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# "THE IMPLIED TERM OF TRUST AND CONFIDENCE, AND FAIR AND REASONABLE TREATMENT, AND ITS APPLICATION TO REDUNDANCY DISMISSALS"

Submitted for the LLB (Honours) Degree at
Victoria University of Wellington

**1 September 1994**

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## PART 1 - INTRODUCTION

The area of employment law has, in recent times, observed an increasing reliance upon ordinary rules of contract law for government of the employment relationship. Many subsequently argue that there has been a diminution of the rights of employees resulting from the imbalance of power that naturally exists in the employment relationship.

The Employment Contracts Act 1991 is pivotal in the perception that pure contract law is now more pervasive in the average employment contract.

A great deal of political opinion is oriented towards this view. Typifying this attitude is the following passage taken from a speech presented by the Labour Party spokesperson on employment law :

> "The Employment Contracts Act does not promote co-operation.... for many thousands of workers, the Employment Contracts Act has been an opportunity for their employer to cut wages and conditions, require longer working hours...."[1]

The reliance upon contractual terms has though seen the development of an increasingly important set of implied contractual terms.

These implied terms have predominantly favoured employers.[2] The focus of this paper though is on the development and application of an implied term requiring employers to act fairly towards their employees so as to maintain mutual trust and confidence in the employment relationship.[3]

Part 2 of the paper looks at the development of the term and its application in New Zealand employment law. Demonstrative examples of the application of the term will be given.

Part 3 of the paper examines a fundamental application of the term in more detail. Focus is on the current application of the term to dismissal for redundancy. An overview of the general principles flowing from the current application of the term to redundancy is provided, in conjunction with comments regarding the consequences of such an application of the implied term.

Part 4 of the paper offers some conclusions and looks at the potential implications of the United Kingdom decision in *McClory* v *Post Office Union*.[4]

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[1]E. Tennet "Address of the Labour Party Spokesperson on Employment" in *Employment Law - Present Developments: Future Issues* (Butterworths, Wellington, 1993) 5.

[2]G. Anderson, B. Banks, R. Harrison, J. Hughes, K. Johnston (eds) *Employment Law Guide* (Butterworths, Wellington, 1993) 510.

[3]See further Part 2(ii).

[4][1993] 1 All ER 457.

Importantly, it is to be noted that the primary application of the common law implied term is to private contracts of employment, and subsequently this is where the attention of this paper is focused. Many public sector employment contracts derive similar terms from statutory provisions.[5] It is proposed that this paper will not undertake to examine such employment relationships, and will instead focus upon ordinary private contracts of employment.

## PART 2 - DEVELOPMENT OF THE TERM

### *(i) Background*

The implied term of trust and confidence, or fair and reasonable treatment, is a term implied by law.[6]

The status of the term is perhaps reflective of the role played in modern employment law by implied terms. Examples of implied terms are numerous, applying to both employers and employees, and including duties of fidelity, care, and confidentiality.[7]

However, the implied term currently under focus is an exception to the modern trend of judicial decisions that has been against the creation of new common law by means of terms implied by law.[8] Many more recent implied terms fall under the category of those implied 'in fact' pursuant to what is known as the 'business efficacy test'.[9]

The acceptance of the implied term of trust and confidence does though reinforce the fact that "behind the specific terms of any employment contract are those implied by the common law."[10]

The term has its origins in decisions of the English courts in the 1970s.[11] There, courts began to find that a contract of employment suggested the existence of mutual duties of trust and co-operation upon employees and employers.

### *(ii) 'Trust and Co-operation' or 'Fair and Reasonable Treatment'?*

It sometimes appears that the implied term of maintaining trust and confidence is, or may be, a distinct term from that of fair and reasonable treatment. It is contended though that these are in reality just different expressions of, or labels for, the same all encompassing implied term.

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[5]For example, see s. 56 of the State Sector Act 1988.
[6]See J. Hughes *Labour Law in New Zealand* (Law Book Company Ltd, NSW, 1990) 951.
[7]For a summary of these duties, see above n. 2, Appendix A, 513 - 532.
[8]Above n. 6, 951.
[9]See *BP Refinery Ltd.* v *Hastings Shire Council* (1977) 52 ALJR 20.
[10]S Hornsby "Bosses Failed to Protect Worker" *The Evening Post*, Wellington, New Zealand, 10 May 1994, 9.
[11]See R Rideout and J. Dyson *Rideout's Principles of Labour Law* (4ed, London, 1983) 69.

Mulgan states that :

> "[T]he term may encompass both the maintenance of trust and confidence *and* reasonable, decent treatment in the circumstances."[12] (Emphasis added).

The term as stated in *Marlborough Harbour Board* v *Goulden*[13] was one of fair and reasonable treatment. *Goulden* and *Woolworths* are cases cited in many subsequent decisions as authority for the existence of the implied term of maintaining trust and confidence.[14] In *Woolworths* the trust and confidence underlying the contract led to the duty to conduct an inquiry into possible dishonesty in a fair and reasonable manner. This demonstrates that the two expressions are in substance the same implied term, and judicially have been used interchangeably.

Trust and confidence in the employment relationship encompasses an expectation that the employee concerned will be treated fairly and reasonably if a dismissal situation does indeed arise. Also, an employer who does not treat an employee fairly and reasonably during the course of the employment relationship is likely to have destroyed the trust and confidence in the relationship. These considerations serve to reinforce that the ideas of trust and confidence and fair and reasonable treatment are so interconnected that it is impracticable or impossible to separate them.

It may be that the obligations will be subsumed under a general duty, requiring an employer to accord fair treatment to employees in all circumstances. This would recognise that the application of the term is variable, depending on the circumstances of the case and whether it is a procedural or substantive matter that is at issue.

As the law currently stands though, the different expressions of the term do suit different applications of the term. Maintaining trust and confidence in the employment relationship is a label better suited to substantive elements of the employment contract, while fair and reasonable treatment is an expression more apt for procedural matters. Indeed, in relation to procedural matters, the implied term imports specific duties on the employer that must be observed in order to demonstrate that fair treatment has been accorded.

The analysis in this paper proceeds on the basis that trust and confidence, and fair and reasonable treatment, are merely different expressions, or imply different applications, of the same implied term. Reference to each specific expression will be made where the application of the term dictates that a particular expression or label is more appropriate.

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[12]M. Mulgan "Implying Terms into the Contract of Employment" (1988) NZLJ 121, 127.
[13][1985] 2 NZLR 378.
[14]*Auckland Shop Employees IUW* v *Woolworths (NZ) Ltd.* [1985] 2 NZLR 372. Examples of this include *Pillay* v *Rentokil Ltd.* [1992] 1 ERNZ 337; *Paul* v *Mobil Oil* [1992] 2 ERNZ 1.

*(iii) Formulation of the Implied Term*

*Woods* v *WM Car Services (Peterborough) Ltd*[15] provides a good example of the implied term. The English Employment Appeals Tribunal held that there was a term implied into the contract of employment that an employer will not behave in such a way as to destroy or seriously damage the relationship of trust and confidence between the employer and employee.[16]

The *Woods* analysis was adopted by the New Zealand Court of Appeal in *Auckland Shop Employees Union IUW* v *Woolworths (NZ) Ltd* [17], where the Court made obiter statements to the effect that the ordinary contract of employment may attract principles of natural justice. Cooke J stated that a duty of fair and reasonable treatment may exist, suggesting it to be the corollary of an employee's implied duty of fidelity.[18]

*Goulden* pursued a similar line of reasoning. The Court of Appeal there stated that :

> "[F]air 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."[19]

*Goulden* was a decision in respect of a state sector employee.[20] The Court did however make obiter statements extending the principles to all contracts of employment, though the precise content of the duty was uncertain and wasn't defined.

The intention of the Court of Appeal to develop the implied term is clear. Following the judgments above, Sir Robin Cooke, who delivered the judgments of the Court in both cases stated that the Court of Appeal has:

> "[B]een moving towards the view that duties of fair and reasonable treatment, like confidence and trust, are normal incidents of the relationship of employer and employee."[21]

This was based on the gradually emerging idea of a general duty of fairness to persons sufficiently closely affected by one's actions. A duty of this breadth would cover the employer - employee situation.

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[15][1981] 1 CR 666.

[16]Above n. 15, 670.

[17][1985] 2 NZLR 372; See also J. Hughes "Natural Justice and the Contract of Employment" (1986) NZLJ 145, where the broad effect of *Woolworths* and *Goulden* is summarised.

[18]Above n. 17, 376.

[19]Above n. 13, 383.

[20]It was decided under the operation of section 42(1) of the Harbours Act 1950 which provides for the appointment and removal of officers. The obligation of fair and reasonable treatment was implied into the statutory framework.

[21]Sir Robin Cooke "the Struggle for simplicity in Administrative Law" in M. Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press in association with the Legal Research Foundation, Auckland, 1986) 1, at 12. It is contended that Sir Robin Cooke is , in this passage, merely referring to the different expressions or applications of the implied term, as opposed to referring to two different terms.

The implied term arises out of the recognition that the employment relationship is 'special'. Richardson J in *Telecom South* v *Post Office Union*[22] recognised this. There it was held that the special nature of the employment relationship imported mutual obligations of confidence, trust, and fair dealing.[23]

Confirmation of this view is also found in *Unkovich* v *Air New Zealand* [24] where Colgan J stated that :

> "I think it can safely be said that the law of employment in this country recognises the existence of mutual obligations of trust and confidence between employers and employees."[25]

Subsequent to the 1985 Court of Appeal judgments in *Woolworths* and *Goulden*, the implied term has been accorded increasing levels of judicial recognition. Applications of the term are provided below.

Case law recognises that it is difficult or impossible to define the content and application of the obligations imported into the relationship by the implied term. As in *Goulden* and *Woolworths*, where the Court could not define the content of the term, Colgan J in *Unkovich* stated :

> "It is, of course, impossible to categorically define all of the incidence of such a duty. The scope and content of those obligations may be as variable as employment contracts are."[26]

## PART 3 - APPLICATION OF THE IMPLIED TERM IN NEW ZEALAND

Despite the absence of any specific content of the implied term, it has been applied in numerous varied circumstances. The term has been raised in relation to unjustified dismissal, imposition of suspensions, management practices, and the bargaining process in an employment contract.

### *(i) Unjustified Dismissal*

A principal application lies in the context of establishing unjustified dismissal under the 'Personal Grievances' provision in the Employment Contracts Act 1991, section 27.[27]

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[22][1992] 1 ERNZ 711.

[23]Above n. 22, 722.

[24][1993] 1 ERNZ 526.

[25]Above n. 24, 589.

[26]Above n. 24, 589. Mulgan, at above n. 12, 127 indicates that the Court of Appeal left the content undefined in *Woolworths* with the intention of allowing the then Arbitration Court to advise on it so as to serve the needs of industrial relations in New Zealand.

[27]The relevant part of this section provides :

**27. Personal Grievances -** (1) For the purposes of this Act, "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because of a claim -

(a) That the employee has been unjustifiably dismissed; or

(b) That the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer...."

Two issues arise in relation to unjustified dismissal here. The first is that of constructive dismissal, which involves demonstrating that an apparent resignation was instead effectively a termination. The second is that of procedural fairness in relation to a dismissal, whether that dismissal is constructive or actual.

*(a) Constructive dismissal*

Constructive dismissal provides a forum in which the implied term is playing a role of considerable importance, and represents one of the primary applications of the term. In this context 'maintaining trust and confidence' is a more appropriate expression to describe the implied term, as constructive dismissal concerns actions by an employer that undermine the substantive trust and confidence in the employment relationship, as opposed to merely concerning the fairness of the procedural implementation of dismissals.

Constructive dismissal involves an apparent resignation by an employee. The resignation however, results from a 'first-phase initiative' by the employer[28] that fits into one of several categories.

The Court of Appeal has described three scenarios in which a constructive dismissal may be found to have occurred.[29] First, it may be found where an employer gives a choice between resignation or dismissal; secondly where the employer engages in a course of conduct intended to force the employee to resign; and thirdly where the employer breaches a duty to the employee.

*NZ Amalgamated Engineering IOUW* v *Ritchies Transport Holdings*[30] reviewed the principles involved in constructive dismissal. It was held that an employee must demonstrate that the employer no longer intends to be bound by one or more of the essential terms of the contract, or that the employer cannot be relied on to perform the terms of the contract fully or consistently in the future.[31]

Whether or not the employee is justified in terminating the contract is assessed against an objective background, so the conduct must be such that a reasonable employer would terminate the contract as a result.[32]

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The implied term also applies to common law wrongful dismissal. However, the development of the Personal Grievances provisions has superseded wrongful dismissal as the primary cause of action. Therefore this paper focuses only on statutory unjustified dismissal.

[28]*Wellington Clerical Union* v *Grenwich* [1983] 1 ACJ 965, 969.

[29]See above n. 17, 374 - 375.

[30][1991] 2 ERNZ 267.

[31]Above n. 30, 271 - 272.

[32]*NZ Woollen Workers IOUW* v *Distinctive Knitwear NZ Ltd.* [1990] 2 NZILR 438, at 449 per Goddard CJ.

Intention to end the employment relationship is not a prerequisite for the third category to be fulfilled. However, the employer must at least intend to breach or unilaterally vary an *essential* term of the contract.[33]

The implied term of trust and confidence is considered to be an essential term of the contract of employment. Subsequently, breach of this term effectively constitutes repudiation of the employment contract, since it is a breach that necessarily goes to the root of the contract.[34]

Therefore conduct which constitutes breach of the implied term is conduct which justifies the employee in terminating the employment and claiming constructive dismissal.

A recent example of conduct by an employer that has given rise to a constructive dismissal because the trust and confidence in the employment relationship has been damaged or destroyed claim is that in *Auckland Electric Power Board*[35], where an employee claimed that the employer did not do enough in response to the employee's complaints of dog attacks while on duty. The employer dismissed the employee's complaints and finally ordered the employee back to work in what the employee considered a dangerous area. The employer's lack of appropriate action justified the employee's resignation and therefore gave rise to a personal grievance claim for unjustified dismissal. The Court of Appeals discussion of constructive dismissal and the implied term of trust and confidence demonstrate that the principles discussed thusfar are still very prominent in New Zealand employment law.

Significantly, widespread acceptance of the implied term may enable an employee to claim constructive dismissal for conduct that would previously not have amounted to a breach of the employment contract severe enough to justify the employee terminating the relationship.

Such conduct by an employer may be what is known as 'squeezing out'. Here, an employer may have the intention of forcing an employee to resign or accept altered conditions, without breaching any single term of the contract seriously enough to amount to constructive dismissal. A series of small breaches over a period of time may not allow a personal grievance, via constructive dismissal, to be brought as the terms breached may be minor or the breaches themselves may only appear as small indiscretions.

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[33]Above n. 30, 272.

[34]Above n. 15, 672; See also above n. 12, 125.

[35]*Auckland Electric Power Board* v *Auckland Provincial District Local Authorities Officers IOUW* Unreported, 23 February 1994, Court of Appeal, CA 109/92. Further examples of constructive dismissal based on breach of the implied term include *Pillay* v *Rentokil* [1992] 1 ERNZ 337, where the employer carried out extensive surveillance of the employer and attempted to hide this from the employee. The observation of the employee itself was not the decisive factor. Rather it was the failure to provide the promised explanation for these activities that justified the employee terminating the relationship.

However, the collective effect of such a course of conduct may make it impossible or intolerable for an employee to continue in the employment relationship.

The classic scenario where an employee is squeezed out is summarised in *Woods* :

> "[E]mployers who wish to get rid of an employee or alter terms... without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort to methods of 'squeezing out' an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract...."[36]

As acknowledged in the passage above, it is difficult in such a circumstance to establish that the employer's conduct was sufficiently serious as to render continuing the employment relationship impossible. Even under category two and three of *Woolworths* the breach or conduct alleged to give rise to constructive dismissal must of a serious enough term or nature as to justify the employee in 'resigning'. In a situation such as that described above, each breach of a term or each instance of the conduct itself is more minor in nature making it very difficult to pinpoint a serious enough breach to justify the employee in terminating.

The implied term of trust and confidence is essential here. An employer who engages in such a course of conduct, with the intention of forcing the employee to resign or accept altered terms, is very likely to have breached the fundamental term of trust and confidence implied into the employment contract.[37] Breach of this fundamental term would justify the employee's termination of the relationship, allowing the employee to bring a personal grievance action for unjustified dismissal.

A potential fetter upon this is though offered in the *Auckland Electric Power Board* case by comments of Cooke P. There, he introduced an element of reasonable forseeability to the test for constructive dismissal.[38] Previously the test focused on whether a reasonable employee would have resigned given the prevailing conditions or treatment by the employer. Cooke P's instead introduces a focus upon the employer's state of mind in respect of whether the employer saw or should have reasonably foreseen a substantial risk that the employee would resign as a result of the breach of the contract or the conduct of the employer.

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[36]Above n. 15, 671.

[37]There do not appear to be any significant New Zealand authorities here. *Woods*, above n. 15 provides a good summary of the position, and the case has been accepted as good law by the New Zealand Court of Appeal in numerous instances.

[38]Above n. 35, 7.

Arguably, it may be that a series of minor breaches, particularly if not intended to force actual resignation, would not be reasonably foreseen to have a substantial risk of causing the employee to resign.

However, this is uncertain, and would only arise in the case of a squeezing out situation. Overall the implied term, formulated here as the duty of trust and confidence, is important to constructive dismissal. It provides a foundation upon which claims of constructive dismissal may more readily be founded, as it is an essential term of any contract and the term may be breached by a range of conduct of an employer which is thought to undermine the trust and confidence at the heart of the employment relationship. This provides a substantive injustice upon which unjustified dismissal under the Employment Contracts Act 1991 can be established.

*(b) Procedural Fairness*

The implied term of trust and confidence, or fair and reasonable treatment, is the foundation for the requirement of procedural fairness. The term requires that an employer treat employees fairly and reasonably in all circumstances, and this includes dismissal situations.

The expression 'fair and reasonable treatment' is more appropriate where procedural fairness regarding dismissal is at issue. Where a decision to dismiss is made, the substantive trust and confidence in the relationship is destroyed and it is the fairness of the procedure used to reach that decision that is important.

Various judicial pronouncements of the effect of requiring procedural fairness can be cited. In *Hill* v *Northland Hospital Board* [39], Hillyer J summarised one of the key components of procedural fairness. He stated that one consequence of the duty was to :

> "[P]ermit any person concerning whom a decision is being made as to whether that person should be dismissed to put forward his or her side of the story."[40]

In *Sparkes* v *Parkway College Board of Trustees*[41] Goddard CJ more broadly outlined the procedural fairness requirement. He stated that :

> "It is surely by now an elementary rule of employment law in this country that no finding should be made by an employer which is adverse to an employee without some fair warning of the risk of the finding being made and an adequate opportunity to adduce material which might have averted that finding."[42]

Clearly then, subsequent to the duty of procedural fairness, an employer must give an employee a genuine opportunity to be heard when a dismissal is contemplated. Not only must the employee be able to 'put forward their side

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[39](1987) 1 NZELC 95, 285.
[40]Above n. 39, 95,293.
[41][1991] 2 ERNZ 851.
[42]Above n. 41, 865.

of the story' though, this testimony must be genuinely considered by the employer before the final decision is reached.[43]

Fair and reasonable treatment in the circumstances may also require the issuing of one or more formal warnings before the dismissal action is commenced.[44]

The requirement of procedural fairness does not however require an employer to conduct the relevant inquiries regarding a potential dismissal with the formality of a court hearing.[45]

It is clear then that if an employer fails to observe the requirements of procedural fairness that arise out of the implied term of fair and reasonable treatment in the circumstances, a subsequent dismissal is liable to be held to be unjustified. The implied term in this context protects not only the employee's procedural interests, but also their substantive interests to an extent, by providing an opportunity to present material that may indeed prevent the dismissal actually taking place.

***(ii) Suspensions***

Fair and reasonable treatment in relation to the imposition of a suspension was a subject considered in *Association of Staff in Tertiary Education* v *Northland Polytechnic Council*.[46] It was established that an employer who imposes a suspension in an unfair manner is likely to be deemed to have undermined the implied term of trust and confidence.[47]

Trust and confidence is an appropriate expression for the term here because though the employer would have failed to treat the employee fairly and reasonably in the circumstances, the employment relationship is still in existence, and it is the trust and confidence that is being damaged by the unfair conduct. This does though again demonstrate the interconnection between fair and reasonable treatment and the maintenance of trust and confidence that in reality means the two expressions are simply alternative references to the same implied term.

The specific obligations accruing in a suspension situation from the implied term are likely to be the same as or similar to those regarding dismissals. A suspension should not be imposed without the provision of fair warning and a realistic opportunity to refute any alleged misconduct which has led to the suspension.

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[43]Above n. 2, 106; See also *Wellington Hotel Union* v *Harrap* [1981] ACJ 261 for an example of failure to do this. The employer made the decision to terminate known to others before the employee had any chance to explain.

[44]*Otago Meatworkers Union* v *NZ Protein Extraction and Manufacturing Co. Ltd.* [1981] ACJ 319; *Auckland Shop Employees Union* v *Modern Bags Ltd.* [1984] ACJ 531 are examples of this.

[45]See *Ross* v *Dunedin Visitor Centre Inc* (1988) 2 NZELC 95, 755, per Tipping J.

[46][1992] 2 ERNZ 943.

[47]Above n. 46, 958 - 961.

