THE INTERACTION OF IMPLIED AND EXPRESS TERMS IN EMPLOYMENT CONTRACTS AND THE EFFECT OF PUBLIC POLICY

Preparation:

In order to prepare for this seminar you should read from one or two of the textbooks in the general reading listed below. You should then look at and consider the four questions that will be discussed. For each question you should read any specific material cited.

Reading:
Selwyn chapters 3, 10 & pp. 541-553*
Deakin & Morris chapter 4, pp. 217-338 and 347-350*
Painter & Holmes chapter 3*
Collins chapter 5*
Honeyball & Bowers chapter 3*
Pitt, pp. 145-148*
Smith & Wood pp.91-100 and 120-134*

Advanced Reading:
David Cabrelli, Commercial Agreements in Scotland: Law and Practice (W Green, 2006) pp. 133 - 142

Journal Articles:
P. Sales, “Covenants Restricting Recruitment of Employees and the Doctrine of Restraint of Trade” (1988) 104 Law Quarterly Review 600
Loraine Watson, ‘Employees and the Unfair Contract Terms Act’ (1995) 24 ILJ 323*
David Cabrelli, “Severability clauses: The blue pencil option” (2001) 6 (3) Scottish Law & Practice Quarterly 231 – 236
David Cabrelli, “Post-Termination Covenants in the Spotlight Again” (2004) 33 ILJ 167*
**Question 1:**

What happens when express terms and implied terms conflict with each other? Do the express terms of an employment contract always prevail? How does the position differ from general contract law doctrine on the same point?

*Johnson v Unisys Ltd* [2003] 1 A.C. 518, 539 at para. [37] per Lord Hoffmann (HL)*
*Barber v Somerset County Council* [2004] 2 All ER 385, 397-398 at paras. [2]-[35] per Lord Rodger*
*Consistent Group Ltd. v Kalwak* [2008] IRLR 505, 510 at para. [23] per Rimer LJ*
*Kulkarni v Milton Keynes Hospital NHS Trust* [2009] IRLR 829, 838 at para. [74] per Smith LJ*

**Question 2:**

What kinds of express terms of a written contract of employment have been found to conflict with the implied terms of the contract of employment?

**Specific Reading:**


*O’Brien v Associated Fire Alarms* [1969] 1 All ER 93 [1968] 1 WLR 1916
*Rank Xerox Ltd v Churchill* [1988] IRLR 280
*United Bank v Akhtar* [1989] IRLR 507*
*White v Reflecting Roadstuds Ltd* [1991] IRLR 331
*Barber v Somerset County Council* [2004] IRLR 475 [2004] 2 All ER 385 [2004] 1 WLR 1089*
*TFS Derivatives Limited v Morgan* [2005] IRLR 246*
*Land Securities Trillium Ltd. v Thornley* [2005] IRLR 765*
*Milne v Link Asset & Security Co. Ltd.* [2005] All ER (D) 143 (Sep)*
*Takacs v Barclays Services Jersey Ltd.* [2006] IRLR 877*
*Luke v Stoke on Trent City Council* [2007] IRLR 305
*Brown v GMB* at para. [40] per Elias J – Full Official Transcript of this case is available from Westlaw*
*Evans v Home Office* [2008] IRLR 59

**Question 3:**

Does the Unfair Contract Terms Act 1997 apply to contracts of employment? Is there a difference between Scots law and English law on this point? Do you agree with the position?

**Specific Reading:**

Lorraine Watson, ‘Employees and the Unfair Contract Terms Act’ (1995) 24 ILJ 323*
Freedland (2nd ed. 2003) *The Personal Employment Contract* pp. 190-191*


*Smith v British European Airways Corporation* [1951] 2 KB 893

*Brodin v A/R Seljan* [1973] SLT 198

*Chapman v Aberdeen Construction Group* [1991] IRLR 505*

*Commerzbank AG v Keen* [2007] IRLR 132*

**Question 4:**

On what basis do the Courts control the enforceability of restrictive covenants? Is it the implied terms of the contract of employment – or some other doctrine?

If an employer wrongfully repudiates an employee’s contract of employment, are they entitled to enforce a restrictive covenant against that employee?

