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NOTHING TO FEAR BUT FAIRNESS: THE IMPLIED TERM OF TRUST AND CONFIDENCE IN NEW ZEALAND EMPLOYMENT LAW

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ABSTRACT

This paper examines the impact that the implied term of trust and confidence has had on employment law. First, it is claimed that the theoretical basis of implied terms may not be appropriate considering the importance that the obligation has. By using implied terms, judges exercise substantial power to determine the content of the obligations in the employment contract. Although the history of employment law demonstrates that this power can be used oppressively, it is unlikely that modern judges will abuse the ability. The lack of definition of the implied term of trust and confidence is of concern. The ad hoc development of the term means that little attempt has been made to form a coherent approach to its use, and this paper makes some progress towards determining a framework. The practical implications of the term are also examined, and it is seen that the implied term of trust and confidence has been used by judges to expand the obligations under the employment contract. In addition, the implied terms that pre-date the implied term of trust and confidence are re-examined and shown to have their foundations in the relationship of trust and confidence.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 17, 400 words.

Trust men and they will be true to you; treat them greatly, and they will show themselves great. [1]

I INTRODUCTION

Implied terms and employment law have had a long and often uneasy association. Implied terms were initially used to reinforce the managerial prerogative and control that was traditionally reserved to the employer under master and servant rules. The implied term of trust and confidence is the result of a movement towards imposing reciprocal rights on the parties to the employment relationship. Its most celebrated effect is to create a number of limits on the behaviour of employers which had never previously existed.

This paper focuses on the theoretical implications of implied terms generally and the implied term of trust and confidence. Placing the obligation to maintain trust and confidence in implied terms creates a number of problems. The most significant of these is the level of discretion implied terms bestow upon judges which allows them to give effect to their perspective of the employment relationship. In addition, the concept of an underlying relationship of trust and confidence in employment has far-reaching implications, which the courts have not been slow to grasp. Yet the exact nature of the obligations is elusive, and is not immediately clear from the cases. It is important to define the principle in order to clarify its application to employment law generally.

This paper also examines the practical implications of the implied term of trust and confidence. The term deals is a concept that is rapidly gaining importance in employment law, and it can be said to impact in a number of ways. Most of the previously formulated implied terms can be brought within the implied term of trust and confidence. The term has also been used as a basis for expanding the obligations owed under the employment relationship in a number of significant

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[1] Ralph Emerson, *Essays, First Series, Prudence.*

ways. The continued expansion of the term will depend on the judges' view of the employment relationship. The implied term of trust and confidence is one of the most comprehensive and important developments in employment law this century.

Part II of this paper examines the development of implied terms in employment law, and the concerns that have been raised about the use of implied terms. One important problem is the broad power judges exercise in establishing and developing obligations. Part III looks at the implied term of trust and confidence: its origins and development. The ad hoc development of the concept makes defining the term difficult. However, it is possible to establish some broad guidelines. Part IV re-evaluates the implied terms that existed before the implied term of trust and confidence, and argues that they can be seen to be dependent on the latter term for their conceptual basis. Unfortunately, the courts have not fully acknowledged this, and continue to apply uneven standards to the behaviour required of employers and employees. Finally, Part V demonstrates that the implied term of trust and confidence has been enthusiastically applied by judges as a basis for continuing to expand obligations in employment, and as a tool to work justice. Some of the developments in New Zealand law will demonstrate the growing importance of the term.

II IMPLIED TERMS IN EMPLOYMENT LAW

A The Master Servant Relationship

The law has not always viewed employment in terms of a contractual relationship. For many years the law made a distinction between different classes of employment.[2] One significant class was that of master and servant.

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2 G Anderson, B Banks, J Hughes, K Johnston (eds) *Employment Law Guide* (2 ed, Butterworths, Wellington, 1995) 7.

Under this view of the relationship servants were seen as being attached to the personal household of their employer. The servant provided personal service in a general way to the employer, while the master was the ruler of the household and the servants. Fox claims that "in all spheres of life, including spiritual communion, subordination to legitimate authority was thought to be a natural, inevitable, and even welcome accompaniment of moral grace and practical virtue."[3]

The rights and obligations of the parties were established independently of the relationship. The sources of the obligations were "custom, ideology and the law, which between them defined the expectations and obligations accepted by all who entered into the master-servant relation".[4] The obligations on the servant were the most onerous, with general devotion and loyalty to his or her master expected. In theory, the master had an obligation to care for the welfare of his or her servants, but the employees were usually not in a position to enforce the obligations.[5]

The courts supported the dominance of the role of the master, and it was only in very extreme circumstances that the servant was likely to succeed against his or her master.[6]

B The Emergence of the Contract of Employment

Increasing industrialisation and the expansion of service industries forced a re-examination of the traditional classifications of employment.[7] The master-servant relationship had not ruled out the existence of a contract, but gradually

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3 A Fox *Beyond Contract: Work, Power and Trust Relations* (Faber & Faber Ltd, London, 1974) 184.

4 Above n 3, 185.

5 Above n 3, 185.

6 Elias argues that the courts would have been very reluctant to make obligations reciprocal and impose broad duties on the employer. P Elias "Unravelling the Concept of Dismissal - II" (1978) 7 ILJ 100, 107.

7 Above n 2, 7

it was recognised that viewing the employment relationship primarily as a contract had a number of benefits. Fox argues that defining employment as a contract emphasised the limited nature of the commitment made by the parties to each other, and the freedom of individuals to enter contractual relations.[8]

One writer claims that a motivation for converting the master servant relationship into contract was the ability to extend the principles to classes of workers who previously enjoyed considerable independence in their employment.[9] The suggestion is that this was a process of 'de-skilling':

> whereby skilled workers (and therefore, by mid-nineteenth century English terms, probably independent contractors) were turned into employees - a group whose rights were established by a gradual and subtle broadening of the category of domestic servants or menials.

Fox argues that one problem with a contractual analysis was that it appeared to give a number of new advantages to employees, which may have interfered with the managerial prerogative and the employer's dominance over the relationship. To counter this perceived weakness, remnants of the master-servant paradigm were imported into the contractual relationship. One method of protecting the interests of employers was the implied term.[10]

> The pure milk of the contract gospel had to be diluted if the entrepreneur was to enjoy practical and moral support in his unfettered command over labour resources. The law did not, therefore, treat the conditions of employment as the outcome of free bargaining and mutual assent. ... Although contract theory ostensibly gave full discretion to the parties in defining the nature and scope of authority, in fact the law imported into the employment contract a set of implied terms reserving full authority of direction and control to the employer.

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8 Above n 3, 187.

9 A Merritt "The Historical Role of Law in the Regulation of Employment - Abstentionist or Interventionist?" (1982) 1 AJLS 56, 58.

10 Above n 3, 187.

Implied terms rarely imposed obligations on employers, but the traditional view of a loyal, devoted employee was captured in the duties created by the terms. The courts were sympathetic to the interests of employers, and this was reflected in the law that developed. The early judicial approach has been described as "disastrous".[11]

The duty to obey the employer is the best example of a duty under the master-servant law which was incorporated into an implied term under the contractual view of employment.[12]

> The duty to obey has been applied in law to deny the parties even that formal equality that contract theory would allow them. The substantive content of a contract of employment can be minimal; the law uses its notoriously vague implied terms to flesh out the contract in the many circumstances in which it may have to be applied.

Forrest points out that the implied term to obey all lawful or reasonable commands left the courts enormous discretion to determine what was reasonable. The employer's right to command his or her employee was left virtually untouched.[13]

Collective bargaining was a method which employees used to counter the economic power of employers. However, the courts did not view unions and industrial action as legitimate.[14] Implied terms were used in this context to reinforce the interests of employers. One of the most infamous cases is that of *Secretary of State for Employment v ASLEF*.[15] In that case railway workers decided to work to rule as a form of industrial action. The intention was to

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11 Above n 2, 24.

12 H Forrest "Political Values in Individual Employment Law" (1980) 43 MLR 361, 363 -364.

13 The case of *Turner v Mason* (1845) 14 M&W 112 held that an employer's order that his employee not visit her dying mother was a perfectly lawful order. The court held that the right was only limited in circumstances where the employee felt her life was in danger, or she was in danger of violence from her master.

14 For example, the decriminalisation of strike action by the legislature was countered by the development of tort law to make strikes illegal. See above n 2, 655.

15 (No 2) [1972] 2 QB 455.

disrupt the business of the employer. The English Court of Appeal found that the employees had breached an implied term of their contract. Lord Denning declared that the action was a breach of contract due to the intention to disrupt the operations. Forrest argues that:[16]

> [t]he introduction of intention into the contractual sphere deprives the employee of what little protection his precise contractual bargain had given him: that he had expressly agreed to work only 40 hours is no longer enough apparently, if, in refusing to work longer, he intends to disrupt the undertaking; that he has his own ends to pursue after the 40 hours are up is neither here nor there.

The result of this trend was to effectively deny employees protection from unreasonable behaviour of employers. Implied terms were a tool which the courts employed to reinforce the interests of employers and capital. They focused on the obligations that employees owed to employers. The few obligations that employers owed were not rigidly enforced, partly because employees frequently did not have the resources to take employers to court.[17]

C *The Difficulties With Using Contractual Theory in Employment Law*

The classification of employment as a contractual relationship created difficulties from the beginning. It has already been discussed how the traditional master-servant obligations were imported into the contract through the use of implied terms. Ultimately, the practical contractual rights given effect to by the courts do not reflect traditional contractual theory.

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16 Above n 12, 365.
17 Above n 3, 185.

1 Implied terms and contractual theory

Implied terms have an established place in traditional rules of contract. The theory relies on the fact that it is impossible to anticipate every circumstance or problem that may arise during the term of a contract. It is very common in employment situations that the parties will be faced with a problem that is not contemplated by the contract. This is due to the extended nature of the relationship, and the fact that a number of employment contracts are either unwritten or minimal in their terms. The courts originally developed the implied term as a method of giving effect to the intentions of the parties, to avoid enforcing a manifestly unjust or absurd solution. There are two broad categories of implied terms: terms implied in fact which depend on the circumstances of the case, and terms implied in law which will be implied into all contracts of a particular class. The implied term of trust and confidence is a term implied in law.

A number of difficulties with the theory of implied terms can be identified.

First, implied terms represent a derogation from the principle of freedom of contract. Contract law is based on the assumption that the court will enforce a bargain freely entered into and agreed upon by the parties to the contract. The terms of that contract will govern the relationship between the parties. There is a tension between this fundamental principle and the ability of judges to impose terms which the parties have not expressly agreed to. Phang argues that:[18]

> the concept of the implied term is, in many ways, contrary to the popularly perceived essence of contract itself which is premised on the classical doctrine of freedom of contract. ... It is submitted that the concept of the implied term, by virtue of its very nature, conjures up (probably more than any other doctrine) horrifying images of the unravelling of contract law as it is traditionally perceived.

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18 A Phang "Implied Terms Again" [1994] JBL 255, 258.

It is true that the implied term is viewed by many as a corruption of the purity of contract law. Pure freedom of contract has never been implemented in its pure form. However, the perceived importance of the doctrine will affect the willingness of the courts to intervene in the contract. The doctrine is becoming increasingly important in New Zealand with the emergence of new right principles influencing employment legislation,[19] and may affect how judges view the appropriateness of using implied terms.

Second, there is considerable confusion about the theoretical basis for the implication of terms. There is evidence that the tests for the implication of terms implied in fact and terms implied in law are similar in that a term should not be implied merely because it is reasonable to do so.[20] However, it now appears that terms implied in law have little to do with the intentions of the parties and much to do with general considerations such as reasonableness and public policy.[21]

On occasion a judge has attempted to establish that the true criterion for a term implied in law is whether it would be reasonable to imply the obligation. This has invariably failed.[22] The New Zealand Court of Appeal has reaffirmed that reasonableness is insufficient for the implication of implied terms: [23]

> There is no established basis for the implication into employment contracts of terms that the parties have not agreed should be binding

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19 Above n 2, 18. Some commentators argue that implied terms are abused by the courts, and that freedom of contract should be given its rightful place in employment law. See C Howard *Interpretation of the Employment Contracts Act 1991* (New Zealand Business Roundtable and New Zealand Employers Federation, Wellington, 1995) 5.