Under the Employment Contracts Act 1991, these obligations will continue to be enforced. The 'Personal Grievances' provisions of the Act apply not only to unjustified dismissal, but also to unjustified disadvantage which would certainly encompass the unfair imposition of a suspension.[48]

*(iii) Management Practices*

The implied term of trust and confidence has been used to impose some form of minimum standards of business management upon employers. In *Auckland etc. Local Authorities Officers IUW* v *Mount Albert City Council*[49] an employer was held to have breached the term by failing to provide training or encouragement in management skills, compounded by failure to provide 'real' supervision of the employee. The Labour Court, as it then was, stated that the implied term meant that the employer "would provide all that was reasonably necessary in carrying out the overall purpose of the contract."[50]

While the implied term may impose some form of minimum standard of management upon employers, it does not require an employer as a matter of legal obligation, to always conform to the highest good management standards. This was demonstrated in *Anderson* v *Attorney-General*[51] , where the plaintiff unsuccessfully claimed that it was lack of good management practice of the employer that caused him, the plaintiff, not to be appointed to a higher position.

Regarding the question of the employer having to always conform to the highest good management standards, McKay J stated :

> "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."[52]

In reaching the decision in *Anderson* the Court stated that the requirement on an employer is of a lesser standard where the employee is of relative maturity and experience with the advantage of specialist knowledge, than where the employee is relatively inexperienced. The basis of the finding was that an employee in a professional category is expected to be self-regulating to an extent[53].

The Court apparently did not consider that the implied term may require more consideration shown to an experienced, loyal employee in order to maintain the higher bond of trust and confidence that may have developed.

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[48]See above n. 27 for the text of section 27 of the Employment Contracts Act 1991.
[49][1989] 2 NZILR 651
[50]Above n. 49, 655.
[51]Unreported, 23 October 1992, Court of Appeal, CA 292/91.
[52]Above n. 51, 10.
[53]Above n. 51, 9.

*(iv) The Bargaining Process*

Application of the implied term of trust and confidence, or fair and reasonable treatment, to the negotiation context of an employment contract offers potential protection to employees, but is also problematic.

The primary foundation for applying the implied term to the bargaining process lies in obiter comments of Colgan J in *Unkovich.* There, Colgan J was considering the possible application of the implied term to the process of re-negotiation of an employment contract.[54]

While recognising that after the expiry of a current employment contract, the nature of the employment relationship is altered, he stated :

> "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...."[55]

Colgan J did concede that this application of the implied term, and the accompanying obligations, are perhaps modified to account for the parties conduct towards each other permitted by law at the time of bargaining.[56]

However, he did not go on to examine the interaction between the obligations imposed by the common law and the statutory bargaining rights and tools to which the employer can have recourse.

The Employment Contracts Act 1991 provides an employer with a statutory right to lock-out employees as part of the negotiation process.[57] Clearly, permitting an employer to lock-out workers and thereby 'force' them into accepting contractual terms which may be less than desirable from the employee's point of view is markedly inconsistent with any obligation to maintain trust and confidence, or to administer fair and reasonable treatment.

In circumstances such as that above, the statutory right must supersede the common law duty. On this basis it is perhaps too easy to generalise that the employer must still act fairly when using such a pervasive and powerful bargaining tool, and difficult to envisage how a court may resolve such an apparent conflict of rights and duties.

It is conceivable though that one possible consequence of the application of the implied term here is that an employer must use the statutory bargaining tools only for legitimate 'bargaining' and not as a means to force an employee

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[54]Above n. 24, 589.

[55]Above n. 24, 589.

[56]Above n. 24, 589.

[57]See the Employment Contracts Act 1991, sections 60 - 64. These contain couterpart provisions which provide employees with a statutory right to strike. However, also note sections 65 - 68 which give an employer additional powers to suspend striking and non-striking employees in certain circumstances. Note also that due to section 72, an employer is not liable for wages during a lockout.

into accepting unduly harsh and oppressive contractual terms. In this regard the application of the implied term here may be more correctly applied to the product, or intended product, of the bargaining process rather than to the process itself.

*(v) Concluding Observations*

The implied term of trust and confidence, or fair and reasonable treatment is obviously very significant in New Zealand Employment law. The term has the inherent potential to apply to many facets of the employment relationship.

As discussed, the primary application lies in affording a measure of protection to employees from unjustified dismissal, and to provide them with the foundation for a personal grievance under the Employment Contracts Act 1991 where such an unjustified dismissal does occur. Further, observation of the implied term in the procedural sense, by according an employee fair and reasonable treatment in the circumstances may prevent needing to have recourse to the personal grievance provisions. This is because the employee has a chance to provide an explanation for apparent conduct that may otherwise see them dismissed.

However, it is clear that a generalised application of the term is not always practicable. It is far easier to make generalised observations as to where and how the term should apply, than it is to specifically analyse how it does in fact apply in situations where statute or contractual principles provide seemingly contrary law. While the area of personal grievances is fairly settled in respect of the implied term, other areas such as good faith bargaining could prove greatly problematic, particularly when the implied term conflicts with statutory powers which oppose it.

## PART 4 - EROSION AND LIMITATION OF THE IMPLIED TERM

*(i) Erosion of the Term by Inconsistent Express Terms*

Due to the nature of the term being an implied one, certain of the subsequent obligations are subject to being eroded or displaced by the presence of inconsistent express contractual terms.

Procedural fairness is the context in which this is most likely to occur. In *Ross* v *Dunedin Visitor Centre Inc.*[58] Tipping J held that a contractual term providing for termination in the case of misconduct 'forthwith...and without prior notice' rendered it impossible to imply a duty to give a fair hearing or otherwise act fairly in a procedural sense.[59] Instead the employee's right was to bring an action for wrongful dismissal by challenging the substantive grounds of dismissal.

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[58](1988) 2 NZELC 95,755.
[59]Above n. 58, 95,766.

Contractual clauses to this effect are not uncommon in employment contracts, but to be effective they must be very explicit.[60]

Given the judicial willingness to apply the implied term of trust and confidence, or fair and reasonable treatment, it is unlikely that a court would deem the implied term to be excluded save in very clear cases. It is possible also that such clauses may be read down to an extent, or interpreted in such a way as to still allow the common law term to apply, though it is questionable if this is legitimate judicial interference in the contractual process.

***(ii) Limitation to Actual Contracts of Employment***

The implied term will only be applied in the form discussed where the employment relationship is one of employer and employee. Where the relationship is one of independent contractor and hirer, the term discussed does not attach.

In *Paul* v *Mobil Oil*[61] the Court found that the role of owner-driver encompassed more responsibility on the part of the independent contractor than exists on the part of an employee. Subsequently, a less paternalistic attitude on the part of the defendant hirer was required. The Court said that :

> "The confidence and trust assumed to lie at the heart of an employment contract is absent or diluted in the case of owner-driver contracts...."[62]

The contrast between employment relationships and independent contractor relationships, regarding the implied term, is most clearly highlighted in respect of procedural fairness. The Court in *Paul* reasoned that the hirer of an independent contractor may terminate the contract without observing any requirements of procedural fairness beyond those stipulated in the contract itself.[63]

This contrasts with the procedural requirements to be observed when contemplating or implementing termination of an employment contract. Though it must be recognised that, as earlier discussed, procedural requirements are potentially subject to being displaced by inconsistent contractual terms in employment contracts it is likely that such terms would have to very explicitly exclude the application of the implied term as well as providing for an alternative procedure.

The effect of this is to reinforce that only workers employed pursuant to an actual employment contract with an employer - employee relationship will benefit from the personal grievance provisions in the Employment Contracts Act 1991.

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[60]See for example*Smith* v *Courier Systems Ltd.* Unreported, 14 June 1986, High Court Wellington Registry, CP 157/86.
[61][1992] 2 ERNZ 1.
[62]Above n. 61, 10.
[63]Above n. 61, 11.

## PART 5 - APPLICATION OF THE TERM TO REDUNDANCY

The implied term of trust and confidence, or fair and reasonable treatment, plays an important role in many redundancy dismissals now. The expression fair and reasonable treatment is most appropriate here because the primary consideration is the procedural fairness of a particular redundancy.

The development of the term in this respect contrasts to a degree with the traditional position regarding redundancy.

Prima facie dismissal for redundancy was considered justified, subject only to the court's inherent right to ensure that a *bona fide* redundancy had indeed taken place.[64] An employer had the right to make genuine economic decisions in respect of their business.

Redundancy is still considered to be a substantive justification for dismissal. However, the implied term of fair and reasonable treatment dictates that procedural fairness must be observed. Should a redundancy be found procedurally unfair, the dismissal is prone to being unjustified so as to give rise to a personal grievance action against the employer under section 27 of the Employment Contracts Act 1991.[65]

### *(i) The Hale Decisions*

The Court of Appeal decision in *G N Hale & Son Ltd* v *Wellington etc. Caretakers etc. IUW* [66] is central in this area of the law. In *Hale*, the Court of Appeal was considering a case where no redundancy agreement existed in the industry. Richardson J stated that where such circumstances exist, complaints by workers are determinable under the personal grievance procedures.[67]

*Hale* is important in the context of this paper in that it provides a good illustration of the interaction between the implied duty of fair and reasonable treatment incumbent upon an employer and the employer's managerial perogative in the redundancy context.

The initial judgment of the Labour Court, as it then was, indicated that for dismissal for redundancy to be justified, or considered fair and reasonable, it must be commercially necessary to ensure the on-going viability of the employer.[68]

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[64]See for example *Southland Clerical Union* v *Trilogy South Island Ltd* [1988] NZILR 180; See also above n. 2, 99.

[65]For the text to section 27, see above n. 27.

[66][1991] 1 NZLR 151.

[67]Above n. 66, 157.

[68]See *Wellington Taranaki etc Caretakers etc IUW* v *GN Hale & Son Ltd.* Unreported, 16 May 1990, Labour Court Wellington Registry, WLC 27/90.

The Court of Appeal in *Hale* however followed a different line of argument.[69] There it was held that commercial necessity was not a prerequisite for a justified redundancy, and an employer may use redundancy in situations of mere business reorganisation.[70] Further, it was indicated that it is largely a subjective area, in that the opinion of the individual employer will not generally be assessed against an objective background.[71]

The implied term of fair and reasonable treatment and its derivative obligations of procedural fairness were, though, still held to be applicable to redundancy by the Court of Appeal. The primary application of these duties was stated to be to determine whether the procedure was fair, but not whether the decision itself should have been made, though as will be seen later, there are issues surrounding the appropriate degree of impact of the implied term and duties.

In the Court of Appeal, Cooke P framed the procedural fairness question in terms of what was open to a fair and reasonable employer to do in the particular circumstances.[72]

Richardson J stated that in considering whether what was done was justified in the circumstances, regard should be had to any mutual obligations of confidence, trust, and fair dealing.[73]

Somers J stated that a redundancy is only justified where it is accompanied by fair and reasonable treatment.[74]

The effect of the *Hale* , against the background of the traditional position as regards redundancy, is summarised in Mazengarb's Employment Law :

> "[T]hat is, if fair treatment is not accorded the dismissal will be unjustified regardless of the underlying economic rationale."[75]

As a result of the decision in *Hale*, an employer's right to make economic decisions regarding their business is reinforced. However, also reinforced are the potential implications of the implied term and the subsequent requirement of procedural fairness.

Numerous specific obligations were proposed in *Hale* , many of which confirm ideas regarding fairness put forward in earlier cases.

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[69]Szakats, in A Szakats *Supplement to Dismissal and Redundancy Procedures* (2ed, Butterworths, Wellington, 1991) at 29, states that the Court of Appeal reversed the decision and formulated the principles of the "true and wider conception" of redundancy.

[70]Above n. 66, 155 per Cooke P, 157 per Richardson J, 158 per Somers J. See also above n. 69, 29.

[71]See the commentary on *Hale* in Szakats, above n. 69, 29 - 30.

[72]Above n. 66, 156.

[73]Above n. 66, 157.

[74]Above n. 66, 158.

[75]M Thompson (Managing editor) *Mazengarb's Employment Law* (Butterworths, Wellington, 1994) para 111.29, A/247.

*(ii) Procedural Fairness in Redundancies*

Particularly in light of *Hale* , it can safely be stated that procedural fairness must still be observed where dismissal for redundancy occurs, irrespective of the employer's managerial rights. However, the label of substantive justification attached to redundancy dictates that the obligations flowing from the implied term of fair and reasonable treatment are different in this context from those applying to dismissals, in particular, for other reasons.

For a redundancy to be considered procedurally fair, it appears that proper information regarding the reasons for the dismissal should be given to the employee concerned.[76] Further, discussion of possible alternatives or redeployment, provision of reasonable notice, and payment of reasonable compensation may be required depending on the particular circumstances.[77]

These procedures arise because the obligations on the employer include an obligation not to cause undue mental distress, anxiety, humiliation, loss of dignity, and undue injury to feelings.[78]

*(a) Consideration of alternatives*

It is notable that an employer may be required to discuss possible alternatives to redundancy. Arguably, the Court in stating this is impinging on the employer's right to make economic decisions affecting their business.

The requirement for an employer to discuss possible alternatives to the redundancy may in effect act as a form of 'check' on the substantive justifiability of the employer's decision.

While commonly accepted that a Court is empowered to examine whether there is a bona fide redundancy, the economic decision making power of the employer is thought to be paramount, and the adequacy of the employer's commercial decisions are thought to be a matter for the employer's judgment.[79]

Despite this, it is implicit in *Hale* and subsequent judgments that some measure of objectivity may be superimposed upon the employer's right to make subjective economic determinations in respect of their business. Though an employer may consider redundancy to be desirable, he or she may be further required to consider other possibilities in order to comply with the duty arising from application of the implied term.

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[76]G Anderson "Personal Grievances" in *Employment Law - Present Developments: Future Issues* (Butterworths, Wellington, 1993) 11; See also above n. 66, 156.
[77]See for example above n. 66, 155; See also above n. 75, para111.29, A/247.
[78]Above n. 76, 11.
[79]See above n. 64 and accompanying text.

*Orringe* v *Forestry Corporation*[80] demonstrates this extension of the implied duty arising out of *Hale* . There, the employment Tribunal stated that :

> "There is clearly in *GN Hale* an obligation to look carefully at all of the circumstances of a dismissal for redundancy and to consider whether, in all of those circumstances, the employer acted fairly and reasonably, having regard to the interests of the employee in continued employment to the possibility of alternatives to dismissal for redundancy."[81]

When viewed in this respect, the requirement to consider possible alternatives assumes an appearance of a substantive as well as procedural safeguard upon the employer's decisions and actions.