List the kinds of restrictive covenants which are encountered in practice.

If a court holds that a particular portion of a restrictive covenant is unenforceable, will the court be prepared to sever that particular offending portion from the contract?

**Specific Reading:**


David Cabrelli, “Severability clauses: The blue pencil option” (2001) 6 (3) *Scottish Law & Practice Quarterly* 231–236


David Cabrelli, “Post-Termination Covenants in the Spotlight Again” (2004) 33 ILJ 167*


David Cabrelli, *Commercial Agreements in Scotland: Law and Practice* (W Green, 2006) at 133-142


*General Billposting v Atkinson* [1909] AC 118*

*Herbert Morris Ltd v Saxleby* [1916] 1 AC 688*

*Hinton & Higgs Ltd v Murphy* [1989] IRLR 519

*Office Angels Ltd v Rainer Thomas* [1991] IRLR 214

*Living Design (Home Improvements) Ltd v Davidson* [1994] IRLR 69

*Rock Refrigeration v Jones* [1997] 1 All ER 1

*Axiom Business Computers Ltd v Frederick* 2003 GWD 37-1021

*Dunedin Independent plc v Welsh* [2006] CSOH 174

*Thomas v Farr plc* [2007] IRLR 419

*Christie Owen & Davies plc v Walton* [2008] CSOH 37
This article seeks to explore how the contract of employment might develop in the light of *Malik v BCCI* [1997] 3 All ER 1. The nature of the obligation of mutual trust and confidence is explored and the importance of *Scally v Southern Health Board* [1992] 1 AC 294 is discussed. The article considers whether the courts would permit the parties to contract-out of mutual trust and confidence. It is argued that, on public policy grounds, any such attempt should be illegitimate. The article then moves on to consider what the contract of employment will look like if it continues to evolve towards being a contract of good faith. It is suggested that this might involve more extensive obligations being owed by EmployEEs as well as EmployERS. One instance of this might be over disclosure of information; both at the time of the formation of the contract and during the period it subsists. The article reviews cases where EmployER’s discretionary powers have been restricted by the obligation of mutual trust and confidence and considers whether this might be extended to control the EmployER’s prerogative over termination of the contract. It is suggested that valuable comparisons can be made with the law relating to the contract of trade union membership. The article also considers the significance that the existence of employment protection legislation holds for the development of the common law.

5. CONCLUSION

The emergence of mutual trust and confidence is a development to be welcomed unreservedly in employment law. It serves to challenge abuse of power, and promotes the dignity of the EmployEE. Its emergence in the UK is consistent with good faith playing a greater role in the law of contract as a whole. It is also significant that the law of employment regulates long-term relationships. Campbell and Harris ‘... see a long-term contract as an analogy to a partnership. The parties are not aiming at utility-maximisation directly through the performance of specified obligations; rather, they are aiming at utility-maximisation indirectly through long-term cooperative behaviour manifested in trust and not in reliance on obligations specified in advance’. What is most intriguing of all, for employment lawyers, is whether the law of the employment contract as a whole will continue to evolve so that the contract could be categorised as one of good faith. To put it another way, will the contract become one of good faith rather than merely a contract which contains elements of good faith. Certainly the judiciary are becoming more willing to find a place for good faith within the law of contract. Writing in the *Law Quarterly Review* Lord Steyn observed that ‘... where in specific contexts duties of good faith are imposed on parties our legal system can readily accommodate such a well tried notion. After all, there is not a world of a difference between the objective requirement of good faith and the reasonable expectations of parties’. In years to come *Malik* may be regarded as the beginning of a new era in employment law. It is also intriguing to speculate as to what effect a whole hearted movement to good faith would have on the rights and obligations of the employment contract. Hitherto, the evolution of mutual trust and confidence has been
very much to the benefit of EmployEEs. One might pause to consider whether, as the term continues to evolve, that will continue to be the case. Underlying notions of 'interdependence, caring and commitment' may lead to the implication of obligations more consistent with a unitary model of employment relations rather than one based on pluralism.

One must also note something of a paradox. The strengthening of employment rights sits uneasily with the contemporary employment market where job insecurity is rife. