed on the basis that the Employment Appeal Tribunal had rightly deferred to the first instance Tribunal's conclusion on what was essentially a matter of fact.

On the implied term, Lord Denning MR favoured a "good and considerate" obligation binding on employers:[19]

> It is the duty of the employer to be good and considerate to his servants. Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them, see *Courtaulds Textiles v Andrew* [1979] IRLR 84. But I prefer to look at it in this way: the employer must be good and considerate to his servants. Just as a servant must be good and faithful, so an employer must be good and considerate. Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice. In each case it depends on whether the misconduct amounted to a repudiatory breach as defined in *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27.

Lord Justice Watkins did not address the implied term directly, but indicated much sympathy for the employer's position:[20]

> Misunderstandings between employer and employee had in the last analysis produced a state of affairs which would have prevented the employer from exercising properly his discretion if not his right to reorganise his business. The obdurate refusal of the appellant to accept conditions very properly and sensibly being sought to be imposed upon her was unreasonable. Employers must not, in my opinion, be put in a position where, through the wrongful refusal of their employees to accept change, they are prevented from introducing improved business methods in furtherance of seeking success for their enterprise.

The third member of the Court of Appeal, Fox LJ, simply noted that the Industrial Tribunal had devoted four days to the hearing and their opinion on whether the employer's conduct was, in the circumstances, likely to be destructive of confidence and trust between employer and employee, carried weight.

It seems clear that in *Woods* the Employment Appeal Tribunal wished to provide a remedy for "unfair" employer behaviour preceding a resignation. The implied term enabled the bypassing of the difficulty created by *Western Excavating*. Again, there are

19 *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666 (EAT); [1982] ICR 693, 702 (EWCA).

20 *Woods*, above, 707.

unanswered questions. What evidence was there of the "inherent desirability" of such a term? What consideration was given to the costs generally of the term, to be weighed against a remedy for "squeezing out" actions by some employees? What was the term thought to mean? If Mrs Woods had persistently sought higher wages or shorter hours, would that have amounted to repudiation of the contract? And why did the Court of Appeal lose sight of the "indefinite" issue recognised in *Western Excavating*?

C Court of Appeal endorsement

While the Court of Appeal's decision in *Woods* was a less than clear-cut endorsement of Browne-Wilkinson J's formulation of the implied term, that formula was treated as settled law in two 1985 Court of Appeal decisions.[21] Notably, *Bliss* involved a common law contract, not regulated by employment legislation.

Sir Nicolas Browne-Wilkinson featured again in the story when, as Vice-Chancellor, in *Imperial Group Pension Trust Ltd v Imperial Tobacco*,[22] he restated his *Woods* implied term as "the implied obligation of good faith". He suggested that a claim of breach of good faith by an employer, in a pension context, could be made as a matter of contract and/or of trust law. In any event, the "good faith" implied term has enjoyed an expanding career to date.

V THE IMPLIED TERM IN NEW ZEALAND

In *Schilling v Kidd Garrett Limited*[23] the Court of Appeal accepted (as was common ground between the parties) that there was a term implied into the relevant contract of employment that the employee would serve the employer "with good faith and fidelity", following *Robb v Green*.[24] Both *Schilling* and *Robb* were concerned with the situation where an employee sought to use information and opportunities derived from their former employment in commercial activity, either for themselves or for a new employer, following termination of that employment.

The Industrial Relations Act 1973 introduced the language of "personal grievance", defined to include both unjustifiable dismissal and other actions (not affecting all employees of the same class) disadvantageous to an employee. With the 1987 legislation (re-enacted in the 1991 and 2000 legislation), the "unjustifiable" object was explicitly applied to lesser disadvantageous actions affecting an employee.

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21 *Bliss v South East Thames RHA* [1987] ICR 700 (EWCA); and *Lewis v Motorworld Garages Ltd* [1986] ICR 157 (EWCA).

22 *Imperial Group Pension Trust Ltd v Imperial Tobacco* [1991] 1 WLR 589 (EWHC).

23 *Schilling v Kidd Garrett Limited* [1977] 1 NZLR 243 (EWCA).

24 *Robb v Green* [1895] 2 QB 315 (EWCA).

The concept of "unjustifiable" was elaborated in a 1982 Court of Appeal decision which continues to have a profound effect upon employment contracts and dismissals in New Zealand. In *Auckland City Council v Hennessey*,[25] the Court held that "unjustifiable" dismissal extended to procedural inadequacies associated with the decision to dismiss. Mr Hennessey was employed as a carpark attendant, and took exception to the speed at which two motorcyclists entered the carpark. Following remonstrations, and allegedly after one of the motorcyclists had thrown a punch at him, he struck one of the motorcyclists with his fist. The Arbitration Court took the view that his actions justified some disciplinary measure by his employer, but that the dismissal was unjustified because he was not given a full opportunity to defend his actions prior to the dismissal notice being issued, and irrespective of the employer's point that he had cautioned Mr Hennessey on an earlier occasion about taking the law into his own hands.

In delivering the judgment of the Court (Cooke, McMullin and Somers JJ), and notwithstanding the common law use of "justified" (see *Halsbury*, first edition, above), Somers J said:

> It is plain, and the contrary was not suggested, that the word "unjustifiably" in s117(1) of the New Zealand Act is not confined to matters of legal justification. If it were so the section would add only a claim to reinstatement to the law. In the context of s117 we think the word "unjustified" should have its ordinary accepted meaning.
>
> Its integral feature is the word unjust — that is to say not in accordance with justice or fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness.
>
> It follows that a dismissal may be held unjustifiable where the circumstances are such that justice or fairness requires that the employee should have an opportunity, which he has not been afforded, of stating his case.

In April 1985 the Court of Appeal (Woodhouse P, Cooke and Richardson JJ) delivered judgment in *Auckland Shop Employees Union v Woolworths (NZ) Limited*.[26] This was essentially a constructive dismissal case, and came before the Court of Appeal on a case stated. The result was that the matter was referred back to the Arbitration Court to consider (or reconsider) whether the employer's inquiry, into whether the employee had failed to put money received from a customer into a supermarket checkout till, had been conducted "in a fair and reasonable manner towards the worker".

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25 *Auckland City Council v Hennessey* [1982] ACJ 699.

26 *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA).

The *Woolworths* decision does not cite *Hennessey*, but the Court's judgment (delivered by Cooke J) quotes extensively from the judgment of Browne-Wilkinson J in *Woods*, and also from Lord Denning's judgment in *Woods*. Then came a relatively tentative formulation:[27]

> It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity. See *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA). No formulation of duties in general terms can relieve a tribunal from assessing the overall seriousness of the particular conduct about which a complaint is made. And the seriousness of any breach of an employer's duties will often be important in deciding whether a resignation was in substance a dismissal. But the term favoured by the Employment Appeal Tribunal in England is, with respect, at least somewhat less nebulous than Lord Denning's later wording. In this case, however, we do not have the benefit of the Arbitration Court's view on how best to define an implied term so as to serve the needs of industrial relations in New Zealand. Therefore it is preferable that we should not now state a final opinion on that general question.
>
> What can be said without doubt is that there must at least be an implied term or a duty binding an employer, if conducting an inquiry into possible dishonesty by an employee, to carry out the inquiry in a fair and reasonable manner. We so hold. It may be seen as part of a wider duty as already discussed, or as an application of natural justice to contemporary industrial relations, or perhaps most naturally as combining both ideas.

Later that year, in a case not governed by the Industrial Relations Act 1973, *Marlborough Harbour Board v Goulden*,[28] Cooke J delivered a judgment (on behalf of himself and Richardson and Tompkins JJ) stating, again tentatively:[29]

> [T]his Court accepted that in the sphere governed by the Industrial Relations Act 1973 the relationship of confidence and trust that ought to exist between employer and employee imports duties on both sides, including a duty on the part of the employer, if carrying out an inquiry preceding a resignation or dismissal (in that case on the ground of possible dishonesty), to do so in a fair and reasonable manner. Perhaps a similar implication might quite readily be found in private contracts of employment not subject to the 1973 Act. Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in a contract of service.

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27 *Auckland Shop Employees Union*, above, 376.

28 *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 (CA).

29 *Auckland Shop Employees Union,* above, 383.

This approach was reflected in the Court of Appeal's restatement of the criteria for a justifiable summary dismissal for misconduct in *Airline Stewards IUW v Air New Zealand Ltd*.[30] The Court of Appeal (per Bisson J, for himself, Richardson and Somers JJ) said:

> The employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the employee. Good working relations depend on loyalty and confidence, both ways as between employer and employee. Once the employee destroys that relationship to the extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable. Similarly, if an employer destroys that relationship by dismissing the employee without reasonable grounds for believing there has been misconduct by the employee, then the employee's dismissal is not justifiable and the employee has a remedy in the personal grievance provisions of the Act.

The decision which apparently entrenched the *Woods* implied term in New Zealand law was that of the Court of Appeal (Cooke P, Hardie Boys and Fisher JJ) in *Auckland Electric Power Board v Auckland Local Authorities Officers IUW*. The judgment of the Court was delivered by Cooke P, and stated:[31]

> As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in Auckland Shop Employees case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Wo*ods v W M Car Services (Peterborough) Limited* quoted in the *Auckland Shop Employees* case.

VI FROM HALE *TO* COUTTS MOTORS*, AND "GOOD FAITH" ...*

The implied term, or some variant of it, surfaces in a line of important redundancy cases decided by the Court of Appeal (and in which Sir Ivor Richardson participated). The first of these was *G N Hale & Son Limited v Wellington Caretakers IUW*.[32] In a concurring judgment, Richardson J noted that redundancy was a difficulty area of labour law, raising considerations of "economic efficiency, individual autonomy and social justice".

The *Hale* decision provided a relatively rare explicit judicial recognition of the employer's entitlement to manage the enterprise. In the words of Richardson J:[33]

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30 *Airline Stewards IUW v Air New Zealand Ltd* [1990] 3 NZLR 549.

31 *Auckland Electric Power Board v Auckland Local Authorities Officers IUW* [1994] 2 NZLR 415, 419 (CA).

32 *G N Hale & Son Limited v Wellington Caretakers IUW* [1991] 1 NZLR 151, 157 (CA).

33 *G N Hale & Son Limited v Wellington Caretakers IUW*, above, 157.

> The Court is able to test the genuineness of the claim that the dismissal was for redundancy reasons. However, the right of the employer to manage its business, which is specifically recognised in many awards and agreements is not made subject, and should not be construed as being subject to the further fetter that it is exerciseable only in those redundancy situations where the business has to close its doors, or its economic survival compels it to dismiss those workers. If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the Courts or the unions or workers to substitute their business judgment for the employer's.
>
> Again, it is not the function of the Courts to construct an overriding extra-statutory concept of social justice applicable in redundancy situations.

On the implied term, Richardson J had earlier referred to unjustifiable dismissal as:[34]

> an elusive concept. The underlying inquiry must be whether or not what was done and how it was done can be justified in the particular circumstances having due regard to the special importance attached under the Labour Relations Act to the relations between workers and employers and to any mutual obligations of confidence, trust and fair dealing (see *Auckland Shopping Employees Union* … and *Marlborough Harbour Board* …).

The implication of terms into employment contracts was the subject of the decision in *Attorney-General v New Zealand Post Primary Teachers Association*.[35] The judgment of the five judge Court (Cooke P, Richardson, Hardie Boys, Gault and McKay JJ) was delivered by Gault J, who said:

> For present purposes it is sufficient to say that the authorities relied upon in [two Employment Court] judgments do not dictate the application of any different principles to the implication of terms in collective or individual employment contracts than are applicable to other contracts.
>
> It can be said immediately that the nature of employment contracts will affect the content of implied terms (such as duties of fairness, confidence and trust) but that does not call for any different test for implication in such contracts. Similarly the jurisdiction may justify a less rigid approach to evidence in satisfaction of the various tests but that should not detract from the tests.
>
> There is no established basis for the implication into employment contracts of terms that the parties have not agreed should be binding conditions of engagement for the reason simply that it would be reasonable to do so.

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34 The qualifying words "*any* mutual obligations" may be noted.

35 *Attorney-General v New Zealand Post Primary Teachers Association* [1992] 2 NZLR 209, 213 (CA).

As will be apparent from the cases already cited, there is some tension within the jurisprudence as to whether (or to what extent) employment contracts are like other contracts, or are different. In *Telecom South Limited v Post Office Unions*, Richardson J said:[36]

> Clearly Parliament has departed from the common law approach not only in relation to procedures and remedies but also in formulating the basic concept of unjustifiable conduct within the employment relationship under the Act. The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing. The statutory enquiry necessarily involves a balancing of competing considerations. Those mutual obligations must respect on the one hand the importance to workers of the right to work and their legitimate interest in job security, and on the other hand the importance to employers of the right to manage and to make their own commercial decisions as to how to run their businesses.

Returning to *Brighouse*, and as earlier mentioned, the fourth step of Richardson J's "principled approach to redundancy" stated:[37]

> In a contract of employment, workers and employers have mutual obligations of confidence, trust and fair dealing. That underlies the concept of unjustifiability. Those mutual obligations do not warrant the application of any different principles to the implication of terms in collective or individual employment contracts than are applicable to other contracts.

In his dissenting judgment in *Brighouse*, Gault J found no assistance in resorting to implied contractual terms to interpret the word "unjustified". He went on to say that he saw logical inconsistency between the *PPTA* decision's rejection of reasonableness as a criterion for implying terms into employment contracts, and any conclusion that by reference to "the duty of good faith" there could be an implication of:[38]

> an obligation of fair dealing such as embodies whatever the Court or Tribunal considers to be fair or reasonable on the part of one of the parties and extending to the payment of compensation for redundancy.

In his judgment in *Brighouse*, Cooke P described the implied term, derived from *Woods*, as a "pervading obligation" and "a staple of New Zealand industrial law", which had been

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36 *Telecom South Limited v Post Office Unions* [1992] 1 ERNZ 711, 722.

37 *Attorney-General v New Zealand Post Primary Teachers Association,* above, 213.

38 *Brighouse Limited v Bilderbeck* [1995] 1 NZLR 158, 181 (CA).

repeatedly recognised and enforced in the line of cases running from *Auckland Shop Employees* to *Auckland Electric Power Board*. He went on to observe that:[39]

> That fundamental principle in employment is not and was not intended to be affected by the decision of this Court in *Attorney-General v New Zealand Post Primary Teachers Association* … [which] of course said nothing in derogation of the abovementioned line of decisions based on the fundamental general principle. Indeed, it did not even mention them. Similarly, one can feel confident that the policy-makers responsible for the Employment Contracts Act 1991 can have had no intention of subverting the principle.