Consideration of *Holden* v *Education Services South Society Ltd.*[82] reinforces this implication. There, it was held that fairness arising from the implied term dictated that at least an opportunity to discuss or comment on the possibilities of redeployment or viable alternative employment be given to the employee. This is arguably providing an employee with a limited right to "take part in determination of their own destiny."[83]

While it may be argued that consideration of alternatives is merely being consistent with procedural requirements in respect of all dismissals, the special position of redundancy must be borne in mind. Procedural fairness is generally required in dismissals for cause to ensure that the substantive causes of a dismissal are in fact true and justified, or at least reasonable enough to warrant dismissal. However, the rhetoric of redundancy is that it is substantively justified per se provided it is a genuine redundancy.[84] The implied term and subsequent duties are merely concerned with ensuring the employee is treated reasonably in light of the substantively justified decision to dismiss for redundancy.

When considered this way, it may be argued that the Court or Tribunal should limit procedural requirements to those necessary to ensure a reasonable procedure to implement the decision is followed. It is not the role of the Court or Tribunal to conduct an examination of what alternatives were actually considered.

However, it may also be argued that given the apparent acceptance of redundancy as a substantive justification, it is important to ensure that a dismissal for other reasons is not being carried out under the guise of redundancy simply to avoid the application of the substantive justification requirement arising from the implied term. This may justify a court or

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[80][1992] 3 ERNZ 490.

[81]Above n. 80, 494.

[82]Unreported, 27 January 1994, Employment Tribunal Christchurch Registry, CT 9/94.

[83]See *Clarkson* v *Dominion Breweries Ltd.* [1992] 1 ERNZ 401, 407. But see also *Sheehan* v *Milne Ireland* [1992] 1 ERNZ 249 where the Employment Tribunal indicated that the decision in *Hale* didn't mean the Court or Tribunal should look at whether there were alternativesto the redundancy.

[84]See above n. 64 and accompanying text.

tribunal looking at the situation more closely in certain circumstances. Such circumstances would particularly arise where only a solitary worker is being dismissed for redundancy, particularly from a large company.

This would not though require a court or tribunal to extend investigation beyond ensuring the redundancy is genuine. It only requires a closer scrutiny of whether the employee was genuinely dismissed for redundancy, by examining whether the position itself has actually been made redundant, or if a mere change in personnel is involved.

Once the decision to use redundancy has genuinely been made, consideration of alternatives should not be a necessary requirement. As stated in *Clarkson*, "...a worker does not have the right to continued employment if the business can be run more efficiently without him."[85] Requiring employers to consult with employees regarding the decision itself appears to contradict this position by giving an employee some form of 'right' of continued employment, while derogating from the employer's managerial perogative.

If consideration of alternatives has any role at all to play, it should be limited to being but one option open to an employer to demonstrate that the implementation of the decision was fair. An employer should, if anything, let an employee make suggestions as part of the provision of information regarding the redundancy. The courts or the Employment Tribunal should not conduct an investigation regarding what alternatives were considered, as this would clearly constitute a substantive objective assessment of the employer's supposed subjective rights.

This ambiguity and potential implications outlined above may be resolved by the generality of the term 'fairness', in that a court may hold that making a genuine effort to consider realistic alternatives discharges the duty, without requiring exhaustive inquiry into all of the potential options. However, this is uncertain and the potential implications still exist.

*(b) Reasonable Compensation and Reasonable Notice*

The payment of reasonable redundancy compensation and the provision of reasonable notice of an impending redundancy are issues of considerable importance, particularly where, no formal redundancy agreement exists. Where a formal agreement regarding compensation exists, the employer must adhere to that agreement save in exceptional circumstances. This latter idea is encompassed within the discussion in *(c)* below.

Reasonable compensation is one factor that has been stated as one procedural requirement arising from the duty of fairness in circumstances that call for it. It is not the intent of this paper to discuss the quantum of such awards as this is a difficult area of its own. It is more intended in this paper to provide a broad outline of the principles involved as a basis for general discussion.

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[85]See *Clarkson* above n. 83, 407.

Compensation is not required in every case. Whether it is depends on the particular facts and circumstances of the individual case. This principle was confirmed in *Hale* where the Court recognised that the requirement of fairness encompasses reasonable compensation in some circumstances.[86]

The basis for the requirement of reasonable compensation lies directly in the duty of fair and reasonable treatment imposed upon the employer by the implied term. This is confirmed in *Johnson* v *Jones Schindler Lifts Ltd.*[87] where the Employment Court stated that the obligation to pay redundancy compensation may be implied a particular employment relationship as part of the implied duty to treat employees fairly and reasonably.[88]

In determining the need for redundancy compensation, factors to be accounted for include the reasons for the redundancy, length of service, period of notice given, and the ability of the employer to pay.[89]

Following the decision in *Hale*, the question was raised as to whether section 40 of the Employment Contracts Act 1991[90] is wide enough to allow redundancy compensation to be awarded by the Court where such compensation was considered appropriate.[91]

Two decisions of the Employment Court subsequent to *Hale* appear to have resolved the issue. In *Johnston* and *Bilderbeck* v *Brighouse Ltd* [92] it was established that section 40 of the Act is indeed wide enough to facilitate Court-awarded redundancy compensation. Palmer J in *Johnston* stated that "[i]n my view, the appellant was entitled to be compensated pursuant to s.40(1)(c)(ii) of the Employment Contracts Act 1991."[93]

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[86]Above n. 66, ; See also I Adzoxornu "Jurisdiction to Fix the Quantum of Redundancy Compensation under the Employment Contracts Act" Employment Law Bulletin February 1994, 4.

[87][1993] 1 ERNZ 300.

[88]Above n. 87, 315; See also Case Summary (1994) 16 TCL 43/8.

[89]Above n. 87, 316; See also above n. 76, 11; Above n. 66, 156.

[90]The decision in *Hale* was made against the background of section 227 of the Labour Relations Act 1987. Section 40 of the Employment Contracts Act provides as follows :

**40. Remedies** - Where the Tribunal or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any one or more of the following remedies :

(c) The payment to the employee ofcompensation by the employee's employer, including compensation for -

(i) Humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) Loss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen.

[91]K. Johnston "Redundancy Compensation" (September 1993) Employment Law Bulletin 78.

[92][1993] 2 EZNZ 74.

[93]Above n. 87, 317.

The effect of the decisions in *Johnston* and *Bilderbeck* is summarised in the Employment Law Bulletin:

> "These two cases appear to clarify the scope of s. 40.... It seems that if an employer fails to pay compensation to an employee for redundancy where, in all the circumstances, such compensation was called for, it is open to the Tribunal and Court to award such compensation."[94]

It is clear then that where it is felt that payment of reasonable compensation should be made, and isn't in fact made, it is likely that a court or tribunal will step in and award such compensation to the employee under the personal grievance jurisdiction.

