Introduction

The contract of employment, which is the product of the industrial revolution and the doctrine of laissez-faire as its justification, has been described as 'the cornerstone of the edifice of labour law' n1.

The relationship between the employer and employee is founded on contract and therefore, the general principles of the law of contract applies to contracts of employment n2.

A contract may be created without a formal document or even an express agreement, written or oral. It can also arise from non-verbal action, namely conduct. For a contract to bind the parties, they must intend to create a legally binding obligation n3.

Contract law is based on the notion that people are at liberty to do as stated in the contract, thus maximising their personal utilities by doing what is best for themselves and society. A contract entered into freely and voluntarily is held sacred and would be enforced by the courts if it is broken, subject to limitations such as undue influence, fraud, duress, misrepresentation or contracts designed to violate criminal law.

The court’s task is to interpret and give effect to the intention of the parties. They should be left "with their own business; lead their own lives unhindered by government intervention” n4. In Printing and Numerical Registrating Company v Sampson, n5 Sir George Jessel J made a similar observation. His Lordship stated: "men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice". Thus, the rights of the parties under the doctrine of laissez-faire is that in the absence of fraud or misrepresentation, the agreed terms and conditions binds the parties and are enforceable in court, irrespective of the inequality of bargaining power.
The importance of freedom of contract is therefore closely linked to a free enterprise capitalist system and together they work to create ideals of a working class. This is based on the whole idea of profit making. The belief was that an individual should strive to maintain his own interest and at the same time the interest of the community. If this can be achieved, then it would create justice for the whole community of the working class. 'Justice' here means freedom of contract, freedom to trade and to make profit. The idea is that all will profit from the presence of the other in free enterprise capitalism to create social harmony.

However, the common law failed to stress, except until quite recently, the unique characteristic of the contract of employment. Unlike an ordinary commercial contract resulting from an exercise of free bargaining power, in employment, individual employees rarely have bargaining power. The doctrine of freedom of contract merely enables the superior in strategic strength, namely, the employer, to dictate the terms. P Davies and M Freedland noted, in relation to employment, that it "is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination". In the United States' case of *Coppage v Kansas*, Pitney J stated: "it is impossible to uphold the freedom of contract and the right of private property without at the same time recognising as legitimate those inequalities of fortune that are a necessary result of the exercise of those rights".

Moreover, the contract of employment is not simply a commercial exchange in the market place of goods and services. This doctrine paid no attention to social and economic pressures forcing a person to enter into a contract of employment. Lord Hanley LC had succinctly noted this in 1762, in the case of *Vernon v Bethell*, where his Lordship stated: "necessitous men are not, truly speaking free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them".

The weaker party who desperately sought employment was frequently not in a position to 'shop' around for better terms. It was aptly noted that "freedom of contract exists only in contracts between large undertakings over atypical objects, and possibly in the area of labour law in the wage scale contracts produced by modern collective bargaining". Lord Wedderburn, also expressed a similar opinion, when he stated that the "common law assumes it is dealing with a contract made between equals, but in reality, save in exceptional circumstances the individual workers bring no equality of bargaining power to the labour market".

Thus, the inequality of bargaining power according to Mill becomes 'but another name for freedom for coercion'. Therefore, freedom of contract under the common law was merely illusory. Without legislative intervention in the form of statutory protection, or by employees' unions through collective bargaining for acceptable terms and conditions of employment, an employee had no alternative but to succumb to the employer's pressure.

In light of the foregoing discussion, this article will analyse the recent development, at common law, where the courts are moving away from the traditional principles applicable to the employment relationship by moulding the law to the changing needs of the society. The courts have acknowledged the existence of the contractual imbalance between the employer and employee and have implied many terms into the contract of employment and the most significant of all is the implied term of trust and confidence. It is undisputed that the courts cannot re-write contracts for the parties, however, what the courts have been doing is implying terms into the contracts.