A different emphasis was found in *Principal of Auckland College of Education v Hagg*, where Richardson P (writing for four members of the Court of Appeal) said:[40]

> The general principles of interpretation of contracts apply to employment contracts under the Employment Contracts Act 1991. There is not a different or special set of rules applicable to employment contracts.

The same judgment went to note the role of "commercial reality" in the modern judicial approach to interpretation of contracts, and observed that:[41]

> An important element of commercial reality in this class of case is that a contract of employment has a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing (*Telecom South*).

In his concurring judgment in *Hagg*, Thomas J said:[42]

> Other than as may be provided in the statute, the ordinary principles of contract law apply to such contracts. The requirement of fair dealing, for instance, is implied into employment contracts, not because they are in a special category, but because such a term meets the criteria for the implication of terms in contracts under the general law. Employment contracts are not covered by a special or separate law of contract.

In *Aoraki* the joint judgment of Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ incorporated a seven step discussion of the statutory scheme for unjustifiable dismissal which incorporated two references to the implied term. First, in the fifth step, the judgment states that:[43]

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39 *Brighouse Limited v Bilderbeck*, above, 164.

40 *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116, 126.

41 *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116,129.

42 *Principal of Auckland College of Education v Hagg,* above, 132. See, for example *A-G v NZ Post Primary Teachers Assn* [1992] 1 ERNZ 1163, 1168; [1992] 2 NZLR 209, 213, Gault J.

43 *Aoraki Corporation Limited v McGavin* [1998] 3 NZLR 276, 294 (CA)

> A just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement the redundancy decisions in a fair and sensitive way.

The seventh step states:[44]

> The contract rules and there is no basis conformable with the settled principles governing the implication of terms in other contracts to read in an implied obligation of that kind [ie to require payment of compensation when an employee becomes redundant] or to extend the mutual obligation of trust and fair dealing in that way. To do this would also alter the substantive rights and obligations in which the parties agree; it would change the economic value of their overall agreement; and it would erode the statutory emphasis on the free negotiation of employment contracts … The mutual obligation is directed to fair treatment in the employment and there is no basis of principle for converting it into a specific variation of the contractual arrangement so as to impose substantive obligations, eg, as to redundancy or pensions or long service leave or employee shares, which the parties had not agreed to undertake.

In his judgment, dissenting in part, Thomas J emphasised that:[45]

> It is firmly established in New Zealand, following the Common Law of England, that parties to an employment relationship are bound by a broad mutual obligation of trust and confidence. This duty has frequently been referred to as "the mutual obligation of trust, confidence and fair dealing".

Thomas J noted the confirmation of the implied term by the House of Lords in *Malik* discussed below, but resiled from his view, expressed in *Hagg*, that the implied term did not reflect a special or separate law of contract. Rather, he took the view that an employment contract possessed characteristics "intrinsic to public law" and thus assisted the protection of employees against the abuse or arbitrary exercise of the power in the hands of an employer.

The transformation of "trust and confidence" into, or perhaps its equation with, "good faith" was marked in *NZ Fasteners Stainless Ltd v Thwaites*.[46] In a judgment for himself, Richardson P, Gault, Keith and Tipping JJ said:

> Where there is a genuine redundancy that will justify termination of the employment of the person in the position. In the course of the employer's consideration of the position and in carrying out the dismissal the obligation of good faith and fair treatment applies. Any failure

44 *Aoraki Corporation Limited*, above, 295.

45 *Aoraki Corporation Limited*, above, 304.

46 *NZ Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565, 572 (CA).

> to discharge that obligation that in itself is unjustifiable may result in remedies appropriate to the breach.

Most recently (as at the date of writing), there has been the decision in *Coutts Cars Ltd v Baguley*,[47] where the judgment of Richardson P, Gault and Blanchard JJ was delivered by Gault J, with Tipping J delivering a concurring judgment and McGrath J a dissenting judgment.[48] This was an unjustifiable dismissal case under the Employment Relations Act 2000. The issue related to consultation over redundancy, but the majority judges (again) translated the *Woods* implied term as one requiring the observance of good faith. In the words of Gault J:[49]

> In the judgment of the [majority] of the Court in *Aoraki*, referring to situations in which a genuine redundancy has arisen, it was said:
>
> A just employer, subject to the mutual obligations of trust confidence and fair dealing, will implement the redundancy in a fair and sensitive way.
>
> We do not see the new statutory obligation on employers and employees to deal with each other in good faith introduces any significantly different obligation to that the courts have placed upon parties to employment contracts over recent years. Undoubtedly the duty to deal in good faith will have impact in additional areas such as negotiations and collective environments, but in the area with which we are presently concerned we consider the law already required the observance of good faith.

VII MEANWHILE, BACK IN THE HOUSE OF LORDS ...

The nature of implied terms in employment was addressed in three decisions of the House of Lords delivered over the past decade, and the *Woods* implied term in two of those. These decisions are outlined below. Their merits are discussed in later sections of this paper.

In *Scally v Southern Heath Board*[50] four doctors alleged breach of contract (and negligence) against their employer by reason of failure to advise them of an opportunity (available under regulations for a limited time period only) to purchase added years of

47 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA).

48 This paper was written before delivery of the judgment in *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA), which cites *Johnson v Unisys Ltd* (discussed below) with approval. It was also written before sighting an article which explains, in terms of an "energy aesthetic" as compared to a "grid aesthetic", what might hitherto have been described as "judicial expansionism" and "judicial restraint" in discussing cases referred to in this paper: Pierre Schlag "The Aesthetics of American Law" (2002) 115 Harv L Rev 1047.

49 *Baguley*, above, 545.

50 *Scally v Southern Heath Board* [1992] 1 AC 294 (HL).

pension entitlement on advantageous terms, the pension arrangements being part of their employment contract.

The leading speech was delivered by Lord Bridge. No mention was made of *Woods*, but the basis of implying a limited term (that the employer was obliged to notify the plaintiffs of their rights in relation to the purchase of added years) was considered in some detail[51]

> Will the law then imply a term in the contract of employment imposing such an obligation on the employer? The implication cannot, of course, be justified as necessary to give business efficacy to the contract of employment as a whole. I think there is force in the submission that, since the employee's entitlement to enhance his pension rights by the purchase of added years is of no effect unless he is aware of it and since he cannot be expected to become aware of it unless it is drawn to his attention, it is necessary to imply an obligation on the employer to bring it to his attention to render efficacious the very benefit which the contractual right to purchase added years was intended to confer. But this may be stretching the doctrine of implication for the sake of business efficacy beyond its proper reach. A clear distinction is drawn in the speeches of Viscount Simonds in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 and Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. If any implication is appropriate here, it is, I think, of this latter type. Carswell J accepted the submission that any formulation of an implied term of this kind which would be effective to sustain the plaintiff's claims in this case must necessarily be too wide in its ambit to be acceptable as of general application. I believe however that this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision. I would define it as the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention. I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness. But I take the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit. Accordingly I would

51 *Scally*, above, 306-307.

> hold that there was an implied term in each of the plaintiff's contracts of employment of which the boards were in each case in breach.

In *Malik v Bank of Credit and Commerce International SA*[52] the leading speeches were delivered by Lord Nicholls of Birkenhead and Lord Steyn, with both of whom Lords Goff, McKay and Mustill expressly agreed. As the law reporter's headnote says, it was held that "there was an implied obligation on an employer that he would not carry on a dishonest or corrupt business". Importantly, the existence of such an implied term was agreed by counsel for the respective parties. Arguments were focussed on the application of such a term.