Where the redundancy is carried out in a manner deemed to be procedurally deficient, not necessarily just in respect of redundancy compensation, the Court or Tribunal is likely to award compensation under 40(1)(c)(i) to account for the loss of dignity and humiliation of the employee. Compensation under 40(i)(c)(ii) is more likely to be awarded where it is determined that the employee concerned should have received compensation, regardless of the fairness of the decision in other respects. Here, as in *Holden* , the employee is being compensated more for the deprivation of future benefits that redundancy compensation would have conferred on them had it been paid by the employer.[95]

Redundancy compensation that satisfies the implied term of fair and reasonable treatment is not limited to mere monetary payments. In *Redgwell* v *Morrison Printing Inks and Machinery Ltd.*[96] the employer provided payment in lieu of extended notice and also provided counselling and support from a consultant for 90 days which was worth approximately $6,000. It was held by the Employment Tribunal that no further redundancy compensation was called for.[97]

However, it is also important in this context to consider the requirement of reasonable notice for redundancy. The provision of reasonable notice, and more particularly the provision of an extended notice period, can significantly affect claims for additional redundancy compensation.

*Richards* v *Elastomer Products Ltd.*[98] provides a good example of the impact of the implied term upon redundancies in this regard. In *Richards* the plaintiff claimed that the employment contract was breached on the grounds of unjustified dismissal for redundancy.

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[94]Above n. 91, 78. Adzoxrnu, above n. 86, confirms that this power does exist for the Court or Tribunal under the Employment Contracts Act 1991.
[95]See above n. 82.
[96][1992] 3 ERNZ 235.
[97]Above n. 96, 241.
[98][1993] 2 ERNZ 215.

The Employment Court held that the manner of dismissal of Richards breached the implied term of confidence, trust, and fair dealing underpinning the contract. Importantly, in this case, Richards had given 10 years service in specialised employment.

The Court found that in the circumstances reasonable notice of the impending redundancy should have been four months.[99]
This notice period required by the Court was significantly more than that given by the employer, resulting in a considerable award to Richards.

Provision of reasonable notice is closely linked to provision of reasonable compensation. Where the period of notice given by the employer is determined to be inadequate by the Court or Tribunal it is very likely that compensation will be awarded to the employee concerned, especially where the inadequate notice has given rise to humiliation and loss of dignity. Further, it may be held that the failure to give adequate notice has deprived the employee of a possible future benefit, and has reduced the amount of time they have available to seek alternative employment.

To be deemed reasonable, the notice period would have to be account for the particular employee's circumstances, such as loyalty and length of service. Therefore where the notice period is reasonable in the circumstances, in that it fairly accounts for the particular characteristics of the employee or employees concerned, a claim for humiliation and loss of dignity at least should be untenable, in the absence of aggravating circumstances.

It is apparent that the provision of a period of notice significantly in excess of that otherwise deemed fair and reasonable, or required under the contract, may go some distance towards negating the requirement for additional compensation.[100] Here, the employee cannot claim that they have been humiliated by the procedure, and the provision of the extended notice may also have provided them with the opportunity to minimise their losses by seeking alternative employment during this period.

While it is correct that an award of compensation should be within the powers of the Court or Tribunal where the procedures followed to implement the redundancy are inadequate in light of the implied term of fair and reasonable treatment or where the application of the term to the particular situation clearly calls for compensation, the Court or Tribunal should not extend this any further to an absolute requirement in every case.

Lack of reasonable compensation should not, of itself, immediately give rise to a personal grievance claim of unjustified dismissal for redundancy. As earlier stated, redundancy is considered to be a substantive justification for dismissal. An employer who implements a redundancy decision in a fair

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[99]Above n. 98, 236.
[100]Above n. 92, 93 per Goddard CJ.

manner in respect of notice, information, and consideration of alternatives, should not be required to pay additional compensation in every case.

It must always be open to the Court or Tribunal to determine that a particular redundancy is fair and reasonable, thereby complying with the implied term, even in the absence of redundancy compensation. This would be particularly justified where a significantly extended notice period is given as this is already compensating the employee concerned to a degree.

*(c) Adherence to formal redundancy agreements*

The intervention of the courts is not dependent on the absence of a formal redundancy agreement. The implied term also has an application to situations where a formal agreement exists..

In *Unkovich*, Goddard CJ stated that where a redundancy agreement is made between the parties, the requirement of fair and reasonable treatment dictates that the parties honour their obligations under the agreement.[101] This stems from the wider obligation that parties will behave in accordance with the understood but unexpressed reasonable and legitimate expectations of the other, arising from the particular employment contract.[102]

An employer who fails to adhere to a formal redundancy agreement may be determined to have breached the implied term of fair and reasonable treatment. The result of this is that "[t]he failure to follow procedures specifically agreed with the employee would seem to raise a very strong case of procedural unfairness."[103]

As earlier stated, when determining whether redundancy compensation is payable, regard is had to the ability of the employer to pay. Goddard CJ, in *Unkovich* , clearly anticipates such an eventuality, even where such compensation is specifically included in the formal redundancy agreement, but adds that this alone does relieve an employer from all obligations arising from the implied term.[104] In this situation, the implied term merely has an altered application. Goddard CJ summarises the altered application as:

> "If the respondent had truly been 'unable' to honour it, then a candid statement to that effect to each employee with an adequate explanation of the reasons for the inability seems to me to be the very least that could be expected from a fair and reasonable employer in the circumstances...."[105]

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[101]Above n. 24, 548.

[102]Above n. 24, 548. R Towner "Employment Law" [1993] NZ Recent Law 103, at 138 states that the abiding theme in the judgment is that the notice requirement in the redundancy agreement is not just a technical nicety of no substance. This would have broader application to the other elements of the formal agreement.

[103]Above n. 2, 101.

[104]Above n. 24, 562.

[105]Above n. 24, 562.

Colgan J adhered to a similar principle. He found that non-compliance with contractual terms and breaches of the obligations of trust, confidence, and fair dealing could independently cause a resultant dismissal to be unjustified. He further found that breach of contractual terms may be a failure to comply with obligations of fairness, trust, and confidence.[106]

Colgan J also agreed with the submission of counsel for the applicant that one element of the duty of fairness incumbent upon the plaintiff in these circumstances was an obligation to act consistently. Where the company had previously complied with its formal redundancy agreements, it failed to do so in this case. Subsequently Colgan J stated:

> "Mr Haigh submitted, correctly I would find, that the evidence established that on prior occasions when effecting redundancies, Air NZ Ltd. had consistently adhered to the redundancy agreement provisions. I would find that to be a further factor going to the applicant's justifiable expectation that the redundancy agreements would be adhered to."[107]

The essence of Colgan's judgment is that in failing to honour the contractual redundancy agreement, an employer may fail to comply with the implied term. This is particularly so where it is established that the failure is out of character, in that the employer has previously adhered to the formal redundancy agreements. Subsequently, the dismissal for redundancy is liable to be found to be unjustified, enabling the employee concerned to bring a personal grievance action for unjustified dismissal.[108]

*(d) Criteria to Determine Selection for Redundancy*

To comply with the implied term , an employer must also demonstrate that the selection of redundant employees was based on fair and proper motives. This encompasses in part ensuring that there is actually a genuine redundancy taking place. However, it also extends further in that even where a genuine redundancy is occuring, an employer should select employees for redundancy using fair and reasonable criteria.