20 A Phang "Implied Terms In English Law - Some Recent Developments" [1993] JBL 242, 246.

21 J Chitty and AG Guest *Chitty on Contracts* (Volume I, 27 ed, Sweet & Maxwell, London, 1994) 619.

22 See JP Swanton "Implied Contractual Terms: Further Implications of *Hawkins v Clayton*" (1992) 5 J Cont L 127, 130.

23 *Attorney-General v New Zealand Post-Primary Teachers' Association* [1992] 2 NZLR 209, 213.

> conditions of engagement for the reason simply that it would be reasonable to do so.

That case was concerned with the implication of terms implied in fact. However, Gault J did not indicate that this principle is restricted to terms implied in fact. In light of judicial approval for the test of necessity, it is possible that this statement was intended to apply to terms implied in law. Cooke P commented on the case's impact on the implied term of trust and confidence in *Brighouse Ltd v Bilderbeck*.[24] He claimed that *NZPPTA* was not intended to derogate from the line of cases supporting the existence of an implied term of trust and confidence. Of course, the difference is that the implied term of trust and confidence is a well established implied term, and *NZPPTA* was concerned with the initial implication of implied terms.

Despite judicial comments to the contrary, it is argued that in many cases the court will impose a term implied in law on the grounds of reasonableness.[25] In practice the test of necessity is rarely addressed by the courts, which usually apply existing terms.

Third, the difference between a term implied in fact and a term implied in law may not always be clear. Some terms can have characteristics of both categories.[26] Another problem is the lack of clarity in the language used by judges. Often judges will appear to talk about terms implied in fact, but introduce concepts of reasonableness.[27] In other cases, where the courts are considering for the first time whether a term should be implied in law, they will use tests which appear very similar to the tests for terms implied in fact.[28]

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24 [1995] 1 NZLR 158, 164.

25 Above n 20, 246.

26 GH Treitel *The Law of Contract* (9 ed, Sweet & Maxwell, London, 1995) 195. For example, in *The Moorcock* (1889) 14 PD 64, the Court found that in a contract for the berthing of a ship at a dock, there was an implied term that the defendants would take reasonable care to see that the berth was safe. This implied term could also be seen as having the characteristics of terms implied in law, as such a term could arguably be applied to *all* contracts with the same subject matter.

27 Above n 20, 245.

28 See JF Burrows, J Finn and SMD Todd *Cheshire and Fifoot's Law of Contract* (8 NZ ed, Butterworths, Wellington, 1992) 173.

The law regarding implied terms in contract is confused, and the implied terms themselves are subject to debate about the appropriate use to which they should be put. Implied terms do not fit easily into contract law, because they involve judges imposing conditions on the parties. But in other ways, implied terms are a useful tool for judges to alleviate hardship that might arise if they were not available. They are able to compensate for gaps left by imposing contract law on employment law.

2 *Contract and employment: an uneasy relationship*

Despite the fact that employment has been characterised as a contract for a number of years, this classification is not entirely satisfactory. A number of factors mean that the employment relationship can never be suitably compared to commercial contracts.[29]

First, unlike most commercial contracts, employment is typically viewed as a continuing relationship, under which the rights of parties will be fluid. "[T]he contract of employment is more than a static wage-work bargain, more even than a continuing exchange of mutual promises: it is also a continuing personal relationship."[30]

Second, the assumptions underlying the principle of freedom of contract are inappropriate for an employment context. Freedom of contract assumes that the parties are of relatively equal power, and that the negotiations take place at arm's length. Kahn-Freund describes the individual contract of employment as a "command under the guise of an agreement" because "the individual worker brings no equality of bargaining power to the labour market and to this

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29 The debate on this subject is extensive, and would be impossible to cover adequately. The debate has achieved particular importance in New Zealand, with the passing of the Employment Contracts Act 1991.

30 Above n 6, 107.

transaction central to his life whereby the employer buys his labour power".[31] For this reason, the contractual analysis is unsatisfactory as a response to conflicts that arise during employment.[32]

The process of incorporating master-servant principles in employment through implied terms is one example of how the courts have manipulated contractual theory to control the employment relationship. Rideout claims that it should no longer be possible "to tinker with the concept of contract, inserting spare parts where the proper ones will not work".[33]

The problem with implied terms must come down to a simple reality. The courts are using a contractual tool which has never been completely acceptable in pure contractual terms, to attempt to identify elements of the employment relationship. But the incidents and nature of employment mean that it is impossible to fit it neatly into a contractual model. It is difficult to reconcile the way the implied terms are used with the contractual theory, but this is to be expected. The dilemma facing the courts is that:[34]

> in the industrial law context the courts ... have had to intervene to modify inapplicable rules, and once they start to do so they have a considerable discretion whether to apply or modify. This is open to the criticism of being too unpredictable, and, indeed, objectionable whatever they do. If they choose to apply a strict contractual approach, that may negate other important aspects of the law ... If, on the other hand the courts take a more lax approach, the result may be better in practice, but the critic could then say that the contractual basis only works by being twisted out of shape or ignored altogether.

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31 Cited in W Davis *Judges and the Politics of Employment Law* (LLM paper, Victoria University of Wellington, 1994) 24. See also IT Smith "Is Employment Properly Analysed in Terms of a Contract?" (1975) 6 NZULR 341, 343; Above n 3, 182.

32 Collective organisation developed as a response to this distortion. Sir Ivor Richardson comments: "History tells us that in the absence of any organisation there is too great a risk of inequality of bargaining power, of exploitation of workers, and of damage to the social fabric". Sir I Richardson "The Role of the Courts in Industrial Relations" (1987) 12 NZJIR 113.

33 RW Rideout "The Contract of Employment" (1966) 19 CLP 111, 112.

34 IT Smith "Is Employment Properly Analysed in Terms of a Contract?" (1975) 6 NZULR 341, 363.

While it is undesirable to completely ignore the theory of contract law, it must be recognised that the value of implied terms lies in their practical application. Implied terms were developed as a way for the courts to do justice when the express contract is inadequate. This makes them a logical resort for judges who, unhappy with a contractual analysis of employment, wish to impose their view of employment obligations on the parties. Implied terms are not necessarily the most satisfactory in terms of theory. But as long as the employment relationship is viewed as a contract, they are destined to play a significant role in developing the rights and duties which attach to employment.

3 *The dominance of express contractual terms*

According to contractual theory, an express term of a contract will always override an inconsistent implied term. This is because a term which the parties have agreed to should be preferred to a term imposed by the courts. This makes sense when considering terms implied in fact, which are specific to the contract. However, terms implied in law usually contain fundamental obligations and it may not be desirable to allow the parties to contract out of those duties. This is particularly true considering the inequality in bargaining power that often exists between parties to an employment contract. Admittedly, there are unlikely to be many situations where the employer will attempt to directly contract out of the implied term of trust and confidence, but it is theoretically possible. It is more likely that the issue will be whether a managerial discretion expressly conferred by the contract must be exercised subject to an implied term. It is difficult to imagine that this will create chaos in the commercial and employment worlds.

The English case of *Johnstone v Bloomsbury Area Health Authority*[35] addressed the question whether the implied term of trust and confidence could override an express term reserving managerial discretion to the employer. This

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35 [1992] QB 333.

case raises the possibility that in some situations the courts are willing to make express terms subject to implied terms. *Johnstone* involved an employment contract in which junior doctors were obliged to work 40 hours a week as well as being available for overtime of another 48 hours on average. The employer had a discretion to determine the amount of overtime which was actually worked. The plaintiffs argued that the express term was subject to an implied term that the discretion had to be exercised according to the implied duty to care for the safety of employees.

The Court of Appeal was divided on the result, and the reasons for the result. Leggatt LJ held that the express term must prevail, and so no implied term could operate to reduce the number of hours worked by the employees.[36] Browne-Wilkinson LJ agreed that an express term must prevail. However, where the provision involved a discretion it was subject to the implied term of reasonable care.[37] Stuart-Smith LJ found that the express term had to be exercised in light of the other contractual terms, which included terms implied in law. Therefore, although the majority approved of the principle that a clear express term would override an implied term, the result was that the implied term prevailed.[38]

The courts in New Zealand seem to recognise that an express term will override implied terms, although the question has never been directly addressed. In *Brighouse*, Cooke P allowed that:[39]

> [i]f the contract contains an express provision and formula for redundancy compensation, or (less likely) an express provision that there shall be no such compensation, no doubt it will govern, *save possibly in very exceptional circumstances.*

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36 Above n 35, 347.

37 Above n 35, 350.

38 This case is the subject of considerable comment. For example, see above n 20; L Dolding and C Fawlk "Judicial Understanding of the Contract of Employment" (1992) 55 MLR 562, 562.

39 Above n 24, 167. Emphasis added.

Cooke P did not indicate what those exceptional circumstances might be.[40] An even stronger statement was made by Richardson J in the same case.[41] The judge placed great emphasis on the fact that the Employment Contracts Act 1991 anticipated that the parties would negotiate relevant aspects of the contract, and it was not for the courts to impose obligations in the absence of agreement.

The New Zealand judicial comments appear to rule out the possibility of an implied term taking precedence over an inconsistent express term, although the *Johnstone* case may leave the prospect open where the employer is exercising a discretion. In light of the important content of the obligations of trust and confidence, this result of using implied terms to impose the obligations is a significant disadvantage to the development of the concept.

D Implied Terms As a Vehicle for a Judicial View of Employment

Implied terms allow the courts to achieve a just and fair outcome in the circumstances of the case. The difficulty is that the flexibility which is required also means that the outcome of the case is highly dependent on the judge's notion of justice. The judge's view of the employment relationship becomes critical in developing rules of law which significantly affect the way the relationship is regulated. The influence of subjective factors is inevitable when dealing with implied terms. The question must be to what extent does the judge have control over the outcome, and what implications will that have for the implied term of trust and confidence?

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40 One possibility is where the contract is found to be harsh and oppressive under s 57 of the Employment Contracts Act.

41 Above n 24, 177.

1 Theoretical basis of implied terms ignored

> The sceptic, of course, can still attempt to have his day. He can argue, for example, that the implied term is merely an instrument for the attainment of the *Court's* notion of justice in the case at hand ...[42]

It is doubtful whether judges give more than cursory credence to the theoretical origins and tests for terms implied in law. Although the traditional standpoint has rejected the idea that implied terms could be implied purely on the basis that it would be reasonable to do so, it is submitted that this is not followed in practice. Implied terms are frequently formulated by analogy with, and extension of, existing terms. It is here that the recognition of an underlying principle that the parties to an employment contract will not act to destroy or damage the relationship of trust and confidence becomes significant. The courts are able to work with a broad principle, and create more specific implied terms which are described as arising out of, or as a corollary to, the wider term. This avoids the need to justify the term with regard to fundamental principles. Downey claims that this is what the Court of Appeal did in *Brighouse*:[43]

> In the *Brighouse* case the Court did not embark on any jurisprudential voyage into the uncharted waters of theory. It simply took for granted the power of the Court to imply a term to achieve a particular result.

New Zealand courts generally do not refer to the traditional tests when discussing whether a term implied in law should be included in an employment contract. There could be a number of reasons for this.

First, the terms are sometimes imported directly from English decisions, and so the initial question of whether the term satisfies the test for implied terms has supposedly already been addressed.[44] Second, the term may often be based on

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42 Above n 18.

43 Above n 24. See PJ Downey "Implied Terms of Employment" [1995] NZLJ 33.

44 This was the case in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 where Cooke P adopted the formulation in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 (EAT); [1982] ICR 693 (CA).

a previous case which implied the term on a factual basis rather than as a term implied in law.[45]

The willingness to ignore the theoretical basis of implied terms allows judges more freedom to regulate the nature of the relationship.