Lord Nicholls described this obligation as:[53]

> ... no more than a reflection of what goes without saying in any ordinary contract of employment, namely, that in agreeing to work for an employer the employee, whatever his status, cannot be taken to have agreed to work in furtherance of a dishonest business. This is as much true of a doorkeeper or cleaner as a senior executive or branch manager.
>
> ... This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.

More generally, Lord Nicholls observed that:[54]

> This is an unacceptably narrow evaluation of the trust and confidence term. Employers may be under no common law obligation, through the medium of an implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another. Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. *38 Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or

52 *Malik v Bank of Credit and Commerce International SA* [1998] AC 21.

53 *Malik*, above, 34-35. No authority was stated for this proposition.

54 *Malik*, above, 37-38.

> by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.

In his speech, Lord Steyn commenced his discussion of the implied term by reference to *Scally*, and the proposition that the term was not implied as a matter of fact, but is a standardised term implied by law: an incident of all contracts of employment, but default rules which the parties are free to exclude or modify. The formulation of the implied term was explicitly drawn from *Woods*.

More generally, Lord Steyn noted that the notion of a "master and servant" relationship has become obsolete. After referring to *Spring v Guardian Assurance*[55] and *Scally*, he observed that: "It was the change in legal culture which made possible the evolution of the implied term of trust and confidence".[56]

Lord Steyn suggested that the *Woods* implied term had evolved from the general duty of cooperation between contracting parties. He then endorsed the validity of the implied term in the following passage:[57]

> The major importance of the implied duty of trust and confidence lies in its impact on the obligations of the employer: Douglas Brodie, "The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 I.L.J. 121. And the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.
>
> The evolution of the implied term of trust and confidence is a fact. It has not yet been endorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.

More recently, the House of Lords revisited the implied term (and *Addis*, as it had in *Malik*) in *Johnson v Unisys Limited*.[58] The majority took the view that to uphold a claim that summary dismissal involved a breach of the implied term would involve by-passing the statutory regime established by the Employment Rights Act 1996 which provided for such claims to be heard by specialist Tribunals (and for an £11,000 ceiling on damages awards).

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55 *Spring v Guardian Assurance* [1995] 2 AC 296 (HL).

56 *Malik*, above, 46.

57 *Malik*, above, 46.

58 *Johnson v Unisys Limited* [2001] UKHL 13.

Thus the County Court Judge had correctly struck out the claim as disclosing no reasonable cause of action.

The leading judgment was delivered by Lord Hoffmann. His essential reasoning was that the issue fell within an area covered by the legislation. More particularly, he observed that:[59]

> Employment law requires the balancing of the interest of employers and employees, with proper regard not only to the individual dignity and work of the employees but also to the general economic interest. Subject to the observance of fundamental human rights, the point at which this balance should be struck is a matter of a democratic decision. The development of the common law by the judges plays a subsidiary role. The traditional function is to adapt and modernise the common law. The substantive elements must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord.

He also observed that:[60]

> The common law decides cases according to principle and cannot impose arbitrary limitations on liability because of the circumstances of the particular case. Only statute can lay down limiting rules based upon policy rather than principle.

Hence, the statutory limits on damages should not be undermined by judicial decision-making.

More generally, Lord Hoffmann observed that:[61]

> At common law the contract of employment was regarded by the Courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms will be implied unless they satisfy the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise the social reality. Most of the changes are being made by Parliament. The Employment Rights Act 1996 consolidates numerous statutes which have conferred rights upon employees. European Community Law has made a substantial contribution. And the common law has adapted itself to the new attitudes, preceding sometimes by analogy with statutory rights. The

59 *Johnson,* above, para 37

60 *Johnson,* above, para 49.

61 *Johnson,* above, para 35.

> contribution of the common law to the employment revolution has been by the evolution of implied terms on the contract of employment. The most far reaching is the implied term of trust and confidence. But there have been others. For example, in *W A Goold (Pearmak) Limited v McConnell* [1995] IRLR 516, Morison J (sitting in the Employment Appeal Tribunal) said that it was an implied term of the contract of employment that an employer would reasonably and properly afford employees an opportunity to obtain redress of grievances.

Also of relevance was Lord Hoffmann's doubt that the implied term could be pressed beyond preserving the continuing relationship into the area of dismissal (and, apparently, beyond dismissal).

In his concurring speech, Lord Millet repeated the theme that contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents, but noted that:[62]

> This change of perception is, of course, partly due to the creation by Parliament of the statutory right not to be unfairly dismissed. If this right had not existed, however, it is possible that the Courts would have fashion a similar remedy of common law, that they would have proceeded by implying appropriate terms into the contract of employment … though there would have been a powerful argument for leaving the reform to Parliament.

Lords Bingham and Nicholls agreed. However, Lord Steyn would only have struck out the employee's claim due to remoteness difficulties. He considered that there was a reasonable cause of action based on a breach of the implied obligation of trust and confidence. In particular, he considered that the unfair dismissal legislation would not be unworkable if his view were adopted, and that a decrease in protection through collective bargaining should be recognised:[63]

> The unfair dismissal legislation must be put in context. At the time of the Donovan report [in 1968] collective bargaining was seen as the main form of protection of individual employees. It apparently covered about 83% of the workforce in 1980. It has, however, been contracting steadily. It felt to 35% in 1998. In the result, individual legal rights have now become the main source of protection of employees: see Brown, Deakin, Nash and Oxenbridge, "The Employment Contract: From Collective Procedures to Individual Rights" (2000) 38 British Journal of Industrial Relations 611, 613-616.

62 *Johnson,* above, para 77.

63 *Johnson,* above, para 23.

Lord Steyn was also sceptical of the proposition that the implied term, if applied in this context, would conflict with the express provision permitting termination on notice:[64]

> This submission [by employer's counsel] loses sight of the particular nature of the implied obligation of mutual trust and confidence. It is not a term implied in fact. It is an overarching obligation implied by law as an incident of the contract of employment. It can also be described as a legal duty imposed by law: Treitel, *The Law of Contract*, p190. It requires at least express words or a necessary implication to displace it or to cut down its scope.

Further, after discussing an increased appreciation of stress-related problems suffered by employees in an era of deregulation, privatisation and globalisation, Lord Steyn said: "The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past".[65]

VIII APPLAUSE FROM THE (BRITISH) ACADEMY ... LESS FROM CHICAGO

In both *Malik* and *Johnson*, Lord Steyn cited articles written by Douglas Brodie of the Faculty of Law of the University of Edinburgh. Brodie has been an enthusiastic supporter of the Law Lords' endorsement of the trust and confidence implied term, but by no means the only one from within the ranks of British legal academia. In one of Brodie's most recent articles, he commences his concluding section as follows: "The evolution of the law of the employment contract has been genuinely exciting in recent years".[66]

(For those with a cautious view about the scope of judicial law-making, the idea that judge-made law is evolving in a "genuinely exciting" way is blood chilling stuff!)

In this article, which is the latest in a series offering the same perspective, Brodie reiterates his expectation that:[67]

> the obligation [under the *Woods* implied term] will come to be seen as the core common law duty which dictates how employees should be treated during the course of the employment relationship.
>
> ... The open-textured nature of the [implied] term makes it an ideal conduit through which the Courts can challenge their views as to how the relationship should operate.