The basic purpose of implying terms is to provide better protection to the employees. In *Wallace v United Grain Growers Ltd*, Iacobucci J delivering the judgment for himself and the majority stated: "The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, responsibly and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law".
Implying Terms in the Contract of Employment

During the pre-industrial era where employment was seen to be a *sui generis* rather than a contractual obligation, no terms were implied. In the late Nineteenth century however, judges in the spirit of Lord Mansfield have been invading into the contract of employment. They have been implying terms into contracts along with the express terms, to afford natural justice to a person whose rights may be affected by a decision. n16 This is, thus, inconsistent with the doctrine of freedom of contract outlined earlier. It has become apparent with the disappearance of the civil jury, the fusion of law and fact, and the single judge.

It must be emphasised that it would not be possible to set out a complete set of express terms of what could or could not be done in the employment relationship n17. Therefore, terms are implied into the contract of employment because such terms are reasonable and are necessary in the contemporary modern world n18. In BP Refinery (Westernport) Pty Ltd v Shire of Hastings, n19 the Judicial Committee of the Privy Council stated: "for a term to be implied, the following conditions (which may overlap) must be satisfied, (i) it must be reasonable and equitable (ii) 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, (iii) it must be so obvious that 'it goes without saying' (iv) it must be capable of clear expression (v) it must not contradict any express term of the contract".

Terms implied can be divided into two, namely implied of law and implied of fact. The terms are implied into the contract of employment with the aim of giving effect to the parties' intention had that been brought to their attention - know as a bystanders test, or to give business efficacy n20. In Howman and Son v Blyth, n21 Browne-Wilkinson J stated: "Implied terms may be of two types. The first ... are terms which the parties, if they had been asked at the time of contract whether the term was part of the contract, would have immediately agreed that it was. The second type ... applies to cases, such as contracts of employment, where the relationship between the parties requires that there should be some agreed term which has not in fact been agreed but both parties would not have agreed what that term would be if they had been asked". For example, the implied reasonable notice to end the employment relationship is implied question of law. In Machttinger v HOJ Industries Ltd, n22 McLachlin J stated: "intention is not, however, relevant to terms implied as a matter of law ... Requirement for reasonable notice in employment contracts fall into the category of terms implied by law".

In Reigate v Union Manufacturing Co. (Ramsbottom) Ltd, n23 - a case dealing with agents' commissions - Scrutton LJ stated: "The first thing is to see what the parties have expressed in the contract; and than an implied term is not to be added because the court thinks it would have been reasonable to have it inserted in the contract. A term can only be implied if it is necessary in the business sense to give efficacy of the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated, someone had said to the parties, 'what will happen in such a case' they would both have replied of course, so and so will happen; we did not trouble to say that; it is too clear. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

Also noted from the above case is that no terms can be implied into a contract of employment, where there already exists express terms n24. Reference may be made to the English case of Hamlyn and Co v Wood and Co n25. Lord Esher MR stated that the "court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist" n26.

However, it is submitted that an express term may be negated by an implied term where justice demands it. For example in Johnston v Bloomsbury Health Authority, n27 an express term entitled the defendant to compel an employee a senior house officer, to work overtime. The express term required him to work for 40 hours and in addition to be available on call up to an average of 48 hours. As a result of working excessive hours with lack of sleep, he felt
sick, as it was too arduous for him.

An application for a declaration that the employer should not compel the plaintiff to work exceeding 72 hours a week was declined. This was so because of the express term 'available on call', the defendant did not impose absolute duty on him to work extra hours, instead gave the defendant the right, subject to an ordinary duty of care, not to injure the plaintiff. The majority however, expressed the view that the express term did not preclude the implication of a term that would put the defendant in breach if it asked the plaintiff to work such hours on call as it is foreseeable would result in ill health.

The Recognition of the Implied Term of Trust and Confidence

The common law courts, in recent years, have been subscribing to the social condition prevalent in the society to promote, among other things, fair treatment of workers in employment, reflecting contemporary needs and realities. For example, courts have begun to impose an obligation on the employer to exercise their managerial prerogative in a reasonable manner. This was based on the recently recognised implied duty of trust and confidence. This term was implied into the contract of employment with an aim of 'protecting an employee's expectation of fair treatment' n28.

It provides that the relationship between the employer and employee must be one of complete confidence and trust. n29 The employers may not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. It imposes a duty on the employer to treat the workers fairly and reasonably during employment and where dismissal is inevitable, it should be carried out in a justifiable manner n30. It is further implied from the above term that the employee would be treated in such a manner as to enable him or her to retain his or her dignity and status.