2 *The subjective element in finding a breach of an implied term*

One writer argues that implied terms are so dependent on the viewpoint of the judge, that all a counsel can do is "tender the strongest possible arguments and hope for the best".[46] This is true to a certain extent. The reason for this is that the court has ultimate control over whether the threshold has been reached for a breach of the term to occur, or even whether a term should be implied into a contract. Where an implied term deals with very broad principles, there is often little indication as to where a judge should draw the line, and what behaviour would cross it. Rideout claims that:[47]

> [m]ore often than not the supposed term is framed so widely that the words used are almost meaningless and the courts rarely discuss the detail that will be necessary to adapt the term to the particular circumstances. The situation under consideration is generalised to a degree which provides a precedent for a vast range of future applications.

The only guidance counsel has is to draw analogies with previous cases. Of course, the judges would be among the first to admit that facts in various cases will rarely be exactly the same. The result will depend on the judge's view of the case before him or her.

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45 An example of this would be the decision in *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484. The implied term in that case was based on *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74. However, the language in the latter case indicates the judge was probably thinking of a term implied in fact.

46 Above n 18.

47 RW Rideout and JC Dyson *Rideout's Principles of Labour Law* (4 ed, Sweet & Maxwell, London, 1983) 46.

Whether conduct is "reasonable" or "destroys or damages" trust and confidence will depend on the judge's perspective of the employment relationship. It is the judge who determines whether certain behaviour is acceptable under the contract or not.[48] This is a factor whenever a judge is expected to decide whether concepts such as fairness or reasonableness have been applied in a factual situation.[49]

3 *Infringing on the legislative function: creating a judicial code*

> "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."[50]

The ability to create, apply and expand obligations owed under the employment contract gives the courts significant power to shape employment relations. The court effectively imposes its view of the relationship onto the parties through the use of implied terms. It is argued by some writers that this power is more appropriate for legislative than judicial bodies.[51]

There can be little doubt that the courts have used the implied term of trust and confidence as a basis for expanding the obligations and rights of the parties under the employment contract. The term has affected the way the courts have interpreted legislation[52] and the development of the common law.[53] If the legislative function involves developing rights and duties enforceable under the law, then the development of the implied term of trust and confidence demonstrates the courts' willingness to exercise legislative powers.

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48 In the past, that has not always been considered as beneficial to employees. See above n 12, 366.

49 Above n 12, 378.

50 D Brodie "The Heart of the Matter: Mutual Trust and Confidence" (1996) ILJ 121, 126.

51 Above n 2, 993-994.

52 See above n 24.

53 See *Stuart* above n 45; *Ogilvy & Mather (NZ) Ltd v Turner* [1994] 1 NZLR 641.

Phang identifies two advantages to courts exercising quasi-legislative functions in the area of implied terms.[54] First, it would be impractical for Parliament to attempt to keep up with terms that should be statutorily implied in every area of contract. Second, terms implied in law allow the court to act as a "testing ground" to allow the legislature to decide whether or not to adopt the term into legislation. However, his confidence that the courts will exercise restraint when implying terms seems to be optimistic, at least in the area of employment law. Undoubtedly Phang would consider the enthusiastic use of implied terms in employment law to be beyond the scope of defensible judicial discretion.

Similarly, his argument that implied terms are useful as a testing ground for legislative terms cannot be relevant in the New Zealand employment context. Parliament has given no indication of an intention to incorporate implied terms into employment legislation.[55] In light of the fact that implied terms have been used by the courts for a number of years without interference from the legislature, the implication must be that Parliament is content to leave the obligations in the hands of the courts. Implied terms are a purely common law phenomenon.

Another suggestion is that where it is unlikely that legislation will be passed in the area of contract law, judges will be less likely to be restrained in their decisions. "Certainly a number of key decisions on the obligation of mutual trust and confidence have been given at a time when the prospects of an expansion of employment protection legislation could not have been slimmer."[56]

The implied term of trust and confidence emerged during the 1980s, which was certainly not a time of legislative restraint in the employment context, which does not appear to fit with this analysis. However, it is true that since the

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54 A Phang "Implied Terms Revisited" [1990] JBL 394, 410.

55 The exception would be the enactment of the "good employer" provisions in the State Owned Enterprises Act 1986 and the State Sector Act 1988. The accepted judicial view is that these provisions incorporate the common law obligations into statute. See *Mathes v NZ Post Ltd (No 3)* [1992] 3 ERNZ 853, 890.

56 Above n 50, 136.

enactment of the Employment Contracts Act 1991, the implied term of trust and confidence has been used to expand the obligations of the parties to an extent probably not envisaged when the term was first proposed.[57] The courts have been willing to use the term as a springboard for creating new obligations, some of which would previously have been considered as separate implied terms. Perhaps the courts in the 1980s were responding to the development of a concept which extended obligations to employers. But it was not until the enactment of the Employment Contracts Act 1991 that judges, concerned with the lack of protection for employees, focused on the use of implied terms to shape the nature of the employment relationship.

The judicial activism regarding implied terms is not without its critics. Howard claims that judges have no authority to "interpret legislation to make it accord more readily with their own policy conceptions than those of Parliament".[58] He argues that the Employment Contracts Act 1991 reflected a change in the way employment relationships are viewed by Parliament, and the courts must not act contrary to that intention.[59]

In a common law jurisdiction the role of the courts is not clearly defined. It is unrealistic to assume that judges will restrict themselves to interpreting and applying law.[60] In many cases, this is impossible where the legislation leaves the courts to define a word or concept. This is seen in the development of the concept of an unjustifiable dismissal.

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57 For example, above n 24, *Stuart* above n 45, *Ogilvy & Mather* above n 53.

58 C Howard *Interpretation of the Employment Contracts Act 1991* (New Zealand Business Roundtable/ New Zealand Employers Federation Publication, Wellington, 1995), 4.

59 Howard cites the majority decision in *Brighouse* as an example of the courts exceeding their judicial function by arbitrarily altering the contract of employment. Above n 58, 11. However, this analysis is flawed, as it fails to acknowledge the historical role of the courts in creating implied terms in contracts. In theory, the courts are giving effect to the whole contract, and not just the express terms.

60 McLauchlan claims that few judges today believe they are restricted to interpreting and applying the law. DW McLauchlan "The 'New' Law of Contract in New Zealand" [1992] NZ Recent LR 436, 447.

It is submitted that the courts are not acting outside their accepted role at common law in creating duties so long as those duties are not contrary to the legislative intention of Parliament. There is no evidence that this is so. Although the Employment Contracts Act 1991 emphasises freedom of association and contract law, there is still evidence that fairness will play a part in employment. This is obvious from the retention of the personal grievance procedures in the Employment Contracts Act 1991, and the extension of these remedies to all employees.

III THE IMPLIED TERM OF TRUST AND CONFIDENCE

If the early examples of implied terms in employment were biased against the employee, the implied term of trust and confidence is a response to that initial trend. The term is notable for its reciprocal nature: the obligation is on *both* parties to maintain trust and confidence in the relationship. Judges are willing to protect employees when the behaviour of their employer steps beyond what is permissible. The recent trend reveals a great deal about the perspectives that judges have of the employment relationship.

A Changing Perspectives on Employment Law

Much has been written about the nature of the employment relationship. Although it is impossible to identify one theory as accurately reflecting the reality of employment, various views have prevailed at times, which help explain the development of implied terms. The different theories may also affect the view of whether it is possible to have a relationship of trust between employers and employees. Two of the main theories illustrate the different approaches.

1 Unitary view

A unitary view of employment emphasises the common values and objectives underlying the employment relationship. It has been described as essentially supporting the right of management to control capital without interference from outside parties.[61] The only legitimate interest is that of the employer, and so opposing behaviour by employees is seen as illegitimate.[62] Good behaviour towards employees is important as part of a human resources policy designed to extract the best performance from labour units.[63] Under this view of employment, a relationship of trust and confidence is possible as long as employees do not act to damage the interests of the employer. Logically, any duties arising under an obligation to maintain that relationship will focus on the duties of the employee in furthering the business of the employer.

Many writers have argued persuasively that until recently, the courts have taken a unitary approach to employment. Forrest claims that the result in *Secretary of State v ASLEF*[64] demonstrates the courts' perspective:[65]

> ...[W]hat is striking about the *A.S.L.E.F.* case is the determination of the judges to hold the work to rule a breach of contract. In doing so they revealed a simplistic unitary approach to the enterprise, an approach which assumed a common interest and a common set of objectives among the parties to the dispute. ... The employees are denied any legitimate interest of their own within the contract.

The tendency of courts to recognise the interests of employers above those of employees is illustrated by the fact that prior to the formulation of the implied term of trust and confidence, the vast majority of implied terms were concerned

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61 Above n 2, 18.

62 Above n 3, 249.

63 Above n 2, 18.

64 Above n 14. The decision in *TISCO v Communication and Energy Workers Union* [1993] 2 ERNZ 779 is also cited as proof of this perspective. See above n 2, 24.

65 Above n 12, 366. In *ASLEF* Lord Denning held that railway employees working to rule were breaching a duty not to obstruct the business of the employer.

with the duties owed by an employee to his or her employer.[66] Napier argues that it is natural for judges to attempt to find a common interest:[67]

> It is, of course, to be expected that judges, faced with the problem of adjudicating conflicts, will try to adopt a compromise solution which maximises what they see as the positive and constructive features of dealings between parties. It is only rarely that the conflict which is an ever-present feature of working relationships is openly acknowledged by the courts.

Unitarism has partially re-emerged in the form of new-right economic principles which argue that the labour market should be unregulated by the government, and that freedom of contract should take primary place in employment law.[68] The unitary perspective is one of individualism and a focus on free-market principles. This view would deny that employees are at any disadvantage in the labour relationship. It also assumes that any interest in opposition to the free operation of the market is illegitimate.[69] In adopting the new-right perspective of employment, the Employment Contracts Act 1991 tends to support a unitary approach to employment.

If judges adopt the new-right viewpoint, it is likely that the implied term of trust and confidence will not be given the wide interpretation that it currently enjoys. The focus on a competitive labour market would emphasise the interests of employers in maximising profits over the interests of employees in achieving the

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66 For example, the duty of fidelity, the duty not to disclose confidential information, the duty to obey all reasonable orders. There were some duties which placed obligations on the employer, such as the duty of care, but these were limited in comparison with the duties imposed on employees. See text at n 10.

67 B Napier "Judicial Attitudes Towards the Employment Relationship - Some recent Developments" (1977) 6 ILJ 1, 9.

68 Above n 2, 18.

69 Such ideas are prominent in two publications released by the NZ Business Roundtable and the NZ Employers Federation. See above n 58; *The Labour/Employment Court: An analysis of the Labour/Employment Courts' Approach to the Interpretation and Application of Employment Legislation* (New Zealand Business Roundtable and New Zealand Employers Federation, Wellington, 1992).

highest standard of living possible. Reducing the cost of labour must be a significant advantage only to employers.

2 *Pluralist View*

A pluralist view of the employment relationship sees it not as a unitary structure, but as a coalition of groups each with their own goals which are equally valid.[70] Some degree of conflict is inevitable as the parties attempt to achieve their objectives. However, it is also accepted that the groups can work together for common purposes, one of which would be the continued viability of the enterprise.[71] This approach would imply that the court holds the balance between the interests of the two parties.[72]

At first glance the pluralist perspective appears to contradict the existence of a relationship of trust and confidence. How can there be trust between parties which are continually in conflict? The answer must be that the parties to an employment contract must cooperate to the extent necessary to support the underlying structures of the organisation. That is, employees have an interest in continuing to work to ensure the business is viable, and employers have an interest in paying workers enough to ensure that the enterprise keeps operating. It is in the interests of both parties to have a safe and happy workplace.

The pluralist view of employment is reflected in the cases which developed the implied term of trust and confidence. For example, in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*,[73] the Court of Appeal emphasised that two interests needed to be taken into account. Bisson J held that when considering dismissal, the decision must be looked at from two perspectives: "fairness to the employee and fairness to the employer".[74]

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70 Above n 62, 260.
71 Above n 2, 16.
72 Above n 12, 370.
73 [1990] 3 NZLR 549.
74 Above n 73, 555.