From this it is obvious that Brodie asserts that the employer and the employee ought not to be left to determine how the employment relationship should operate, and that the

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64 *Johnson,* above, para 24. Lord Steyn also took the view that, as a breach of the implied term would sound in damages, it could operate consistently with an effective termination on notice.

65 *Johnson*, above, para 25.

66 Douglas Brodie "Mutual Trust and the Values of the Employment Contract" (2001) 30 ILJ 84.

67 Douglas Brodie "Mutual Trust and the Values of the Employment Contract", above, 85

Courts should exercise an influential role in patrolling, through the implied term, the treatment of employees by employers. This assumes not only that employees are vulnerable, but also that employment is a relationship involving much more than the exchange of wages for labour. Hence, Brodie observes, with approval:[68]

> In recent years the Courts' vision of the employment relationship has broadened.
>
> ... Just as the Courts have taken a broader view of what workers gain from employment they have similarly acknowledged what workers contribute by participating in an employment relationship. Far greater judicial recognition now exists that employment relations involve personal relations ...

Just what these passages mean is, with respect, far from clear. It must be true in the United Kingdom, as it is in New Zealand, that all but a tiny percentage of employees are employed by corporations or by Government agencies. While the directors of such companies, and the managers employed, are human beings, it is difficult to see what describing their primary relationship as involving close "personal relations" means, unless it is a repetition of the point that the workplace will often provide a community of importance to the employee. On that point, one might observe that, whenever several human beings get together on a regular basis, a community (or sub-community) is likely to develop, and to be of importance to its membership. The question remains: Does this tell us anything new or true about the nature of employment?

Brodie is at least clear about his perception that it is wrong to approach an employment contract on the basis that it involves the employer's commercial activity, and is "based on commercial considerations".[69] Such an approach is "heavily weighted in favour of employers", and thus undesirable.

In considering the "great scope for development" of the implied term, Brodie suggests, with conscious reference to public law jurisprudence, that it permits the legitimate expectations of the parties to be given legal force. It seems clear that Brodie assumes this will be done on the basis that there are no tiresome questions, such as have plagued public law, about whether the expectations are procedural rather than substantive, or whether there needs to be detrimental reliance. Given the implied term's role of securing the meeting of legitimate expectations, and preventing the abuse of employer prerogative power, Brodie suggests that it might apply to termination (writing before the House of Lords' decision in *Johnson*), to procedural fairness, and indeed to "all aspects of the employer's prerogative", including a general expectation of consultation and of consistency of treatment.

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68 Douglas Brodie "Mutual Trust and the Values of the Employment Contract", above, 84.

69 Criticising *Secretary of State for Employment v ASLEF* [1972] 2 All ER 949, 972 Buckley LJ (EWCA).

The only area which gives Brodie some pause appears to be that of disclosure. He accepts that an obligation on a party to disclose its own breach of contract is "problematic", and that the same might be said of a greater obligation to report wrongdoing by others. The general tenor of Brodie's approach is indicated by his questions on this point:

> What say if one employee knows another is stealing in a situation where the employer is paying the statutory minimum wage and has just announced record profits? Would an obligation to inform be acceptable given the huge disparities of power and wealth between the workforce and the employer?

The same perspective has Brodie suggesting that the implied term might be used to reallocate risks in conventional areas of the employment contract. He has in mind that the employee's obligation to take reasonable care in the performance of his or her duties might be rolled back by the implied term. Nevertheless, it is clear that Brodie fears that the implied term may not be applied sufficiently enthusiastically to redress the "fundamental imbalance in power between employer and employee".

Brodie concludes this article with the suggestion that the implied term is part of a profound change in the nature of contract law:[70]

> The obligation of mutual trust and confidence can be seen as part of broader changes in the law of obligations and therefore likely to endure and involve. Its emergence in the UK is consistent with good faith playing a greater role in the law of contract as a whole. From a different perspective Collins [*Regulating Contracts*, page 8] writes that 'legal systems are in a process of transition from the dominance of traditional private law regulation to one where welfareist regulation increasingly provides that basic discourse of the legal regulation of contracts'.

This last point effectively anticipated the observation made by Lord Steyn in *Johnson*:

> It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract.

For those not especially familiar with the concept of a "relational contract", some illumination may be found in an article by Professor Melvin A Eisenberg.[71] Eisenberg elaborates on the proposition that relational contract theory stands as a contrasting mirror image of classical contract law:[72]

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70 Douglas Brodie "Mutual Trust and the Values of the Employment Contract", above, 100.

71 Melvin A Eisenberg "Why There is No Law of Relational Contracts" (2000) 94 Northwestern University L Rev 805.

72 In "Star Trek" terms: contracts, Jim, but not as we know them.

> Classical contract law was axiomatic and deductive; relational contract theory is open and inductive. Classical contract law was standardised; relational contract theory is individualised. Classical contract law was based on the paradigm of strangers transacting on a perfect market; relational contract theory is based on the paradigm of transactions by actors who are in an ongoing relationship, and often in a bilateral monopoly. Classical contract law was static; relational contract theory is dynamic. Classical contract law was based on rational-actor psychology; relational contract law is not.

All of this is a very considerable distance from the analysis undertaken by those associated with the term "law and economics". In particular, those pillars of the University of Chicago Law School, Judge Richard A Posner and Professor Richard A Epstein, have written in defence of employment "at will" — that is, employment terminable by either party, at any time and without grounds. The term "at will" is used in contrast to "just cause" employment terminations.

In his chapter on "Hegel and employment at will", Posner states:[73]

> Employment at will is a corollary of freedom of contract, and freedom of contract is a social policy with a host of economic and social justifications ... Employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, involuntary servitude and guild restrictions. That should be a point in its favour.

Posner goes on to make the point that employment at will, being a free market institution that is persistent and widespread, is presumptively more efficient than an externally imposed alternative. In support of this proposition, he mentions the costs of litigation (or arbitration), the weakening of discipline in the workplace, and the contrasting relative efficiencies of the non-unionised private sector as against the unionised private sector and Government agencies (and universities). He states:

> Do law professors know more about the efficient management of labor than business people? ... The "British system" of employment regulation is no more promising a model for our economy than the employment practices of our non-profit and Government sectors are. And while it is plausible that cooperative relations between labor and management are more conducive to increases in productivity than antagonistic relations, it is implausible that granting workers tenure is an efficient method of fostering that cooperation. If it were, why would not companies adopt it without prodding by Government?
>
> We must not neglect the incidence of the costs of a just-cause or rational-cause principle. Consumers will be hurt to the extent that the employer passed on part of these costs to its

73 Richard A Posner "Hegel and employment at will" in Richard A Posner *Overcoming Law* (Harvard University Press, Cambridge (Mass), 1995).

> customers in the form of high product prices. Workers would be hurt the most ... The higher the indirect cost of employment, the lower the wage the employee will be willing to pay ... [and] unemployment would rise because the cost of labour would now be higher. Employers would have an incentive to hire less, automate more, and relocate plants to foreign companies that do not have such protection.

In *Simple Rules for a Complex World,*[74] Epstein makes similar points, and goes on to state:

> The ubiquity of the contract at will in unregulated markets should be treated as a sign not of widespread corruption but a widespread utility. To go against common practice, one needs to have enormous confidence in his own judgments about right and wrong. Typically, those who know most about the subject are aware of the subtle variations between individual cases and are least willing to intervene in the affairs of others, no matter what organisational form they adopt. But for those who have not faced the challenges on running a business, it is easy to disparage practices that are not understood. The law and economics of labor contract and labor markets is a complex business, whose outlines have only been well explicated in the last generation. Imperfections are the order of the day in all markets. Anyone who thinks that the legal system can be operated without substantial error and cost is unduly optimistic about the power of law in general and of regulation in particular. But as we learn more about labor markets this universal law should apply: those who know the most seek to govern least.