The locus classicus where this term was seen to operate is the English case of Woods v WM Car Services Ltd, n31 where Sir Nicholas Browne-Wilkinson P stated:

"There is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damages the relationship of confidence and trust between employer and employee ... 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...".

Lord Denning MR however, preferred the term 'good and considerate'. His Lordship stated: "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” n32.

Before Wood’s case, English courts had significantly classified and augmented the implied obligation of fairness in the employer/employee relationship as early as the 1970's. For example, in Hill v C A Parsons and Co Ltd, n33 the survival of mutual trust and confidence between the parties was the main reason for which specific performance was granted. This decision went against the public policy consideration of granting specific performance in an employment contract. The public policy being that it was improper to compel a person to serve another against his will, as that would unduly interfere with personal liberty. It was so because being in the fiduciary position, there must exist between the parties a relationship of mutual confidence, mutual endeavour and reciprocal obligations.

The courts in New Zealand had endorsed the implied term of fairness in employment contracts to the extent that Cooke P stated that ‘it has become a staple of New Zealand Industrial Law’ n34. In Auckland Shop Employees IUW v Woolworth's (NZ) Ltd n35, the Court of Appeal stated that “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”. In a
more assuring term, the implied term of fair dealing in a contract of employment was mentioned in Marlborough
Harbour Board v Goulden n36. It was stated that "the position has probably been reached in New Zealand where there
are few, if any, relationships of employment, public or private, to which the requirement of fairness has no application
whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty ... Fair and
reasonable treatment is so generally expected today of any employment that the law may come to recognise it as an
ordinary obligation in a contract of service”.

Again, in Turner v Ogilvy and Mather (NZ) Ltd n37 Castel J accepted the above implied term which, according to
His Lordship, "formed an integral part of that contract and is not swapped by the concept of managerial prerogative”.
n38 It was stated, inter alia, that the employer would not conduct itself in a manner calculated to destroy or damage the
relationship of trust and confidence between the parties; that the employer would act fairly and reasonably in its
treatment of the employee, and that reasonable notice of termination would be given by the employer to end the
employment relationship.

The Origin of the Implied Term of Trust and Confidence

This implied duty, which has now been regarded as a normal incident of the employer and employee relationship, is
corollary of the employee's duty of fidelity n39 which was first recognised by the English Court of Appeal in Lamb v
Evans n40. The implied duty of fidelity had since its reception been applied in many different circumstances. It
includes duty to render faithful and loyal service towards the employer; duty to obey a lawful instruction; duty to exert
reasonable degree of competence and skill; duty to protect employer's property; and in exercising trust placed on him by
the employer. It also includes duty not to dishonestly secure benefits at the employer's expense; not to accept
commission, bribes and not to work in the spare time with a competitor of the original employer. The employee is also
under a duty not to disclose confidential information acquired during the course of employment n41.

The duty not to disclose confidential information may vary depending on the nature of the employment. This
obligation lasts until the end of the employment relationship n42. Some of these obligations, such as preservation of
the employer's confidentiality, extends even after the end of the relationship. In Lister v Ramford Ice & Cold Storage Co
Ltd, n43 Viscount Simond stated: "it has been said on many occasions that an employee has a duty of fidelity to his
employer, a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far
that rather vague duty of fidelity extends. Prima facie it seems to me that on considering the authorities and the
arguments that it must be a question on the facts of each particular case. It can very well be understood that the
obligation of fidelity which is an implied term of the contract may extend very much further in the case of one class of
employee than it does in others”.

The implied trust and confidence term was endorsed by the House of Lords in Malik v Band of Credit and
Commerce International SA and Mahmud v Bank of Credit and Commerce International SA, n44 "as a sound
development” n45. The Law Lords unanimously n46 concluded that aggravated damages n47 for the manner of
dismissal may be granted where a dismissal has involved a breach of the implied term of trust and confidence and in
turn has caused financial loss. In other words, an employee would now be able to recover additional damages for breach
of the implied term, if he or she could establish that the manner of the dismissal would lead to it taking longer for him
or her to get alternative employment as a result of damage to his or her reputation. In Malik's case, it was stated that this
implied term was not known when Addis v Gramophone Co Ltd n48 was decided, back in 1909. In particular, Lord
Nicholls of Birkenhead n49 stated that "Addis v Gramophone Co Ltd was decided in the days before this implied
term was adumbrated. The implied trust and confidence term is now implied in every contract of employment” n50.