Which perspective is adopted will tend to affect the content of the implied term. The judge's view of the relationship of trust and confidence will be influenced by his or her general perspective of employment. For example, a judge is more likely to emphasise the importance of each party's interests in the relationship if a pluralist perspective is taken.[75]

B The Origins of the Implied Term of Trust and Confidence

The implied term of trust and confidence is a relatively recent development in the range of implied terms. It has practical significance for the potential effect it has on the obligations of the employer. It is also important because it signals a new approach to the sources and uses of implied terms.

The implied term of trust and confidence originated in England as a response to dismissals which were lawful according to the existing rules, but which were patently unfair. The English cases led the way, but New Zealand courts have not been slow to pick up on the potential of the new trend.

1 The development of the term in England

Constructive dismissal cases had the largest impact on the development of the implied term of trust and confidence. The need for an obligation on the employer to act reasonably arose from the judicial insistence that a constructive dismissal could only occur where the contract of employment was breached. The Court of Appeal in England rejected a suggestion that an employee could be constructively dismissed only because the employer acted unreasonably.[76] *Western Excavating (ECC) Ltd v Sharp*[77] established conclusively that the only

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75 See text at n 102

76 See above n 6, 100-101.

77 [1978] 1 All ER 713.

criteria for constructive dismissal could be a breach of contract. This posed difficulties for judges who did not wish to allow employers to benefit from unreasonable behaviour designed to force employees out of their jobs. It was in response to this problem that judges created the concept of an implied term in employment contracts that the employer will not behave unreasonably. This allows the court to find that unreasonable behaviour is a breach of contract, which means the employee was constructively dismissed in the right circumstances.[78]

> Perhaps another way of stating the test is to say that just as it is a breach of contract for one party to the contract to make it physically impossible for the other to perform, so in the employment context the courts are developing the idea that it is a fundamental breach for the employer to make it psychologically impossible for the employee to perform.

In this area, the fact that the obligation is deemed to be contained in the contract is vitally important, and has allowed the expansion of the term into other areas of employment law.

2 *The implied term of trust and confidence in New Zealand*

Until 1985, the implied term of trust and confidence was relatively unknown in New Zealand. A number of cases had dwelt on the need for the employee to maintain the trust of his or her employer, and this resulted in a number of specific implied terms which were aimed at limiting the acceptable behaviour of the employee.[79] Very few cases examined the obligations of an employer towards his or her employees.[80] However, courts have now recognised that

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78 Above n 6, 102.

79 For example, the duty of fidelity exemplified in *Schilling v Kidd Garrett* [1977]1 NZLR 243; the duty of employees to obey all lawful and reasonable orders of the employer, and the duty not to disclose confidential information.

80 For many years, the most important implied term at that time was the duty of the employer to provide a safe system of work. UK courts have also recognised that in limited circumstances an employer may be subject to an obligation to provide work for the employee. See *Langston v Amalgamated Union of Engineering Workers* [1974] 1 All ER 980.

fairness and trust are concepts which are particularly significant in the employment context.[81] A frequently cited example of this is given by Richardson J, which clearly demonstrates the influence of pluralist theories of employment:[82]

> 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 inquiry 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.

The term was introduced into New Zealand law by two Court of Appeal decisions in 1985. The first case involved a claim of constructive dismissal.[83] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[84] an employee was accused of stealing money. She was held in an office for a period of time until the company's security manager arrived from another town, and then interrogated about the incident. Ultimately the employee resigned and paid the sum of money. Cooke J considered the English constructive dismissal case of *Woods v WM Car Services*.[85] Preferring the formulation of the Employment Appeal Tribunal in *Woods* over that of the Court of Appeal, the judge held that:[86]

> 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

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81 *Auckland City Council v Hennessy* [1982] ACJ 699 is an example of the court insisting on fairness in the dismissal context before 1985.

82 *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275, 285.

83 Constructive dismissal cases continue to base the obligations of the employer in the implied term of trust and confidence. See *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR 415.

84 [1985] 2 NZLR 372.

85 Above n 44. See above n 47, 72.

86 Above n 84, 376.

> of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity ...What can be said without doubt is that there must at least be an implied term or a duty binding on 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.

The second case was *Marlborough Harbour Board v Goulden.*[87] The Harbour Board had resolved to terminate the plaintiff's employment as general manager. The plaintiff brought a judicial review application to order the Board to reconsider its decision, based on a lack of procedural fairness. The Court of Appeal, in upholding the application, considered the principles raised by *Woods* and *Woolworths*:[88]

> [W]e think 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 requirements of fairness have 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 employer that the law may come to recognise it as an ordinary obligation in a contract of service.

Since these two cases were decided, the obligation of trust and confidence has been utilised in a number of areas of employment law. The scope of the term is growing, and the enthusiasm of judges in finding new applications for it shows no sign of diminishing. It is fair to suggest that the contribution of the term to unjustifiable dismissals, including procedural fairness and constructive dismissals is enormous and well established.

The enactment of the Employment Contracts Act 1991 has increased the significance of this term. The move to view employment relationships in

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87 [1985] 2 NZLR 378.

88 Above n 87, 383.

contractual terms has increased the possibility that many employees will suffer from an inequality in bargaining power, and be subject to contracts which contain terms that favour the employer. The fact that the obligation is a contractual term is therefore particularly useful. Courts are able to impose broad concepts of fairness onto employers and employees who may otherwise rely on the express terms of the contract as not forbidding specific action. Of course, this power has been criticised as depending too much on the discretion of the judges.

C Defining the Implied Term of Trust and Confidence

The implied term of trust and confidence is swiftly becoming a fundamental principle in New Zealand employment law. It is recognised that maintaining a level of trust in employment is important for a number of reasons. The first is based on the need for good working relations in organisations to promote harmony and productivity.[89] Another is that where a relationship of trust exists, disputes may be more likely to be settled through negotiation rather than by legal sanctions.[90] Fox also argues that there will be a benefit to society as a whole if the level of trust in employment is enhanced.[91]

The exact nature of the duty is not clear from the case law. Judges have formulated the obligation in a number of ways, and there is confusion about how the existing implied terms relate to the implied term of trust and confidence. Because the concept has been developed in an ad hoc manner, it is essential that the principle is clearly and satisfactorily defined. The best place to start is with the meaning of a relationship of trust and confidence.

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89 See above n 73, 556.
90 Above n 3, 168.
91 Above n 3, 14.

1 *Defining trust*

The Concise Oxford Dictionary defines trust as: "a firm belief in the reliability or truth or strength etc. of a person or thing"; "the state of being relied on"; "a confident expectation".[92] Confidence is defined as: "firm trust", "a feeling of reliance or certainty".[93]

Fox claims that "trusting behaviour" consists of actions that increase one's vulnerability to another who is not under one's control.[94] However, "trust" is also used in situations where little or no faith is involved. Fox gives the example of the parents of a kidnapped girl who ask the kidnapper how they know she will be returned safely. The kidnapper replies that they will have to trust him. In that situation the parents do not really trust the kidnapper, but feel constrained by circumstances to submit to his or her discretion.[95] This type of trust is usually encountered where one party is inferior in power or knowledge to another.

Fox identifies three other points about trust.[96] First, trust relations are essentially reciprocal. "Trust tends to evoke trust, distrust to evoke distrust". Second, a perceived decline of trust on the part of one party will be replaced by distrust. "To say that X does not trust Y is to say that he distrusts him. As trust shrinks, distrust takes over". Finally, there are two ways in which trust is manifested in social relations. The first is expressed in personal terms: how a person feels about his or her friends and enemies. The second is a form of institutionalised trust: the idea that trust or distrust is embodied in the rules, roles and relations established among people. They could be formal rules or

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92 *The Concise Oxford Dictionary* (8 ed, Oxford University Press, New York, 1990) 1312.

93 Above n 92, 239.

94 Above n 3, 66.

95 Above n 3, 66-67.

96 Above n 3, 67.

informal understandings, customs and conventions. These reflect a level of trust to the extent that the rules are observed by people.[97]

2 *The level of trust*

A relationship of trust is not a static concept. The level of trust will change as the parties to the relationship alter their position in response to the actions of others. Fox distinguishes between high-trust and low-trust employment relationships.[98]

A low-trust situation is often found where employees have little discretion over the performance of their jobs. The parties bargain to reduce the relationship to formal terms in order to cope with what is seen as divergent interests. There is a strong reliance on formal rules and bargains. Parties agree to terms as a result of mutual coercion, and there is no incentive to do more than the minimum requirements. Fox states: "[t]here is no development of mutual bonds of support expressive of reciprocated trust: only the calculated wariness and suspicion expressive of reciprocated distrust." [99]

On the other hand, a high trust relationship is usually characterised by a large amount of discretion in the employee's job performance. There is a perception of shared goals and shared responsibility:[100]

> Where this high-trust reciprocation is at its fullest, defensive behaviour by individuals and groups is at its minimum. The mutual support that both expresses and promotes high trust 'enables' each member to be more himself, to feel less necessity for fighting to obtain his 'rights'...

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97 Above n 3, 68. Fox concentrates on the latter category in his study of trust and employment.

98 See Appendix I.

99 Above n 3, 75.

100 Above n 3, 79.

These two options are the ends of a continuum, along which most employment relationships fall.

Fox correctly surmises that it will be rare to find a high trust situation in employment relationships. These would most likely be found in small firms, where there is almost a family atmosphere. Others agree that the growth of large organisations has made the actual existence of trust in employment highly unlikely.[101] There appears to be a pessimistic consensus that modern employment situations are not capable of creating trusting relationships.[102]

3 *The impact of perspectives of employment on the relationship of trust and confidence*

No matter which perspective of employment is adopted, it is possible to accept that some form of trust is possible, and indeed important, in the relationship. Under a unitary paradigm, it is easier to believe the relationship exists, due to the assumption of a common interest in the enterprise (from the employer's perspective). However, the obligations will be biased in favour of employers, to ensure that their interests are not infringed on by the actions of employees.

A pluralist approach does not appear to be conducive to a high-trust relationship due to the presumption of a conflict between the two parties. However, pluralism does not rule out the existence of trust. The requirements of ensuring the business is at least viable should allow some level of trust to be established. The assumption of conflict will mean that the level of trust may not be able to be very high. On the other hand, the equality of the trust under this paradigm is greater than under the unitary approach. Because the interests of all the parties are legitimate, there is a dependence on each other to ensure that the underlying goals are achieved. The employer is not viewed as having the right to coerce employees to his or her perspective, and so must rely to a greater extent

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101 Above n 50, 130.

102 Above n 3, 362; above n 50, 130; above n 6, 108.

on the confidence of the employees. Employees have a legitimate expectation that the employer will consider their perspective and needs. For this reason, the trust that *does* exist will be more legitimate and important to the relationship.

4 *A standard of trust for the court*

The question is what standard should the court set in determining whether the relationship of trust has been damaged. One possibility is that the court attempts to encourage good employment practices by expecting parties to live up to a standard of high trust. Judge Finnigan of the Employment Court appears to see this standard as a goal:[103]

> In seeking a better quality of work life, all are on the same road, heading in the same direction, Their goals may be different, even conflicting. In response to a normal human need, however, each person is seeking a feeling of fulfilment. In meeting that need for themselves, each is bound sooner or later to acknowledge the similar need of others, and in some way or other accept the responsibility to help the other meet those needs, just as the other is helping him.

The other possibility is that the court insists on a minimal level of trust. In the majority of cases, this would reflect the reality.[104]

> If the duty of trust and confidence means little more than a reciprocal obligation for employers and employees to treat each other with a certain decency, this is a satisfactory development. The problem is that the duty is so vague that it could be used as a tool to forge a high trust relationship in the employment contract, even though that contract does not exist in practice. ... [T]he law could be in danger of trying to impose unrealistic obligations on the parties.