In a later lecture, given in Wellington,[75] Esptein sought to emphasis the flexibility and interconnections in contractual bargaining, not least in employment:

> When we understand that how firms write one term of the contract will depend heavily on how they are allowed to write the other terms, we recognise that interfering with one dimension of an employment relationship will adversely affect all the other dimensions. The employment contract should not be regarded as an exception ... One must go back to the boring fundamentals, keep the law simple and coherent, and allow all the complexity to arise out of the actions of the people who know something about the transactions. Judges and legislators can know precious little about those complexities, and they do best when they do precious little.

In an earlier article, Epstein made the related point that:[76]

> The strength of the contract at will should not be judged by the occasional cases in which it is said to produce unfortunate results, but rather by the vast run of cases where it provides a

74 Richard Epstein *Simple Rules for a Complex World* (Harvard, Cambridge (Mass), 1995).

75 Richard Epstein "Restoring Sanctity of Contract in Employment Relationships" (NZ Business Roundtable, Wellington, 1999).

76 Richard Epstein "In Defence of the Contract at Will" (1984) 51 University of Chicago Law Rev 947.

> sensible private response to the many and varied problems in labor contracting. All too often the case for a wrongful discharge doctrine rests upon the identification of possible employer abuses, as if they were all that mattered. But the proper goal is to find the set of comprehensive arrangements that will minimize the frequency and severity of abuses by employers and employees alike.

In these remarks, Epstein anticipated the conclusions offered in Sir Ian McKay's 1999 FW Guest Memorial:[77]

> The longer one is involved in the law, the more one recognises the basic good sense of much of our common law. One should be reluctant to depart from past practices without first understanding the reasons for them, and considering all the likely effects of any proposed change. A judge must always remember that he or she sees only the tip of an iceberg, the small group of cases that arise from disputed questions that cannot be resolved except by the Court. The success of our legal system should be judged by its predictability, and by the ability of the vast number of situations to be resolved without dispute.

IX LEGITIMACY AND THE WOODS *IMPLIED TERM*

At one level, there may be little point in querying whether the *Woods* formulation of the implied term of trust and confidence is "legitimate". If both the New Zealand Court of Appeal and the British Law Lords say that it is the law, it is: they are infallible, if only because they are final.[78]

Nevertheless, and as *Coutts Motors* reminds us, notwithstanding the Employment Relations Act 2000, employment *is* a contractual arrangement, and there are longstanding common law principles on the implication of terms into contracts. Judged against those, is the *Woods* implied term a legitimate use of the judicial power? If not, what does it say of judicial decision-making in New Zealand and the United Kingdom in the last quarter of the 20th century?

As noted earlier, the "Master and Servant" discussion in the first edition of *Halsbury* makes reference to implied terms. Volume 7 of the same encyclopaedic work (published in 1909), on "Contract", records strict requirements for the implication of a term not expressly stated by the parties. The primary requirement was that it be:

> clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them … and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended to have, and to prevent such a

77 Sir Ian McKay "Interpreting Statutes — a Judge's View" (2000) 9 Otago LR 743, 756.

78 *Brown v Allen* (1953) 344 US 443, 540 Jackson J.

> failure of consideration as could not have been within the contemplation of the parties. … It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a written contract unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. If the contract is effective without the suggested term and is capable of being fulfilled as it stands, an implication ought not to be made. In every case the question whether an implication ought or not to be made would depend on the particular facts …

A primary authority for that discussion was the decision in *Robb v Green*,[79] relied on by the New Zealand Court of Appeal in *Schilling*,[80] as mentioned earlier.

In *Robb* an employee had copied a list of his employer's customers with the intention of using it, after leaving that employer's service to solicit those customers to his own new business. Lord Esher MR had no doubt that such conduct "was a breach of the trust reposed in the defendant as a servant of the plaintiff in this business", and was prepared to hold (as were the other members of the Court of Appeal) that it amounted to a breach of contract — in particular, an implied stipulation "that the servant will act with good faith towards his master".

Lord Esher justified the implication of the term on the basis that it was something which must necessarily have been in view of both parties when they entered into the contract.[81] He cited Bowen LJ in *Lamb v Evans*:[82]

> What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended to have, and without which it would be futile.

In *Lister v Romford Ice and Cold Storage Co Ltd*,[83] the House of Lords confirmed that an employee was under a contractual obligation of care to his employer, and (by a 4:1 majority) rejected the argument that there was an implied term in the contract of service that an employee driver was entitled to be indemnified by his employer if it were (or ought to have been) insured. In our present context, Lord Tucker's discussion of the implication of contractual terms is of some significance:[84]

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79 *Robb v Green* [1895] 2 QB 315 (CA).

80 *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA).

81 *Robb v Green*, above, 318.

82 *Lamb v Evans* [1893] 1 Ch 218, 239 (EWCA).

83 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 (HL).

84 *Lister*, above, 594.

> Some contractual terms may be implied by general rules of law. These general rules, some of which are now statutory, for example, Sale of Goods Act, Bills of Exchange Act, etc, derive in the main from the common law by which they have become attached in the course of time to certain classes of contractual relationships, for example, landlord and tenant, innkeeper and guest, contracts of guarantee and contracts of personal service. Contrasted with such cases as these there are those in which from their particular circumstances it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their minds to the contingency which has arisen. These are the 'officious bystander' type of case, to use MacKinnon LJ's well-known words. I do not think the present case really comes in that category, it seems to me to fall rather within the first class referred to above.
>
> Without attempting an exhaustive enumeration of the duties imposed in this way upon a servant, I may mention: (1) the duty to give reasonable notice in the absence of custom or express agreement; (2) the duty to obey the lawful orders of the master; (3) the duty to be honest and diligent in the master's service; (4) the duty to take reasonable care of his master's property entrusted to him and generally in the performance of his duties; (5) to account to his master for any secret commission or remuneration received by him; (6) not to abuse his master's confidence in matters pertaining to his service: cf *Robb v Green*.
>
> It would, I think, require very compelling evidence of some general change in circumstances affecting master and servant to justify the court in introducing some quite novel term into their contract, for example, a term absolving the servant from certain of the consequences of a breach of his recognised duty to take care, or as to the provision of insurance covering the servant's liability to third parties or his master.

It may be seen that there is an imperfect match between Bowen LJ's analysis in *Lamb v Evans*, based on the parties' necessary intentions, had they turned their minds to the matter, and those which "have become attached in the course of time", referred to by Lord Tucker in *Lister*.

In *Liverpool City Council v Irwin*, the House of Lords held that the Council's lease of a maisonette on the upper storeys of a tower block included an implied term to take reasonable care to keep the means of access in reasonable repair and usability. Lord Wilberforce saw the implied term as implicitly and necessarily required by the nature of the contract:[85]

> I find it difficult to think of any term which it could be more necessary to imply than one without which the whole transaction would become futile, inefficacious and absurd as it would do if in a fifteen storey block of flats or maisonettes, such as the present, the landlords

85 *Liverpool City Council v Irwin* [1977] AC 239, 262-263.

were under no legal duty to take reasonable care to keep the lifts in working order and the staircases lit.