Conduct of the Employer Infringing the Implied Term of Trust and Confidence

Being a contract of mutual trust and confidence, the contract may require much more than adherence to the normal
contractual position. Today, the implied obligation of mutual trust and confidence has become generally accepted and
applied in the consideration and ruling on relevant disputes concerning dismissal. It has featured in many decisions of the courts in England and Malaysia, as well as other common law jurisdictions. It is implied into a contract of employment that the employer will not, without reasonable and proper cause, conduct himself or herself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. An 'employer must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term”  n51.

The significant of the implied duty of trust and confidence lies on the employer "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"  n52. The employer is required not to conduct in a way 'which employees cannot be expected to put up with any longer’  n53.

It has now been accepted that whenever an employee is to be dismissed, demoted or reprimanded for his conduct, the affected employee should be fairly dealt with and given the opportunity to answer the allegation. Breach of the implied term of trust and confidence is regarded as a fundamental breach that goes to the root of the contract  n54. It may lead to an employee resigning and claiming constructive dismissal.

Constructive dismissal is not defined in the Industrial Relations Act 1967, however, from the various pronouncements of judgment, the courts have interpreted it to denote that the employer is in breach of the significant term of the contract going to the root of the contract of employment, whether through some conduct of the employer, such as making working life intolerable or demotion or a transfer, among others. The wrongful conduct of the employer entitles him to claim that the employer had evinced an intention no longer to be bound by the contract of employment thus, enabling the worker to regard himself as being dismissed and walk out of his employment. In determining the question on a constructive dismissal under section 20(1) of the Industrial Relations Act, common law principles, vide, the contract test as propounded in the Wong Chee Hong v Cathay Organisation (M) Sdn Bhd  n55, are followed, namely, whether the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention to no longer be bound by the contract.

The English Court of Appeal laid down the test of constructive dismissal in Western Excavating (EEC) Ltd v Sharp,  n56 namely;

1. that the employee must show that the employer no longer intends to be bound by one or more of the essential terms of the agreement;
2. the employee must leave the employment immediately for reason of the employer's breach and for no other cause;
3. the employer's breach must be a significant one, going to the root of the contract, entitling the employee to terminate it without notice;
and
4. the worker had not terminated the contract before the employer's breach.

In Robinson v Crompton Parkinson Ltd,  n57 Kilner Brown J stated: "In a contract of employment, and in conditions of employment, there has to be mutual trust and confidence between master and servant. Although most of the reported cases deal with the master seeking remedy against a servant or former servant for acting in breach of confidence or in breach of trust, that action can only be upon the basis that trust and confidence is mutual. Consequently, when a man says of his employer; 'I claim that you have broken your contract because you have clearly shown you have no confidence in me, and you have behaved in a way which is contrary to the mutual trust which ought to exist between master and servant' he is entitled in those circumstances, it seems to us, to say that there is conduct which amounts to a repudiation of the contract".
The type of behaviour that infringes the implied term of confidence and trust is a question of fact that is left for the courts to determine. For instance, telling the employee 'you can't do the bloody job' may not warrant constructive dismissal if used reasonably and with justification. However, if used intentionally and maliciously by a manager, without believing its truth, to an employee who has had a long and faithful service record may warrant a constructive dismissal. In the English case of Courtaulds Northern Textiles Ltd v Andrew, Arnold J stated that, "any conduct which is likely to destroy or seriously damage that relationship must be something which goes to the root of the contract, which is really fundamental in its effect upon contractual relationship".

According to Lord Steyn the implied obligation extends 'to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee ... The motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may arise'.

Sometimes an employer may, in order to get rid of an employee, resort to making the life of the employee miserable, stopping short of any major breach of contract. Such actions of the employer are known as 'squeezing out', where by reasons of the employer's conduct, the employee may opt to resign, thus, relieving the employer from compensating the employee for breach of contract or with a redundancy payment.