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103 Judge Finnigan "Equity and Equality in Employment, With Particular Reference to New Zealand" [1993] NZLJ 402, 404.

104 Above n 6, 107-108.

The most suitable approach would be for the court to insist on a minimum level of trust. That level would not be set at the lowest point on Fox's continuum, at which no trust in fact exists. Rather, the point should be at the minimum point at which the parties' mutual interests coincide, taking account of the presumption that a certain level of conflict is inevitable. To insist on a higher level could be difficult in many situations, and open the court to accusations of imposing too high a standard.

The standard in each case will be different, as the court will take into account the situations of the parties. The courts already accept that for some senior employees the duty of fidelity is greater due to their position of responsibility.[105] In deciding whether the relationship of trust has been damaged, the court often takes into account the nature of the relationship and the history of the parties.[106] The standard of behaviour expected of the employer should also vary depending on the seniority of the employee. A senior employee will expect greater consultation from his or her employer. Lower status employees, on the other hand, are more vulnerable to an abuse of position by the employer.

Another issue is whether the courts can determine that the relationship has been damaged when there is no relationship of trust in reality. It would appear to make a nonsense out of the implied term if it was based on damage to a nonexistent relationship. If it could be argued that there is (or could be) no relationship of trust and confidence because it has been destroyed, then subsequent behaviour by the employer or employee could not amount to a breach of the term. However, this argument ignores the prescriptive role played by the implied term. Judges now expect employers and employees to behave to a minimal standard in the employment relationship.[107]

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105 See above n 2, 1008.

106 *Anderson v Attorney-General* Unreported, 23 October 1992, Court of Appeal, CA 292/91, 9.

107 Above n 50, 130.

> Since there is now a duty on employers, as a matter of law, to treat their employees in a manner consonant with mutual trust and confidence, then the absence of such trust and confidence, as a matter of fact, should have no legal consequences for any aspect of employment law.

There has been no suggestion by the courts that the implied term of trust and confidence is not available where it can be demonstrated that no trust actually existed. To do so would be to invite a race to the bottom - the situation where once one party has acted so as to destroy the trust, the parties may act with impunity without fear of being liable for breach of the implied term. There would be no incentive for the parties to maintain the relationship if that meant they escape liability. This approach is supported by the cases. Cooke J in *Marlborough Harbour Board v Goulden* held that "the relationship of trust and confidence which *ought* to exist between employer and employee imports duties on both sides..."[108] It is only some employers who will act to damage the relationship. Good employers will probably never run foul of the term to start with.[109]

5 *Judicial attempts at definition: searching for a standard*

Although the obligation has been a part of employment law since 1985, there has been some confusion about the precise wording of the principle. Judges have noted that the obligation is not easily defined in the abstract, and this is very true.[110] However, it is desirable to identify a common standard to avoid uncertainty.

One common version is based on the Employment Appeal Tribunal's formulation in *Woods*.[111] This is that employers (and employees) "will not, without reasonable and proper cause, conduct themselves in a manner

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108 Above n 87, 383.
109 Above n 50, 136.
110 See *Talbot v Air New Zealand Ltd* [1995] 2 ERNZ 357, 362.
111 [1981] ICR 666, 670.

calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." This formulation has been adopted in a number of cases.[112]

The obligation has also been described as a positive duty on both parties to act fairly and reasonably towards each other in the employment relationship.[113] On similar terms is the proposition that the obligation is of "fair dealings" between the parties.[114]

There is some confusion about these various formulations of the principle. In many cases the different versions are treated as different implied terms. One judge has treated them as discrete obligations, which were "separate facets of the main principle requiring mutual trust between employer and employee".[115] This confusion is a result of the ad hoc development of the implied term. It is also a result of the way the pleadings are formulated, where the different versions of the implied term of trust and confidence are often pleaded as separate implied terms.[116] This trend is undesirable, as it only increases the confusion and mystery surrounding the term. It is important to establish the obligations created by the relationship of trust and confidence. It is clear that there are not two terms, as the two versions deal with the same subject matter. It is therefore a matter of choosing between the two formulations.

In *Brighouse Ltd v Bilderbeck* Cooke P noted that various wording has been used by judges to express the obligation, but that none could be significant for

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112 For example, *Waugh v Coleman Consolidated Business Ltd (T/A The Cafe, the Bar and the Casino)* [1995] 2 ERNZ 251, 257-258; *Samuels v Transportation Auckland Corporation Ltd* [1995] 1 ERNZ 462, 475; above n 82, 278; above n 24, 164, 179. This version is sometimes shortened to an obligation to *maintain* trust and confidence. See *Caledonian Cleaners and Caterers (1992) Ltd v Hetariki* [1994] 2 ERNZ 400, 410.

113 For example, *Ireland v Rattray & Son* [1992] 3 ERNZ 816, 820; *Gallagher v Watercare Services Ltd* [1994] 1 ERNZ 511, 536.

114 See *New Zealand Nurses Union v Air New Zealand Ltd* [1992]3 ERNZ 548, 577.

115 *Turner v Ogilvy & Mather* [1995] 1 ERNZ 11, 28.

116 For example, see *Palmer v Lees Power Sed Ltd* [1996] 1 ERNZ 165, 184-185.

that case.[117] This raises the question as to whether the wording *could* be significant in some circumstances.

The most obvious difference between the two options is that the first formulation is expressed in a negative manner - the employer or employee must *refrain* from certain destructive behaviour. The latter is expressed in a positive way - the parties must *act* fairly and reasonably. Theoretically, there is scope for a difference between the two approaches. An obligation *not* to act in a way that will seriously destroy the relationship of trust is narrower than an obligation *to* act fairly. It is possible to identify behaviour which does not damage the relationship of trust and confidence, but would not amount to the parties acting reasonably towards each other. Such behaviour might consist of one party not actively helping the other in a non-vital matter.

It is possible to argue that the obligation to maintain trust and confidence is more consonant with a minimal level of trust. The duty to be fair and reasonable would attempt to impose a higher level of trust in the relationship, one that is inconsistent with reality.

The theoretical differences in the way the term is expressed may not be significant. More important is how the term is applied in practice. Rideout claims that "[d]estruction of 'trust and confidence' is really no more than a technical sounding name for intolerable behaviour the existence of which destroys the ability to work together".[118] It is suggested that the courts will look for behaviour that meets this practical standard, rather than splitting hairs about positive and negative duties. As the outcome of the case will depend on the view of the judges in determining whether the behaviour breached the standard, the result will be difficult to predict. It may well make little difference in practice which formulation is chosen.

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117 Above n 24, 164.

118 Above n 47, 70.

A review of the case law demonstrates the difficulty in choosing one formulation over the other - both have been used by the courts. In light of the fact that in practice there is little difference in the approach of the judges, it would perhaps be more appropriate to rely on the *Woods* approach for two reasons. First, it is the formulation preferred by Cooke P in the first New Zealand case on the topic,[119] and is usually applied by the Court of Appeal. Second, it is theoretically narrower than the second version, and corresponds with a minimal level of trust in the relationship. A narrower formulation may convince the judges to be restrained in finding that the behaviour has breached the implied term.[120]

IV RE-EVALUATING EXISTING DUTIES IN LIGHT OF THE IMPLIED TERM OF TRUST AND CONFIDENCE

A Rethinking the Basis of Existing Implied Terms

A number of implied terms existed prior to the implied term of trust and confidence as formulated in *Woods*. The most analogous to that implied term is the duty on an employee to act faithfully towards his or her employer. However, a number of other terms could also be said to be closely related to the implied term of trust and confidence. These include the duty to provide work and obey instructions, the duty to provide a safe system of work, and the duty not to divulge confidential information. It is submitted that these obligations are not separate terms, but actually arise out of the relationship of trust and confidence that is deemed to exist between the parties.

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119 See above n 84, 376. The Judge preferred the EAT formulation over Lord Denning's duty on an employer to be "good and considerate". This latter approach comes close to the requirement to act fairly and reasonably.

120 This is particularly important considering the approach of the courts to employee's obligations. See text at n 131.

The implied terms identified by the courts to date are broad in scope and cover a variety of situations that can arise in the employment relationship. They have generally focused on the obligations owed by the employee to the employer, although more recent decisions have recognised that employers owe some reciprocal duties. However, the implied terms are rarely seen as connected in any theoretical sense. It is only recently that courts have begun to recognise the interconnection of the implied terms, and only to a limited degree.

It is submitted that in most cases, if not all, the implied term can be explained as being based on the idea that a relationship of mutual trust and confidence should exist between employee and employer, which should not be unreasonably damaged or destroyed.

There may be some concern that recognition of such a basis could lower the threshold for the behaviour which constitutes a breach. In the course of employment, it is to be expected that there may be periods of strained relations, especially at times such as bargaining for new contracts. However, this objection is answered by pointing out that behaviour will not damage the relationship unless it is unreasonable or unjustifiable. In the employment relationship, the parties will be expected to be robust in their dealings. Courts will not hold that the relationship has been damaged by the creation of hurt feelings. In fact, it is desirable that a reasonably strict threshold be set, given the amount of discretion the judges have in determining the level of behaviour.

1 The duty of fidelity

Cooke J (as he then was) expressed his opinion in *Woolworths* that the implied term of trust and confidence "would be a corollary of the employee's duty of fidelity". Others suggest that the duty of fidelity underlies more particular duties

such as the implied term of trust and confidence, and is more fundamental than any of them. [121]

With respect, although it is correct to say that the duty of fidelity predated the implied term of trust and confidence, it must be inaccurate to describe the former as underlying the latter duty. Rather, the implied term of trust and confidence is a broad duty, from which the obligations contained in the duty of fidelity flow.

Support for this proposition lies first of all in principle. The duty of fidelity applies only to the employee, whereas the implied term of trust and confidence has implications for both employee and employer. It would be difficult to say that the duty of fidelity is the basis for the employer's obligations under the implied term of trust and confidence, as fidelity has never been applied to employers. In fact, this extension of the obligation is one of the major advantages of the more recent term.

Second, it is possible to explain the duty of fidelity in terms of the destruction of the relationship of trust and confidence. If an employee acts in a way that breaches the duty of fidelity, the act will always be one that could be said to breach the implied term of trust and confidence. For example, in the leading case of *Schilling v Kid Garrett Ltd,* [122] the respondent's actions in negotiating to obtain the agency from his employer before and during his notice period could be explained in terms of destroying the relationship of trust and confidence underlying the employment relationship.

Later cases in which the duty of fidelity is pleaded refer to the relationship of trust and confidence. In *Tisco Ltd v Communication & Energy Workers Union,* Cooke P found that: [123]

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121 Above n 2, 1004.
122 Above n 79.
123 [1993] 2 ERNZ 779, 782. Emphasis added.

> The employment relationship gives rise to reciprocal duties among which are the employee's duties of fidelity and good faith. The latter are illustrated by cases cited in the judgment under appeal, such as *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 All ER 350 and *Schilling v Kid Garrett Ltd* [1977] 1 NZLR 243 (CA), *but they are all part of a wider concept which in our view is now recognised in modern industrial law.* See, for example, *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* ... [1985] 2 NZLR 372 (CA) and the English authorities there cited.
>
> Often recognition of this concept benefits employees, but it may benefit employers also, as the present case demonstrates. Any conduct by an employee which is likely to damage the employer's business, for instance by impairing its goodwill, or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty. *The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence.*

Cooke P's comments make it very clear that he sees the two duties as interrelated. What is not obvious from the extract is exactly *how* the duties interrelate. The last sentence suggests that the implied term of trust and confidence flows from the duty of fidelity. However, in the previous paragraph the judge mentions that the duty of fidelity is part of a wider duty, found in *Woolworths*. On balance, it seems more likely that Cooke P sees the obligations of fidelity as sourced in a broader principle of trust and confidence. This is the more logical conclusion, given the application of the implied term of trust and confidence to *both* parties.