In his speech, Lord Wilberforce suggested four varieties of implied term:

(1) where there is an apparently complete bilateral contract, but terms were added to spell out what both parties know and would, if asked, have unhesitatingly agreed to be part of the bargain;

(2) where there is an apparently complete bargain, but the courts are willing to add a term on the ground that without it the contract will not work;

(3) where it is reasonable to do so (favoured by Lord Denning, but rejected by Lord Wilberforce and the other Law Lords); and

(4) where the court is concerned to establish what the contract is, and thus searches for what must be implied to complete the terms of the contract.

(Lord Wilberforce saw the *Liverpool City* case itself as an example of the fourth category.)

A restatement of the requirements for implication of a contractual term by the Privy Council in *BP Refinery (Western Port) Pty Ltd v Shire of Hastings*,[86] has been consistently applied in New Zealand. It requires that the term to be implied must be reasonable and equitable; it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; it must be so obvious that "it goes without saying"; it must be capable of clear expression; and it must not contradict any expressed term of the contract.

In our Court of Appeal, the *NZPPTA* decision tells us that the test for implying terms into employment contracts is the same as for all other contracts. That means *BP Refinery*: necessary for business efficacy; contract otherwise ineffective; and so on. But somehow the *Woods* implied term has slipped through this filtering process, and without any explicit discussion.

In other words, it is difficult to see that the *Woods* implied term is legitimate. It may be recalled that in *Courtaulds*, the Employment Appeal Authority referred to a term "necessary to give [the employment contract] commercial and industrial validity". This failed to address the question whether the contract was effective without the term sought to be implied; and, likewise, whether such a term was so obvious that "it goes without saying". There was also the further question of whether it was "capable of clear expression".

86 *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363.

On this last point, while the words of Browne-Wilkinson J in *Woods* are clearly expressed, the content of the implied term is anything but clear. What does "seriously damage the relationship of confidence and trust between the parties" mean? Insofar as the *Woods* term was meant to impose obligations on an employer, what is the confidence and trust that the employee "ought" to be able to have in the employer? Is it that the employer is a competent business person? That they are honest (the *Malik* situation was extreme — what of imperfect taxation returns, breaches of local authority by-laws or traffic regulations)? Is it an expectation of pleasantness on the part of management towards employees? Conversely, apart from honesty (including not purloining intellectual property, as in *Robb*), what is to be expected of an employee? As Brodie acknowledges, an employee is unlikely to disclose wrongdoing on their own part, or even on that of other employees — is this contemplated? And does the term extend to preclude persistent lobbying for better conditions or promotion by an employee (that is, *Woods* in reverse), who fails to take hints not to press the point further?

The point underlying these questions obtains some reinforcement from the considerable care with which Lord Bridge set out a narrowly framed implied term in *Scally*. It will be recalled that Lord Bridge adhered to the requirement for necessity, at least in the sense of the implied term being a necessary incident of a particular category of contractual relationship, which category was then defined in particularly precise terms.

In *Malik*, Lord Nicholls seems to have adopted the proposition of "what goes without saying", which at least alludes to the classical "officious bystander" test. Lord Steyn simply asserted a standardised term implied by law as an incident of all contracts of employment, referring to *Scally*, but without reference to the "necessity" hurdle.

Similarly, in *Johnson*, Lord Steyn reiterated that the term was not one implied in fact, but was an "over-arching obligation implied by law as an incident of the contract of employment". To which one might respond that the obligation has obviously been imposed by law — in the form of the judges — but the question is against what criteria it ought to be, or could be, so imposed.

In *Malik*, Lord Steyn suggested, by reference to a leading English text, Hepple & O'Higgins,[87] that the implied term (or obligation) might have had its origins in the general duty of cooperation between contracting parties. This point was endorsed by Douglas Brodie,[88] describing the implied obligation as "a positive version of the general obligation of cooperation" (and footnoting this as "Hepple's insight").

87 Bob A Hepple and Paul O'Higgins *Employment Law* (4 ed, Sweet & Maxwell, London, 1981).

88 Douglas Brodie "Beyond Exchange: The New Contract of Employment" (1998) 27 ILJ 79.

This is unpersuasive. A contractual obligation of cooperation was discussed by the Court of Appeal in *Devonport Borough Council v Robbins*.[89] Both the judgment of Richardson J, and the joint judgment of Cooke and Quilliam JJ, cited Lord Blackburn in *McKay v Dick*:[90]

> Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.

Similarly, in *Vickery v Waitaki International Limited*,[91] all three judgments make reference to a dictum of Cockburn CJ in *Sterling v Maitland*:[92]

> If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he should do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

On their face, neither the test in *Sterling* nor that in *McKay* could justify the *Woods* implied term: in each, the essential requirement is necessity — the absence of other options. The same point emerges from the fuller discussion of the topic by John Burrows.[93]

It might be said, in defence of the *Woods* implied term, that if it was good enough for the classical common law to imply a duty of fidelity applicable to employees, it is good enough for the modern common law to imply a mutual trust and confidence term. But does this survive analysis? The employee's duty of fidelity reflects the fact that an employee must often have unsupervised access to the employer's property. It would be absurd (as everyone knows, or as officious bystanders would agree) if theft of the employer's property did not involve a breach of the employment contract. The implied fidelity is necessarily required by the nature of the contract. What fact, what absurdity, and what kind of bystander, demands the implication of a duty that an employer act so as to maintain the employee's trust and confidence? On this, the case-law to date is silent.

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89 *Devonport Borough Council v Robbins* [1979] 1 NZLR 1.

90 *McKay v Dick* (1881) 6 App Cas 251, 263.

91 *Vickery v Waitaki International Limited* [1992] 2 NZLR 58 (CA).

92 *Sterling v Maitland* (1864) 5 B&S 840.

93 John Burrows "Contractual Cooperation and the Implied Term" (1968) 31 MLR 390.

X PRAISEWORTHY LAW-MAKING, OR NOT?

At the end of the story, looking back, what do we see? Perhaps the following:

(1) The legislative introduction of "unjustifiability" as a higher test for employer termination of employment contracts, initially only those subject to industrial awards, but from 1991 applicable to all employment contracts;

(2) The gradual importation from British employment jurisprudence of a broadly stated implied term, invented to overcome a perceived (and narrow) problem in quite differently worded legislation, and on the basis of minimal evidence or even argument;

(3) The restatement of that term as one of "good faith";

(4) In the result, a broad and flexible (or, on another view, unpredictable and unbargained for) mechanism to control employer actions which judges find unattractive or unreasonable;

(5) A suggestion that this development may foreshadow more general changes to the traditional understanding of contract law;

(6) Any assessment of the merits of the judicial formation and acceptance of the implied term of trust and confidence in employment will reflect a personal perspective. It seems clear that Douglas Brodie and Lord Steyn, for example, perceive those merits as very substantial. Another perspective, offered below (and foreshadowed earlier), is more sceptical;

(7) As this is a review of a judicial law-making exercise, some questions that occur are:

- Was any change to the legal rules required at all?
- If so, was it a task for the judges or the legislature?
- If a task for the judges, was it undertaken on sound analysis and evidence?
- Is the result one which contributes to the clarity and predictable application of the legal rules formulated?

A Was Any Change Required?

In the English context, the *Woods* implied term was consciously designed to avoid the perceived limits of the Court of Appeal's *Western Excavating* decision in the area of repudiation and constructive dismissal. In *Courtaulds* the employee needed to show a fundamental term had been breached to justify his constructive dismissal claim. The specific problem identified in *Woods* was employer conduct amounting to "squeezing out" an unwanted employee.

From a New Zealand perspective, it is doubtful that, post-*Hennesey* and the expansive interpretation of "unjustified", the *Woods* implied term was necessary. The particular problem addressed in *Courtaulds* and *Woods* was that of employer actions likely to discourage an employee from remaining in the employment, but short of a singular repudiatory action. Both were "constructive" dismissal cases. The scope of "unjustifiable" after *Hennesey*, and the legislative extension of personal grievances to not only unjustified dismissals but also unjustifiable actions short of dismissal, very effectively removed the problem.

On the same reasoning, it may be said that *Woolworths* required no more than confirmation that unjustified dismissal included unjustified constructive dismissals. There was no need for the narrow implied term or duty asserted "without doubt" as to carrying out fairly and reasonably an inquiry into possible dishonesty by an employee. The Court did not address either *Hennesey* or the relevance in New Zealand of the "squeezing out" problem identified in *Woods*. It may be that *Hennesey* was not cited by counsel, a supposition perhaps reinforced by the *Woolworths* Court's general observation about applying "natural justice to contemporary industrial relations".

It may also be said that the *Woolworths* judgment was alive to some of the definitional problems with implying a term in this context. The judgment adopts a narrowly defined term (fair and reasonable inquiry into possible dishonesty). It also criticised Lord Denning's suggestion in *Woods* of an employer duty to be just and considerate as "nebulous", at least relative to Browne-Wilkinson J's formulation. But what was absent in the *Woolworths* judgment, and in those that followed, was discussion of just how nebulous the trust and confidence term might be, and what advantages or disadvantages it might involve across the wide range of employment contracts. In the absence of that discussion, it is surely difficult to say that the judicial law-making process established any need for a change in the pre-existing legal roles.

B Was Any Change a Matter for Legislation?

In considering whether any change to legal rules was more appropriate for the judges or for the legislature, the point already made is that the legislature had effectively done all that might reasonably have been required in legislating into employment contracts the requirements that dismissals and other disadvantageous actions affecting employees be "justifiable". Beyond that, Lord Hoffmann in *Johnson* identified the important point that, to the extent that employment law requires the balancing of the interest of employers and employees, it inevitably touches on the "general economic interest" and is "a matter for democratic decision".

C Sound Analysis and Evidence?

On the evidence of the judgments delivered in *Courtaulds* and *Woods*, there was no substantial analysis or evidence upon which the courts acted when the implied term was first formulated and adopted. Similarly, when the appellate courts approved it in both the United Kingdom and New Zealand, no substantial analysis or evidence was undertaken or provided.

It is beyond argument that the primary factor which has driven the development of the *Woods* implied term has been a change in judicial perceptions of employment, or, as Lord Steyn described it in *Malik*, a "change in legal culture". But when one seeks to identify the foundations of any such change in perception or culture, the judgments of the Courts offer little. Lord Nicholls in *Malik* stated that jobs were less secure than formerly, that people change jobs more frequently, that the job market was not always buoyant: "Everyone knows this." Perhaps, but had he forgotten the 1930s' depression? Or the 1950s' mobility? Where is the change?

Similarly in *Johnson*, Lord Hoffmann asserted that the nature of the employment contract "has been transformed" over the last 30 years or so. Regrettably, he failed to elaborate on how and why, apart from mentioning a (judicial) recognition that a person's employment is usually one of the most important things in his or her life. At least since the beginning of urbanisation, and the wage economy, that will have been so. Again, where is the change?

Also in *Johnson*, Lord Millett related the change of the past 30 years to the statutory changes of the 1970s, and went on to observe:[94]

> But the common law does not stand still. It is in a state of continuous judicial development in order to reflect the changing perceptions of the community. Contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents.

As authority for this assertion, he cited from a Supreme Court of Canada decision about the importance of work, and the trauma of losing a job. This hardly rates as a "change in perceptions of the community". Again, what evidence, and what recognition of the very "general economic interest" that Lord Hoffmann referred to in his speech in *Johnson*? Is this really a matter for judicial notice?

Inevitably, one's attention is attracted by the lack of impact of the "law and economics" approach in our story, as in British legal discourse generally. But it would appear that none of the points made by Epstein and Posner were addressed by any of the many judges who have caused the *Woods* implied term to become "established" — including, it has to be

94 *Johnson v Unisys Limited* [2001] UKHL 13, para 77.

said, the New Zealand judges. Indeed, one strongly suspects that the Epstein/Posner points were not even raised by counsel.

D Clarity and predictable application of legal rules

In its own terms, let alone what it might add to the statutory "unjustifiable" test, the *Woods* implied term can hardly be said to be clear or predictable. In situations of employee dishonesty, whether in relation to physical or intellectual property, it is not difficult to say that there has been a breach of the trust which an employer would ordinarily place in an employee. Beyond that, it is difficult to see that an employee is, in any meaningful sense, a fiduciary (that is, putting the employer's interests ahead of the employee's interests). Or vice versa: indeed, in *Hale* and *Aoraki* the Court of Appeal has made it clear that employers are able to manage their enterprises in a commercially effective manner, which may well adversely impact on employees' job security.

In the recent *Coutts Motors* decision, and at least implicitly reflecting Browne-Wilkinson VC's reformulation in *Imperial Group*, the implied term has been redescribed as one of "good faith". While this does have the advantage of harmonising with the statutory language of the Employment Relations Act 2000, it shares with the statutory language a conspicuous lack of clarity, and is very greatly removed from the traditional basis of the common law, discussed well in Burrows' article.[95]

In approaching a conclusion to this paper, it is useful to return to its starting point: Sir Ivor Richardson's judgment in *Brighouse*. That judgment's statement of a principled approach to redundancy cases illustrates a full appreciation that provisions in employment contracts have "an economic value and an economic price"; that it is for the parties to negotiate the enforceable contents of an employment contract; and that an employer's commercial judgments about its operational needs, and any necessary restructuring strategies, are entitled to judicial respect.

Indeed, Sir Ivor's *Brighouse* judgment rather suggests that the relevance of "mutual obligations of confidence, trust and fair dealing" is in underlying the statutory concept of unjustifiability. The actual results of the subsequent cases in which Sir Ivor has presided are broadly consistent with that suggestion. On the other hand, the rhetorical expansion to "good faith" provides for the future, in Brodie's language, the ideal conduit for the Courts to give effect to their views as to how the employment relationship should operate.

It is true that there was room for a more sympathetic view of the employee's position than was provided under the classical law of employment contracts. It is also true that legislatures in both the United Kingdom and New Zealand had imposed various "just cause" requirements on dismissals, and, further, that the courts had received academic

95 Burrows, above.

praise and tacit legislative acceptance of their engrafting of natural justice principles into statutory regimes. But this writer remains unpersuaded that the adoption of the *Woods* implied term, or the implied term of good faith, has enhanced the clarity or predictable application of the legal rules governing employment contracts.

Obviously enough, the *Woods* implied term, and perhaps the good faith term, are here to stay. The rhetoric of "trust and confidence" splendidly begs many of the important questions, final appellate decisions are well entrenched, and there is no groundswell of political opposition to the implied term. For this writer, the important ongoing question is the scope and foundation of judicial law-making in our era. On that question, there is still perhaps something to be said for the naif who queries the paucity of the imperial clothing.