The practice by the employer in 'squeezing out' an employee was reprimanded by Brown-Wilkinson J in Wood's case. His Lordship stated that "any 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 to resort to methods of 'squeezing out' an employee stopping short of any major breach of the contract, such an employer attempting 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".

There are many instances where the employer's behaviour infringed the implied trust and confidence term such as calling an employee 'bitch' or accusing an employee of theft without adequate supporting evidence or unjustifiably undermining the supervisors' authority in the presence of other employees. Similarly, dismissing an employee without clear warning or assessing an employee's performance as poor on grounds of malice and refusing an application of the employee for transfer by misrepresenting that there was no vacancy suitable for the employee when in actual fact there was.

It can also arise where an employee is demoted or his wages are reduced without justification, or where the employer fails to provide a safe place of work, failure to give reasonable support to perform duties without disruption and harassment; failure to comply with and disregard of the agreed procedures designed for a fair resolution of grievances accompanied by consequential arbitrariness and capriciousness in the decision to transfer an employee and drastic change of conditions of employment. These are some of the many examples of the breach of the implied trust and confidence term. As stated earlier, breach of this term has been regarded with great depth, which is now regarded as a fundamental breach going to the very root of the contract.

There is a duty on the employee to inform the employer by words or conduct, or both, that he was accepting the repudiation and treating the contract of employment as having been terminated by the employer. There is a legal requirement in constructive dismissal cases for the employee to inform the employer that he deemed himself as having been constructively dismissed before initiating any action against the employer. Where a representation was made before or preceding the dismissal, the dismissal would in law be premature and the Industrial Court would not be seized with jurisdiction to hear the claim of dismissal on the representation.
As a final remark, it would be worthwhile to producing the commentary by Lord Nicholls of Birkenhead, in Malik's case, whose opinion was shared by Lord Goff of Chieveley and Lord Mackay of Clashfern: "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. Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term". n74

Conclusion

Although the doctrine of freedom of contract, which assumes equality in bargaining, serves an important role in facilitating private arrangements and supporting freedom of exchange, in reality however, it is manifestly unworkable as a universal theory. It is not appropriate in employment contracts because individual workers are relatively weaker in bargaining position. The courts in the common law jurisdictions are responding to the social changes, contemporary needs and realities.

The courts have now recognised that a contract of employment is neither concerned with trade or commerce nor with profit but more on psychology and identity elements of the workers, besides economic considerations. The employer's unfettered discretion to hire and fire workers in the manner he desired is subject to many restrictions implied into the contract of services with the view of protecting workers from exploitation. The House of Lords has recognised the implied term of trust and confidence - a term much to the favour of workers which imposes an obligation on the employer to act reasonably and responsibly in the treatment of an employee.

Common sense and logic would explain this very simple deduction of the implied term. The root word and the wisdom of having an implied term is the ever-important 'fairness'. What the courts are trying to explain is that there should be implied in every contract of employment the element of fairness. This term could not be swapped by the concept of managerial prerogative.

At the outset, there has been implied the element of confidence and trust between the employer and employee, where the employee owes fidelity to the employer who in turn should be reasonable and responsible, and does not arbitrarily breach any terms of the contract of employment, express or implied. Therefore, the principle of confidence and trust is to come hand in hand with fairness as a wider duty. Thus, when both trust and confidence and fairness are seen to work together, it adds up to natural justice and this, the courts emphasise, is to be implied in every contract of employment, from the very beginning of the appointment right to the point of dismissal. Any breach of the implied duty of confidence and trust warrants the employee to resign and claim for constructive dismissal.

The implied term of trust and confidence in the contract of employment are examples of 'status'. No employer can ignore the 'status' of the employee and that 'status' is the real guarantee of workers' security of tenure. A contract could not afford the real protection to the individual workers who were in relatively weaker bargaining strength. Based on the foregoing discussion, the writer submits that contract of services should be categorised as a personal contract or special contract and regulated not merely by the contractual intention of the parties, but also the principles of fairness.

The employer's unfettered discretion to dismiss workers in the manner he desires is subject to the restriction noted above. An impending dismissal should be implemented fairly where the affected worker should be notified and given appropriate opportunity to rebut any allegations against him. Furthermore, employers must treat workers with concern
and common decency, they must refrain from maintaining a wrongful accusation of insubordination and theft, among other things. Such unscrupulous conduct of the employer may give rise to embarrassment, humiliation and damage to one's self-worth and self-esteem. Any unfair treatment of the employee in employment, including at the time of dismissal, may give rise to a cause of action for breach of the implied trust and confidence. Maliciously defaming an employee with the intention of inflicting mental distress may also find a cause of action in tort.

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FOOTNOTES:

n1 O Kahn-Freund, "Legal Framework", in A Franders and H A Clegg (eds), The System of Industrial Relations in Great Britain (Oxford: Blackwell, 1954) 45. The application of contractual principles in employment relationships was enunciated by prominent English jurists of the early Nineteen Century such as by Bentham through his philosophy of 'the utilitarian principles' which enunciated the principle that the parties to a contract freely assume legal obligations, or by Sir Henry Maine through his theory of 'progressive society', namely, movement from 'status' to 'contract'.

n2 Contract is an agreement between two or more persons by which legal rights and obligations are created. A contract of service is in the nature of a bilateral contract that imposes mutual obligations. The servant owes the duty of obedience and due respect whereas the master must provide protection and good treatment. See Limland v Stephen (1801) 3 Esp 269, 270; 170 ER 611. In High v British Railways Board [1979] IRLR 52, 54, Talbot J stated: "A contract is the product of an agreement between parties, providing for rights and obligations, and therefore one must look to the contract in question in order to determine this particular point". Again, in Mitsud v MacMillan Bathurst Inc (1990) 63 DLR (4th) 714, at 719, Ont. CA, MacKinley JA observed: "[T]he relationship between the parties is contractual. Where there is no written contract it is necessary first to determine what terms are implied in the specific contract involved, and those terms are not those which the court considers reasonable, but rather what the parties would have agreed to when forming the contract, had they turned their mind to the type of situation which later transpired".

n3 In Rose and Frank Co v J R Crompton and Bros Ltd [1924] All ER 245, at 252, Atkin LJ stated: "To create a contract there must be a common intention of the parties to enter into legal obligations, mutual communication expressly or impliedly. Such an intention ordinarily will be inferred when the parties enter into an agreement which in other respects conforms to the rules as to the formation of contract. It may be negatived impliedly by the nature of the agreed promise or promises as in the case of offer and acceptance of hospitality or of some agreements made in the course of family life between members of a family".


n5 (1875) LR 19 Eq at 465.


n8 236 US 1, 17 (1915).

n9 (1762) 2 Eden 110, 113; 28 ER 838, at 839.


n14 With him were Lames CJC, Sopinka, Gonthier, Cory and Major JJ.

n15 Ibid at 37.

n16 Lord Denning in Pett v Greyhound Racing Association Ltd [1969] 1 QB 125, at 132 CA stated; "[W]hen a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor". See also Cambell v Gorman (1977) 18 ALR 108, at 112; Gleworth v Barrow (1978) 20 ALR 359; Ridge v Baldwin [1964] AC 40, at 81.

n17 See Alan Fox, Beyond Contract: Work, Power and Trust Relations (Faber and Faber Ltd London, 1974) at 183. See O'Brien v Associated Fire Alarms Ltd [1969] 1 All ER 93.

n18 Per Lord Edmund-Davies, in Liverpool City Council v Irwin [1977] AC 239, at 266. Whether a term is to be implied is a question of law. See O'Brien v Associated Fire Alarms Ltd [1969] 1 All ER 93. For example, the implied term of trust and confidence which is regarded as essential in the contemporary modern world is not merely based on the implied intention of the parties, but is a legal incident of the relationship which is attached by law itself. See Mears v Sofecar Security Ltd [1982] ICR 626, at 651.


n20 See The Moorcock (1889) 14 PD 64, at 68.

n21 [1983] IRLR 139, at 141.


n23 [1918] 1 KB 592, at 602. See also Shirlaw v Southern Foundaries Ltd [1939] 2 KB 206, at 227.


n25 [1891] 2 QB 488, CA.

n26 Ibid at 491.


n29 See for example Isle of Wight Tourist Board v Combes [1971] 3 WLR 995.

n30 Wilson J (dissenting) in Vorvis case (above at fn 24) used the term 'civilised behaviour'. The learned Judge stated: "the very closeness engendered by some contractual relationships, particularly an employer/employee relationship in which there is frequently a marked disparity of power between the parties,
seems to me to give added point to the duty of civilised behaviour" (at 224).