The duty of fidelity was also discussed by the Court of Appeal in *Big Save Furniture v Bridge*.[124] Language consistent with the implied term of trust and confidence was used to describe the test for determining whether the term of fidelity was breached. It was emphasised that the test was not dishonesty, but some lesser behaviour. Tipping J put it simply: [125]

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124 [1994] 2 ERNZ 501.

125 Above n 124, 517.

> As stated in *Tisco* the duty of fidelity and loyalty which an employee owes to his employer is broken when there is conduct which undermines the relationship of trust and confidence which must exist between employer and employee. Whether the conduct is sufficiently serious to warrant instant dismissal is a matter of fact and degree which must be judged against the circumstances of the individual case.

The test for a breach of fidelity is defined in terms of a breach of the implied term of trust and confidence.

It is submitted that effectively the terms are the same in most situations. That is, a breach of the duty of fidelity will always involve some breach of the confidence and trust between employer and employee.

2 *The duty of care*

Under this term, the employer is obliged to provide a safe system of work, and the employee is deemed to undertake to be competent for the job, and to take reasonable care in carrying out the tasks assigned.[126] If an employer does not provide a safe system of work, he or she could be regarded as damaging the confidence that the employees are entitled to have in the employer. Similarly, the employer could reasonably claim that the failure by an employee to take reasonable care in the job is a breach of their trust in that employee. Certainly such an argument can be made if the employee misleads the employer as to their capabilities.

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126 See above n 2, 998-999.

3 *Confidential information*

An implied term is often used to justify the idea that employees must not disclose confidential information obtained during their employment. A unique feature of this term is that aspects of the obligation continue after the employment is ended. However the nature of information protected will be different once the employee has left the employer's business. Considerable debate has taken place over the exact nature and extent of this implied term, but it is not my intention to examine the term in depth. I would note two points.

First, it appears that there is an overlap between this duty and the duty of fidelity. One possible explanation for the different standards of information protected is that disclosure of lesser levels of information will not breach the duty of disclosure, but actually the duty of fidelity. The argument is that: "[t]he breach would consist of the perceived damage done to the employer's business rather than necessarily turning on the strict confidentiality of the information in question".[127] In fact, a more fundamental reason for the breach of the duty is the damage done to the relationship of trust that exists in the employment relationship. In many cases, the information would have been available elsewhere, and so it is not the employer's business that is primarily affected, but confidence in the employee.

Second, the duty continues to have effect past the termination of employment. It may be argued that it is hard to justify this term with regards to the implied term of trust and confidence in the employment relationship, if the relationship no longer exists. However, it could be argued that the relationship at the time of employment might suffer if an employer was concerned that employees would be free to disclose confidential information once they had left the job. By extending this obligation further, an employer is encouraged to trust his or her employees during the term of the employment.

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[127] See above n 121, 1012.

4 *The duty to provide and perform work*

There is a long-standing obligation on employees to perform work provided and to obey lawful and reasonable instructions. A breach of this obligation damages the confidence the employer has in the employee. The perceived severity of the damage can be seen in the fact that the employer may be justified in instantly dismissing the employee if the conduct is sufficiently serious.[128] In some cases, the courts have insisted on a high standard of loyalty by employees, which may go beyond the desirable limits of the implied term.[129]

A different development is that in certain situations the employer may be under an obligation to provide work to employees if the work is available.[130] The extent of this obligation is unclear, and is probably restricted to situations where the employee's income or reputation is reliant on availability of work. In these situations the denial of work is far more likely to damage the employment relationship, as the employee depends on the work for reasons beyond those found in more usual employment situations.

B *The Remaining Imbalance in Application*

Although the courts are attempting to bring a balanced perspective to the implied terms, there is evidence that the level of trust actually being imposed on the parties is unequal. The level of trust and loyalty expected of employees under the duty of fidelity is higher than the level of trust expected from

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128 See *Samuels v Transportation Auckland Corporation Ltd* [1995] 1 ERNZ 462.

129 See *Sim v Rotheram Metropolitan Borough Council* [1987] Ch 216; above n 15. See text at n 132.

130 Above n 80. The New Zealand position is discussed in *Heenan v Broadcasting Corporation of New Zealand* Unreported, 31 May 1979, Supreme Court, Wellington Registry, A 159/78; *Rank Xerox (NZ) Ltd v U-Bix Copiers and Anor* Unreported, 20 December 1985, High Court, Auckland Registry, A 1407/85.

employers under the implied term of trust and confidence. Merritt claims that the imbalance is sourced in the origins of the common law obligations.[131]

> Statistics of cases under the Masters and Servants Acts foreshadowed the inbuilt imbalance between the implied common law obligations of employer and employee - the employee's duty of faithful service being basic and uncontrovertible, the employer's duty to pay wages being usual but arguably not essential.

One example of this imbalance is *Tisco Ltd v Communication & Energy Workers Union.*[132] The employee was an electronics technician who ran a business in his spare time repairing television sets and selling them. The Employment Court found that the business did not compete directly with the employer's business. However, the Court of Appeal found that the behaviour of the employee breached the implied term of trust and confidence in three ways. The first, abusing the staff concession scheme, is arguably correct. However, the following three breaches appear to impose very high standards of trust on the employee. These were: [133]

> ... the making of money, essentially by repair work, through buying old machines cheaply and renovating them; the obvious risk that customers of the employer might elect, instead of repair by TISCO, to sell the appliances to the employee in his own business; and the souring of the relationship between the retailers and TISCO because of TISCO's apparent failure to restrict the activities of its own employee.

These factors are not insignificant. However, with respect the Court failed to take into account the employee's perspective. He was acting in his own time, and his business was mainly concerned with machines that would not normally be dealt with by his employer due to their age. The Court of Appeal appears to come close to the approach of the court in *ASLEF* in imposing a very high

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131 Above n 9, 68.
132 Above n 123.
133 Above n 123, 782.

standard on the employee, while ignoring his interests in making a living. It certainly imposes a standard beyond a minimal level of trust.

On the other hand, the standards which are imposed on employers under the implied term of trust and confidence seem to tend towards low-trust levels. McKay J has commented that:[134]

> The implied term does not require employers to conform at all times to the highest standards of management practice. That would be an unlikely obligation for any employer to accept and it is certainly not one which could be implied into terms of employment where it is not expressed.

The court recognised a distinction between the standard of behaviour required towards different classes of employees. However, this comment indicates that the court was not insisting on the same high standard of behaviour required of employees under the duty of fidelity.

One explanation for the inequality could be the fact that the duty of fidelity was developed before the implied term of trust and confidence, and so the courts base their decisions on the precedents already established. This is not a sufficient justification for the different standards. The courts have very broad discretion over what behaviour is considered to breach the implied term of trust and confidence. The decision will ultimately reflect the perspective of the judge. Therefore, the conclusion must be that New Zealand courts still approach the employment relationship with an unbalanced view of the obligations owed.

The question for the court must surely be whether, without good cause, the employee has *unreasonably* acted so as to destroy or *seriously* damage the relationship of trust and confidence. As already discussed, it is desirable for the courts to use a minimal level of trust as the standard. In *ASLEF* the employees were undertaking industrial action.[135] There may be some situations where the

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134 Above n 106, 10.

135 Above n 15.

parties expect to encounter adverse behaviour, the most obvious example being bargaining. The threshold in that situation should be higher than usual,[136] as the parties are almost certain to be in conflict about the outcome of the negotiation. The inquiry should be whether, in obstructing the employer's business, the behaviour unreasonably damaged the relationship. It is hard to imagine that this question could be answered in the affirmative, taking into account the circumstances.

V THE IMPACT OF THE IMPLIED TERM OF TRUST AND CONFIDENCE IN EMPLOYMENT LAW

The implied term of trust and confidence is easily one of the most important developments in employment law in the last 10 years. The courts have applied the term in a number of areas of employment law to expand obligations and rights under the employment contract. While not aiming to give a complete description of the development of the implied term of trust and confidence, this section will examine some of the more significant developments that have occurred recently. It will be seen that not all developments are satisfactory, and there may be a feeling emerging among some Court of Appeal judges that the expansion of the term is reaching its limits.

A Unjustifiable dismissal

When the action for unjustifiable dismissal was created, no attempt was made in the legislation to define "unjustifiable". The courts were left to determine what standards of behaviour would make a dismissal unjustifiable. It is not necessary to refer to the implied term of trust and confidence in setting the standard, but this is what a substantial number of judges have done. The term has been commonly used in establishing the standard of behaviour expected of employers.

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136 See *Unkovich v Air New Zealand* [1993] 1 ERNZ 526. See also text at n 169.

For example, the Employment Court considered the standard of behaviour that would justify summary dismissal in *Samuels v Transportation Auckland Corporation Ltd.*[137] The employee was dismissed for disobeying an order from his employer. Judge Colgan argued that the test was not whether the order was lawful, because it is not fair to "expect an employee under stress to understand that assertion, and to apply it objectively in assessment of his or her behaviour".[138] The Judge held that an employee could be summarily dismissed if the disobedience was serious enough to warrant dismissal, meaning it deeply impairs or destroys the confidence and trust in the relationship.[139]

The action for unjustifiable dismissal has reduced the emphasis on express terms, and given weight to implied terms in the contract which require fairness. In *Haddon v Victoria University of Wellington* the full Employment Court noted that "in general, an employer cannot rely on the contractual term to operate to end the contract where the employer has not complied with the duty of fair dealing".[140] A similar statement was made by Cooke P in *Telecom South Ltd v Post Office Union (Inc)*.[141] The President of the Court of Appeal held that an express notice provision "does not override or displace duties central to the employment relationship".[142]

Colgan J discussed the role of the implied term of trust and confidence in dismissals in *Unkovich v Air New Zealand*:[143]

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137 Above n 128.

138 Above n 128, 472.

139 Above n 128, 475. See also *BP Oil NZ Ltd v Northern Distribution Union* [1992] 3 ERNZ 483, 487. Of course, this standard is as difficult for an employee to measure as whether the order was lawful.

140 [1995] 1 ERNZ 375, 385.

141 Above n 82, 278.

142 It should be noted that these comments were made in the context of unjustifiable dismissals. It is unlikely that the judges intended them to support the idea that express terms cannot override implied terms generally. However, the recognition of the importance of the implied term of trust and confidence may indicate that should the question of contracting out of the implied term arise in another context, the courts may be reluctant to allow it to be overridden by an express term.

143 Above n 136, 579.

> Not only do I consider that non-compliance with contractual terms and breaches of the obligations of trust, confidence and fair dealing may independently cause a resultant dismissal to be unjustified but, as in this case, breach of contractual terms may be a failure to comply with the obligations of fairness, trust, and confidence implied in all contracts of employment.

It is clear that the relationship of trust and confidence is very influential in the cases on unjustifiable dismissal. The courts have found it a useful standard by which to judge the actions of the parties.

B Wrongful dismissal

The contribution of the implied term of trust and confidence has been particularly noticeable in the area of wrongful dismissal. A number of developments involving the term are broadening the scope of wrongful dismissal.

The availability of an action for wrongful dismissal was confirmed in *Ogilvy & Mather (NZ) Ltd v Turner.*[144] That case involved the dismissal of an advertising executive following a disagreement with another senior employee. At the appeal on jurisdictional issues, Cooke P discussed the relationship between the statutory scheme and the common law remedies. He stated that "[c]ommon law remedies for wrongful dismissal and common law implied terms are becoming closer to the redress given and the obligations recognised by the personal grievance procedure."[145] The implied term of trust and confidence has influenced the move closer to the statutory framework. There are still some differences between the actions, and it is for the plaintiff to decide which form his or her action will take.

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144 [1994] 1 NZLR 641.

145 Above n 144, 644.

The implied term of trust and confidence has provided the courts with a useful tool to mitigate the harshness of the traditional common law action. Traditionally, the action for wrongful dismissal was restricted to instances where the employer breached the notice period of the contract. The only available remedy was damages to the amount of lost wages for the notice period. The implied term of trust and confidence has expanded the basis on which employees can recover in a wrongful dismissal action. At common law the rule was that even if the actions of the employer was unfair, the employee could not recover if the notice period was observed.[146] However, if the actions of the employer breach the implied term of trust and confidence, the courts are now prepared to find that the employee was wrongfully dismissed. This was the situation in *Waugh v Coleman Consolidated Business Ltd (T/A The Cafe, the Bar and the Casino)* where an employee was dismissed in a manner that was procedurally unfair.[147] The court found that the manner of the dismissal caused damage to the implied term of trust and confidence and amounted to a wrongful dismissal.