In this regard, the decision in *Hale* is again of importance. There, the Court, while acknowledging that procedural fairness is required, held that redundancy could arise from normal business reorganisation.[109]

An employee's poor work record may be one justified consideration, but in line with *MacLeod* v *Spinax Motors Ltd.*[110] this is only applicable where an employee's unsatisfactory work performance has been previously drawn to the employee's attention.

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[106]Above n. 24, 579.

[107]Above n. 24, 584. As a result, compensation was awarded at an average of $30, 000 per worker.

[108]See above n. 24, per Colgan J, 588 - 589.

[109]See above n. 70 and accompanying text.

[110][1988] NZILR 253.

It is though unclear as to whether an employer may consider the relative productivity and other work related merits of the pool of employees considered for redundancy in a situation where no poor performance is alleged, but some have given superior performance to others. In this situation, until the need for redundancy arises, the employer may have no reason to advise an employee of poor performance. On this basis, the employer should not be prevented from using this as one criteria, even though the employee or employees concerned may be unaware of their relative merits. This would be consistent with the employer's right to make genuine commercial decisions regarding their business.

An example of an employer using productivity based factors in deciding upon candidates for redundancy is found in *Law* v *GE Tregenza Ltd* .[111] There, the employees' relative work performance and efficiency were considered in addition to work related accident history, marital status, and financial commitments, to select which employee or employees would be made redundant. The employer successfully contended that there was no obligation to apply the 'last on, first off' principle because there was no such requirement in the award agreement.[112]

However, in *Tregenza*, as in *MacLeod*, it was held that there was a requirement that the employee should be made aware of the criteria used to determine the redundancy selection, and this wasn't complied with.[113] In *Tregenza* the employee had to wait eight months, until the personal grievance hearing, to find out why he had been selected. Subsequently, while the selection criteria was fair, the process used to implement the redundancy wasn't, so it was unjustified.[114]

In a situation where no specific redundancy agreement exists, the judicial attitude seems to favour the employer at least considering the 'last on, first off' principle.[115] However, it is conceded that this is not a firm rule. This is rightly conceded because it creates a presumption against non-selection of newer employees when retention of these employees may in fact be more economically viable for the employer. This is particularly so when the new employees bring additional technological or work related knowledge and skills to the business. *Redgwell* provides a good example of this type of situation. There, one employee was selected for redundancy. The employee selected had given twenty two years of service. The employee retained had only been in employment for fifteen months. However, it was held that the selection was within the bounds of reasonableness, as the employee retained had the advantage of newer and more beneficial skills.[116]

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[111][1992] 2 ERNZ 149.
[112]Above n. 111, 154.
[113]Above n. 111, 158.
[114]As a result, an award of $5,000 was made under section 40(1)(c)(i) of the Employment Contracts Act 1991.
[115]See for example above n. 110; See also above n. 2, 100.
[116]Above n. 96, 235 - 239.

It therefore appears that an employer may have recourse to a number of criteria in selecting employees for redundancy. Economic considerations may be used, subject to demonstrating that employees who have been selected because of poor performance have previously been adequately advised of their performance problems.

Further, to comply with the requirements arising from the implied term of fair and reasonable treatment, adequate information regarding the reasons for selection for redundancy should be given to the employee or employees concerned.

Length of service is likely to be considered, and indeed may be required to be considered, but alone this cannot be said to be a determinative criteria.

*(iii) Conclusions*

As in the case of dismissals for cause, the implied term imports obligations of procedural fairness even though redundancy is considered a substantive justification for dismissal. The obligations are of a different nature to those normally associated with procedural fairness in dismissal and are primarily concerned with ensuring that an employee who may well be blameless in the matter is treated fairly and reasonably given the impending dismissal.

Unlike procedural fairness in dismissal for cause, an employer is not required to allow an employee to put a case against the dismissal. However, as discussed above, the requirement of considering alternatives to the redundancy has the potential to constrain the employer's managerial perogative, and as such must be carefully applied by the Court or Tribunal.

An employer may be required to pay compensation to the employee as well as complying with the contractual notice period, or providing reasonable notice where no period is specified. Where it is determined that compensation should have been paid but wasn't paid, the Tribunal or Court has the power under the Employment Contracts Act 1991 to award compensation to the employee concerned under the personal grievance provisions of the Act.

Clearly then, the implied term has a fundamental application to redundancy, applying in such a manner as to ensure that employees are treated reasonably without compromising the long recognised right that an employer has to make subjective determinations in respect of their business. This right is still recognised, and workplace realities are considered[117], but the implied term dictates that these do not extend to allowing an employer to dismiss employees for redundancy without regard to the employees' interests in fair treatment.

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[117]Above n. 76, 2.

## PART 6 - CONCLUSION

This paper has attempted to provide a broad outline of the development and application of the implied term of trust and confidence, or fair and reasonable treatment, to New Zealand employment law.

It is clear that the concepts of trust and confidence and fair and reasonable treatment are so interconnected as to effectively be the same implied term, simply under different expressions which connote altered applications of the term as between procedural and substantive matters in the employment relationship.

The implied term is an established element within the framework of the New Zealand personal grievance procedures under the Employment Contracts Act 1991, but it also has a wider application. Good faith bargaining is potentially the most significant of these areas, but is also likely to be an area riddled with many hidden issues which will require judicial intervention.

The implied term further imports obligations of procedural fairness into the framework of redundancy dismissals in New Zealand. The application of the term is of a different nature for redundancy than for dismissal for cause, but the effect is still significant. Compensation, provision of the contractual or otherwise 'fair' notice, and the provision of information to the employees regarding the redundancy are all important obligations. Discussion of alternatives is a further possible requirement, but it is important that the Court or Tribunal does not extend this to a power allowing them to look at the particular alternatives considered, as this would encroach greatly on the employer's managerial perogative.

The implied term is likely to remain an important part of our employment law. It is unlikely that the New Zealand Courts will adopt the approach of the English Court in *McClory* v *Post Office Union*[118] where it was held that there was no such obligation of fairness in employment law. The Court denied the existence of both a general implied term that the employer will behave reasonably and a more specific duty to act fairly in regard to dismissals.

The Court placed substantial weight on the concept of the employment relationship as a purely contractual one which therefore did not warrant the implication of the principles of natural justice. It appears that the fundamental reasons given for this were that such an implication was neither obvious or necessary, and that to make such an implication may involve the court inappropriately in the administrative and organisational decisions of the employer.[119]

For the New Zealand courts to follow such a decision would require a complete shift in attitude. The trust and confidence principles would need to

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[118]Above n. 4.

[119]Editorial Comment "The Role of Fairness in Employment Law" (March 1993) Employment Cases Summary 1.

be discounted, as an employer who has no obligation to act fairly towards an employee could not possibly be maintaining trust and confidence in the employment relationship.

The principles of trust and confidence, or fair and reasonable treatment are too entrenched within New Zealand employment law to be discarded now. Recognition and application of the term has occured from the level of the Employment Tribunal to the Court of Appeal, and has been so universally accepted as to now be part of the fabric of our law.

To conclude, it can safely be said that the decision in *McClory* does not represent the law in New Zealand at the present time or in the foreseeable future.[120] The implied term of trust and confidence, or fair and reasonable treatment will continue to apply to the ordinary contract of employment with the particular significance that breaches of the subsequent obligations will probably give rise to a statutory personal grievance claim.

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[120]Above n. 119, 2.

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