n33 [1971] 3 WLR 995.

n34 See for example Brighouse Ltd v Bilderbeck [1994] 2 ERNZ 243, at 252, NZ.

n35 [1985] 2 NZLR 372, NZ.


n37 [1995] 1 ERNZ 11, EC.

n38 Ibid at 28.

n39 See for example Schilling v Kidd Gorrett Ltd [1977] 1 NZLR 243.

n40 [1893] 1 Ch 218, at 229, Bowen LJ observed that "What is an implied contract or an implied promise in law? It is that promise which the law implies and authorised us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile".

n41 See Chetty on Contract Vol 2.

n42 See for example Wessex Dairies Ltd v Smith [1935] 2 KB 80, at 85, CA.

n43 [1957] AC 555.

n44 [1997] 3 All ER 1, HL.

n45 Per Lord Steyn, Ibid at 16.

n46 Lord Goff of Chieveley, Lord Mackay of Clashfern, Lord Mustill, Lord Nicholls of Birkenhead and Lord Steyn.

n47 Aggravated damages are given to an employee when the harm done to him by a wrongful act was aggravated by the manner in which the act was done. It takes into account the intangible injuries, such as distress and humiliation that may have been caused by the defendant's insulting behaviour. For example, the manner of the wrongful dismissal besmirched their name, thus making it difficult for them to secure new employment.

n48 (1909) AC 488, HL.

n49 Speaking for himself and on behalf of Lord Goff of Chieveley and Lord Mackay of Clashfern.

n50 Ibid at 9.

n51 See Wallace’s case, above at fn 13, at 8.
n52 Per Lord Steyn, in Malik's case, above at fn 44, at 10.


n56 [1978] 1 All ER 713.


n59 See fn 54, at 86.

n60 See Malik's case, above at fn 44, at 17.

n61 See fn 54, at 351.


n63 See Robinson v Crompton Parkinson Ltd[1978] ICR 401 (EAT); Courtaulds Northern Textiles Ltd v Andrew, above at fn 54.

n64 See Associated Tyre Specialist (Eastern) Ltd[1977] ICR 218; Waterhouse (Bond St.) Ltd v Lynn [1978] ICR 205.

n65 See Country Fare (Christchurch) Ltd v Dixey [1995] 2 ERNZ 372, here the respondent was warned of unsatisfactory work performance. He was given a final warning when he completed a task contrary to the instruction. Subsequently, due to his refusal to follow lawful and reasonable instruction he was dismissed. Her dismissal was held unjustifiable since the appellant failed to disclose specific reasons for the dismissal. Again, in Waugh v Coleman Consolidated Business[1995] 2 ERNZ 251, the plaintiff was dismissed for allegedly using obscene language despite various warnings. However, at no stage was the plaintiff informed that what she was doing was offensive to customers, or that the alleged use of obscene words could be heard outside the kitchen, or that there had been complaints from customers. The instant dismissal was held to be in breach of the implied term of trust, confidence and fair and reasonable dealing.

n66 See Courtaulds Northern Textiles v Andrew, above at fn 54.


n68 See the Canadian case of Moser v Farm Credit Corp [1993] 2 WWR 122, at 125, where Kyle J stated: "there is implied in contracts of employment 'that an employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of contract"’. See also Cox v Phillips Industries Ltd [1976] 3 All ER 161, QBD; Lewis v Motorworld Garage Ltd [1986] ICR 157. InRigby v Ferodo Ltd [1988] ICR 29, HL, the employer unilaterally reduced wages without justification and it was held that an employee was entitled to recover the difference between the contractual entitlement and the amount paid by the employer either in damages for breach of contract or debt. See also Bristop Garage (Brighton) Ltd v Lawen[1979] IRLR 86.

n70 See Wigan Borough Council v Davies [1979] IRLR 127.


n73 See for example Southern Bank Bhd v Ng Keng Lian & Anor [2002] 2 CLJ 514; Syarikat Ismail Ibrahim Sdn Bhd v Ong Heng Seng [2003] 1 ILR 815.

n74 See fn 44, at 8.