The progress in this area may have struck a obstacle in *Stuart v Armourguard Security Ltd,* a recent wrongful dismissal case.[148] McGechan J reluctantly held that where the contract allows employers to dismiss an employee on notice without cause, that power could not be subject to an implied term that it should be exercised according to a fair process. The judge made it very clear that this was not a result he would have desired, but he felt constrained by authority.

McGechan relied on the Court of Appeal decision in *Andrews v Parceline Express.*[149] That case involved a contract for services, but the Court considered it to be very similar to an employment contract. The plaintiff's contract was terminated by Parceline Express with one month's notice. The plaintiff alleged a breach of implied terms in the contract that a reasonable period of notice of six

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146 Above n 2, 1072.
147 [1995] 2 ERNZ 251. The defendant argued that it was a dismissal for cause.
148 [1996] 1 NZLR 484, 494.
149 [1994] 2 ERNZ 385.

months was required, and that the parties were under an obligation to act fairly and reasonably towards one another. The Court held that there was a term of the contract that it was terminable on six months notice, and that the obligation to act reasonably and fairly towards each other has to subsist with the first term. It appears from the case that the Court felt that the injustice had occurred in the breach of the notice period, and not from any unreasonable behaviour on the part of the defendant.

The passage relied on by McGechan J was as follows:[150]

> Mr Jeffries also argued that there was an implied term that Parceline would exercise its power of termination reasonably. The first and simple answer to that proposition is that no such implied term was pleaded. Such an implied term cannot reasonably be read into para 11(c) either in itself or particularly in conjunction with para 11(b) stating that the contract was subject to a 6 months' notice of termination. That point aside, there is absolutely no foundation for implying into a contract of this kind a term whereby a clear and express power to terminate on so many months notice is to be subject to a limitation that it be exercised reasonably. The scheme of the December 1987 contract is to provide separately and distinctly for termination without cause and then for termination for cause. The same must apply to the January 1991 contract. There is no basis for any implication to the contrary.

The Judge in *Stuart* read this passage as forbidding any implied term requiring procedural fairness where there is power to dismiss on notice without cause. He considered the Court of Appeal to be laying down the proposition that a "without cause" term in a contract cannot be impaired by some further implied term requiring fair process.

The decision in *Andrews* does appear to have the effect that McGechan J stated. However, there could be an alternative explanation. It is significant that the Court of Appeal mentioned that the implied term had not been pleaded.

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150 Above n 149, 392.

Therefore, it must be different to the implied term that the parties act fairly and reasonably toward each other in all the circumstances of their contractual relationship, which *was* pleaded. This wording has been used to justify procedural fairness in the past. It could be that what was argued before the court was not reasonableness in procedure, but reasonableness in the decision to exercise the power to terminate. This would make sense for two reasons.

First, it is easy to understand that the court would reject such a proposition. The ability for employers and business people to manage their affairs without interference is respected by the courts. This is clear from the redundancy cases. The courts would not wish to second-guess the decision of an employer to terminate a contract where he or she was justified in doing so.

Second, as McGechan J mentioned, the effect of the alternative interpretation goes against the trend of wrongful dismissal cases. Cooke P has recognised the closing of the gap between common law and statutory remedies for dismissal. In the *Andrews* case, Tipping J addressed the problem of whether to award damages for distress and stated that the "common law is entitled to develop its principles and its approach to contemporary problems bearing in mind, and by analogy with, the way the Legislature has dealt with allied subjects".[151] If the court was willing to move towards the legislative method of dealing with damages, it seems strange that it would deny movement towards accepting procedural fairness requirements which are part of the personal grievance action. Of course, damages for humiliation are express statutory provisions, while procedural requirements were developed by the courts.

The decision in *Stuart* can also be challenged on the grounds that it is contrary to the Employment Court and Court of Appeal decisions in *Ogilvy & Mather*.[152] The Employment Court decision argued that the lack of procedural fairness accorded to the plaintiff breached the implied term of trust and

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151 Above n 149, 397.

152 Above n 115; *Ogilvy & Mather v Turner* [1996] 1 NZLR 641.

confidence.[153] Colgan J also held that the implied terms were not 'swamped' by the managerial prerogative.[154] With respect, the comments in this case, which were not overturned by the Court of Appeal, are directly relevant to the *Stuart* case. There is a clear indication that the employer's right to dismiss under the contract is limited by the implied term of trust and confidence.

To distinguish between dismissals with or without cause is to introduce an artificial division in the cases. Employers wishing to dismiss for cause would be able to by-pass the requirements of fairness by alleging the dismissal was actually without cause.[155] There is little justification for alleging that there is no need for fairness where the dismissal is without cause. The implied term of trust and confidence is flexible, and the standard of behaviour required will depend on the circumstances. Obviously, the courts will require greater procedural fairness in cases where the employer alleges misbehaviour on the part of the employee. The judge himself recognised the problem with the distinction: [156]

> The difficulty, with respect, is that the dichotomy of clear implied terms allowing both dismissal for cause, requiring procedural fairness, and without cause on reasonable notice will be very common. It is difficult to see how a term requiring fair process as an adjunct to dismissal without notice will come to be implied, except as a rare exception. That is not my preferred outcome. Nor does it align with the previous trend.

It is submitted that the way remains open for procedural fairness requirements to be accepted in wrongful dismissal actions where the contract gives employers the power to dismiss without cause. It would be unusual for the courts to turn their backs on the advances made in the last few years, in light of judicial comment about the development of the wrongful dismissal action, and the impact of the implied term of trust and confidence. Generally, the courts are

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153 Above n 115, 37.

154 Above n 115, 28.

155 Employers would, of course, run the risk that employees will take personal grievances, in which case fairness will automatically be considered. The distinction discussed only matters in actions for wrongful dismissal, which are usually taken because the personal grievance procedure is unavailable for some reason.

156 Above n 148.

following a desirable trend, which will expand the options available to an employee. However, *Stuart* demonstrates the difficulties that can arise when the law is not settled. It is hoped that future decisions will clarify the law applying implied terms to this area of employment law.

C Damage to Reputation

Even if the courts adopt McGechan J's approach, this does imply an end to reasonableness in wrongful dismissal cases. The judge in *Stuart* found for the plaintiff on the grounds that the employer had breached an implied term in the contract that it would not, without reasonable or proper cause, act so as to damage the employee's reputation or cause distress or humiliation. A term similar to this was first proposed in *Whelan v Waitaki Meats Ltd* [157] although it could be argued that the language of that decision indicated that it was closer to a term implied in fact than a term implied in law. However, the term has been adopted by other judges,[158] and McGechan J viewed it as a part of the requirement of trust and confidence.[159]

> The complexity of modern employment situations necessitates confidence and trust. The modern "free market" employee is relatively exposed, and necessarily must place a degree of faith in the employer. Dismissal can be a devastating blow. Alternative employment may not be easy to find, and a damaged reputation may be a grave or even fatal hindrance. It is right the law now recognise resulting employer obligations to not act in manner likely to cause distress, or loss of reputation, without proper cause. ... In adopting such a policy approach to the common law, the Courts will merely be following a position approved by Parliament in relation to all employment contracts through provision for "unjustified dismissal" and personal grievance action with extended statutory damages. ... The recognition and enforcement of such an implied term is development. It is not revolution. The time has come.

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157 [1991] 2 NZLR 74.

158 See *Ireland v J Rattray & Son* [1992] 3 ERNZ 816.

159 Above n 148, 498.

The judge was able to avoid the perceived obstruction caused by *Andrews* by implying a similar but sufficiently remote term into the contract. As the judge also pointed out, the plaintiff did not sue for damages for the lack of procedural fairness in the dismissal, but did claim for humiliation resulting from the process. There is perhaps little practical difference between the two. Both stem from the theory that the employer acted unreasonably in the dismissal.

There is some cause for concern in this new variation of the implied term of trust and confidence. The factors upon which the judge decided the term was breached were not remarkable in any way.[160]

> I accept that the personal effect upon Mr Stuart has been serious. ... His forced resignation was the abrupt termination of a position in life, and a considerable blow to his self-esteem. The pain and anger, although controlled, was very evident when he gave evidence. It carried, inevitably, damage to his reputation, at both employment and personal levels. A person who resigns abruptly, without official explanation is looked upon with caution for a considerable period afterwards. That is a simple fact of life.

Mr Stuart was asked to resign following on-going concern about his performance. The final straw was a media report of his unauthorised suggestion that the company provide truancy officers for local schools. It is probable that the dismissal was not carried out in a procedurally fair manner. However, the employer did not, beyond acting unfairly in a procedural context, do anything unusual which was designed to damage Mr Stuart's reputation. As the judge himself recognised, whenever someone resigns or is fired suddenly, some element of curiosity or "caution" will ordinarily be encountered by the former employee. If this threshold is accepted, damages would be available to a wide variety of plaintiffs, even where there is no unusual effect on the employee. Grieg J, in *Brandt v Nixdorf Computer Ltd,* pointed out that: [161]

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160 See above n 148, 498.

161 [1991] 3 NZLR 750, 762.

> [a]ny termination of employment is likely to cause upset and, indeed, to affect the reputation and standing of a person. The higher the status and responsibility of the employee the greater the effect of his dismissal.

A higher standard should be required to establish a breach of this implied term, which is not in itself objectionable,. The focus should be on some exceptional effect on the employee as a result of the employer's behaviour, more than the ordinary consequences of an abrupt end to employment. This will prevent the creation of a class of damages which is almost automatically applied in every dismissal case.

D Redundancy

One of the most controversial cases involving the implied term of trust and confidence is the Court of Appeal's split decision in *Brighouse Ltd v Bilderbeck.*[162] The plaintiffs in that case argued they were unjustifiably dismissed because they were not paid adequate compensation for their redundancy, and there was a lack of consultation and communication with them in respect of their redundancy. No redundancy agreement existed, and they were not claiming that the redundancy was for anything other than genuine commercial reasons. The defendants relied on the decision in *GN Hale & Son v Wellington etc Caretakers etc IUW.*[163]

The majority of the court found that they were entitled to ask whether the redundancy had been carried out in a fair and reasonable way, and that part of that inquiry was whether any compensation had been paid, even if the employer was not required to pay anything under an agreement. Casey J said that in "discharging the obligation to preserve the relationship of trust and confidence between them, the employer should act with sensitivity and consideration to staff being made redundant."[164] Cooke P recognised that the lower courts

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162 Above n 24.
163 [1991] 1 NZLR 151.
164 Above n 24, 179.

(which found in favour of the plaintiffs) were applying the implied term that the employer will not, without reasonable cause, damage or destroy the relationship of trust and confidence between the parties. The question was whether the courts had taken the principle beyond its proper sphere. He accepted that they had not.[165]

> [I]n my opinion it must be open to an employee to establish that a dismissal for redundancy has been carried out in an inconsiderate manner, inconsistent with and amounting to a repudiation of the relationship of confidence and trust; or that in the particular circumstances some special notice or payment in lieu thereof would be given by a reasonable employer.

Strong dissents were given by Richardson and Gault JJ, who felt that the findings of the majority went against legislative intent. They argued that it should be up to the parties to decide whether redundancy compensation would be paid. The implied term of trust and confidence could not be used as a basis for obliging the employer to pay compensation which was not agreed to by the parties.

Gault J pointed out that there could be no need to look to implied terms to interpret the meaning of "unjustified" dismissal.[166] However, the majority seems to be keen to give some credit to the implied term as the source of this obligation. The implied term of trust and confidence has received considerable attention since the Employment Contracts Act 1991 was enacted, and it is clear that the Court of Appeal sees the relationship as a fundamental aspect of employment obligations. However, in *Brighouse*, the Court may have extended the term beyond what was necessary. Two members of the Court have objected to this development, and this could signal the beginning of a halt to the development and influence of the term.

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165 Above n 24, 167.
166 Above n 24, 181.

The result of *Brighouse* is that in some situations where no agreement about redundancy compensation has been reached, the courts may require compensation as part of the procedural fairness of the redundancy procedure. [167] Does this mean that there is a general obligation which will arise whenever there is no agreement?

The contemporaneous decision of *Jones Schindler Lifts Ltd v Johnston* [168] made it quite clear that no such obligation could be implied. Once again the Court of Appeal was split three-two. In addition to the dissenting judgments, Casey J made it very clear that the Employment Court was not justified in concluding that there was an implied term to the effect that the employer will not fail to pay compensation without reasonable cause in the appropriate circumstances. Therefore, a majority of the court expressly or impliedly rejected the existence of a general implied term.

With respect, it will be very difficult to make the distinction between the court's reasoning and a general implied term. It is possible that the decision in *Brighouse* will have the effect of creating just such an implied term that Casey J rejected. This case illustrates the ability of the courts to extrapolate a specific obligation from a broader implied term.

E Bargaining

It is now accepted that the implied term of trust and confidence will undergo some change when the parties to an employment contract are negotiating a new contract. Colgan J commented on the apparent conflict that occurs during bargaining in *Unkovich v Air New Zealand Ltd*:[169]

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167 The general state of the law following the *Brighouse* cases is discussed in Rossiter GP "Redundancy Dismissal and Procedural Fairness - the Establishment of an Extra-Contractual Entitlement to Compensation" (1996) 2 NZBLQ 175.

168 [1995] 1 NZLR 190.

169 Above n 136, 137.

> At such times the existing employment relationship continues as do, I think, the parties' obligations of trust and confidence. The law allows for hard bargaining, even the use of coercive tactics which might appear to be the antithesis of trust and confidence in a subsisting relationship of employment. But even within that altered relationship during the period of bargaining and negotiation, I would find that the underlying obligations of trust and confidence which arise from an existing and continuing employment relationship survive, albeit perhaps modified in some instances to take account of the parties' conduct towards each other permitted by the law at the time of bargaining.

The idea of a limited relationship of trust and confidence continuing is a particularly useful notion to explain the situation when bargaining is taking place. The conflict that underlies the relationship is particularly obvious, as this period affords employees the opportunity to improve on their conditions of employment. At other times, the conflict is not immediately apparent. However, it would not be desirable for the courts to abandon the concept entirely, for two reasons.

First, the employment relationship is still in existence, and so the mutual interests of the parties continue to operate, so the underlying structures in the relationship still exist. Second, the employment operates on a number of levels, and bargaining is not the only area of employment which operates at the time. Therefore, to remove the protection for the parties in other areas of the relationship would not be desirable.

The courts have applied the obligations to regulate the behaviour of the parties in the bargaining process.[170] The question must be what standard will be applied, and this will be answered on the facts of each case. The Court of Appeal has noted that there should be a degree of robustness in the bargaining process.[171]

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170 See above n 136, 579; *Rasch v Wellington City Council* [1994] 1 ERNZ 367, 372.

171 *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85, 102.

The implied term of trust and confidence has also been used in the bargaining context to expand the obligations owed by employers. The full Employment Court found that the implied term of trust and confidence created a duty on employers not to resile from settled collective agreements until the union has given its members a chance to ratify the agreement.[172]

F Damages

At common law damages were traditionally restricted to compensation for a failure to pay adequate notice.[173] Damages for distress or humiliation were allowed only in very restricted circumstances.[174] If the action is brought under the Employment Contracts Act 1991, damages for humiliation and loss of dignity are available under s 40(1)(c). However, it is now becoming clear that damages will also be available at common law for distress and humiliation if an employer breaches the implied term of trust and confidence. The expansion of the availability of damages has the most importance for wrongful dismissal claims.

Addis v Gramaphone Co Ltd is the basis for a long-standing rule that damages for dismissal could not include compensation for distress or humiliation due to the manner of dismissal.[175] *Whelan v Waitaki Meats* was the first case to suggest that *Addis* would not apply to some employment contracts.[176] Following a comprehensive discussion of the development of the rule, Gallen J suggested that there was a general lack of enthusiasm for the *Addis* rule in the industrial area, and indeed no legal or logical justification for it.[177] He

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172 *New Zealand Engineering Union Inc v Shell Todd Oil Services (New Zealand) Ltd* [1994] 2 ERNZ 536, 548. This conclusion was also reliant on an interpretation of s 16 of the Employment Contracts Act 1991.

173 *Addis v Gramaphone Co Ltd* [1909] AC 488.

174 For example, where there was a breach of a contract which had the purpose of entertainment or enjoyment.

175 Above n 173, 491.

176 Above n 157. The trend represented by this case is discussed in GP Rossiter "Developments in the Role of the Employment Court in Dismissal Cases" (1995) 1 NZBLQ 8.

177 Above n 157, 88.

considered that no cases from the Court of Appeal bound him to apply the rule. The Judge then awarded general damages for injury to feelings. Gallen J considered that the award should be basically compensatory rather than exemplary, but should reflect the nature of the behaviour of the defendant and its effect on the plaintiff.[178]

This approach to damages for wrongful dismissal was affirmed by the Court of Appeal in *Ogilvy & Mather v Turner*.[179] It is now generally accepted that general damages will be available for wrongful dismissal cases.[180] This demonstrates the importance that a breach of the implied term of trust and confidence will have in wrongful dismissal cases, if damages are available as a consequence. If damages were not available for a breach of the term, the implied term of trust and confidence would be rendered "virtually illusory".[181]

VI THE FUTURE OF THE IMPLIED TERM OF TRUST AND CONFIDENCE

The implied term of trust and confidence has influenced a wide range of employment law decisions and rules. The courts have been willing to base expansions and modifications of existing rules on the premise that every employment relationship should contain a basic level of trust and confidence. The result is that employees now have more avenues to explore in protecting themselves from inappropriate action on the part of employers. The impact on the employee's obligations has not been as noticeable, although the opportunity exists for expansion in that area. The employee's obligations were well established in existing implied terms.

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178 Above n 157, 90.

179 Above n 144, 653; above n 152, 654.

180 See *Waugh v Coleman Consolidated Business Ltd (T/A The Cafe, the Bar and the Casino)* [1995] 2 ERNZ 251; above n 116, 193.

181 Above n 50, 133.

It is not clear whether the courts will continue to extend the application of the duty. *Brighouse* indicated that some judges in the Court of Appeal believe that the duty has been used inappropriately to justify expanded obligations. This could signal that the courts may put limits on the future extension of the term. The departure of Lord Cooke from the Court of Appeal means that the implied term of trust and confidence has lost its main supporter in that Court. Lord Cooke has been instrumental in allowing the obligation to grow in the way that it has. It remains to be seen whether the Court of Appeal will draw back from the previously proactive approach to the implied term of trust and confidence. The Employment Court will undoubtedly continue to explore the limits of the implied term.

There must be some concern about the fact that such important obligations are contained in an implied term, which is subordinate to express terms in the contract. Although there is some doubt in England about whether express terms will override the implied term of trust and confidence, it is likely that a New Zealand Court of Appeal, under the Employment Contracts Act 1991, would give precedence to an express term. This is not a satisfactory situation. As the implied term of trust and confidence affects employers predominantly, and as employers generally hold the balance of power in contract negotiations, it is not impossible to imagine employers attempting to contract out of the obligation if the courts continue to extend it. The courts are unlikely to hold that the implied term of trust and confidence is not subject to an express term - that would involve too great a departure from contractual principles. This problem probably requires the intervention of Parliament if implied terms are to gain precedence over express terms in employment contracts.

VII CONCLUSION

One author has argued that: [182]

> [a]s the number of reported cases on mutual trust and confidence steadily increases it may not be fanciful to suggest that the obligation will come to be seen as the core common law duty which dictates how employees should be treated during the course of the employment relationship (of course, a wide range of matters are already covered by more specific implied terms in law). In this regard, the embryonic nature of the obligation is important because the courts and tribunals can expand its scope relatively unrestricted by precedent.

It is correct to identify the implied term of trust and confidence as a core common law duty in employment. The obligation is permeating a number of areas of employment law, and is being used by the courts to expand the obligations owed by the parties to the employment contract. There is now some indication that the Court of Appeal is calling a halt to the term's rapid development.

The implied term of trust and confidence is a beneficial development in employment law. However, the term is surrounded by confusion and has not been developed according to a cohesive philosophy. The ad hoc development of the obligation means that both the actual definition of the term and the goals of the courts in using it are extremely confused. Different judges have different views on the appropriate role of the term, and this results in a tension in the development and practical use of the term. The vagueness of the term also means that it can be used in a variety of contexts, in order to enforce the judicial view of the employment relationship. The utility of the term in creating a just outcome means that, while it is important to establish an idea of the basis for the

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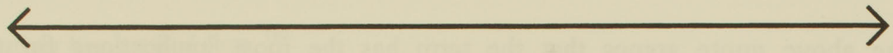
182 Above n 50, 125.

obligation, any attempt to exactly define its boundaries of application would be inappropriate.

The above quote argues that the term has the most implications for the employer, and it is true that the implied term of trust and confidence has had the most impact in the area of the employer's obligations. However, the implied term of trust and confidence can also be seen as providing the philosophical basis for the pre-existing implied terms which concentrated on the employee's obligations. The courts have not yet fully acknowledged this basis, and continue to apply unequal standards of behaviour to employees' duties. Enforcing a minimal level of trust means that the courts must re-evaluate the tests that have traditionally applied to employees.

The implied term of trust and confidence is an intriguing development in employment law. It has been expanded by the courts beyond its original role as a response to developments in the theory of constructive dismissal. The employment relationship can create significant conflict between employers and employees and the parties to an employment contract may not always act in an exemplary manner. The implied term of trust and confidence provides a basis for judges to enforce standards of reasonable behaviour on the employment relationship, which in turn reflect judges' own views on the employment relationship. It will be interesting to monitor the use of the implied term in future, as its use by the courts will undoubtedly demonstrate the trend of judicial perspectives on employment law.

VII APPENDIX: FOX'S PARADIGM[183]



Low-discretion role	High-discretion role
Low trust	High trust
Economic exchange	Social exchange

Low discretion / low trust relationships are characterised by:

(a) a perceived disposition on the part of superordinates to behave as if the role occupant cannot be trusted;

(b) the imposition, as a consequence, of close personal supervision, specific impersonal rules, or other forms of systematic control;

(c) the imposition of tight coordination through externally applied standardised routines and schedules, thereby ruling out the open unrestricted communication and interaction patterns more appropriate for certain kinds of problem solving;

(d) an assumption that failures or inadequacies of performance result from negligence or insubordination; and

(e) a tendency for conflict to be conducted on a group basis through bargaining, with an acknowledged divergence of interests and the exercise of threats, gamesmanship and other characteristics of negotiation.

High discretion / high trust relationships are characterised by:

(a) an assumption by superordinates of personal commitment on the part of the role occupant to an occupational calling and/or to the goals and values of the organisation (as superordinates define them).

(b) freedom from close supervision and detailed regulation by specific impersonal rules;

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183 From A Fox *Beyond Contract: Work, Power and Trust Relations* (Faber & Faber Ltd, London, 1974) 73, 77 .

(c) a relatively open network of communication and interaction, with those in superordinate or leadership positions being seen as supportive colleagues;

(d) a tendency for communication to take the forms of advice, information and consultative discussion, rather than of orders, commands and directives;

(e) an emphasis on problem solving through 'processes of mutual adjustment' rather than on externally imposed coordination through standardised routines;

(f) a tendency for inadequacies of performance to be characterised as honest misjudgments rather than as derelictions of duty or insubordination; and

(g) the handling of disagreements on a basis of 'working through' in the light of shared goals rather than on a basis of bargaining in the light of divergent goals.

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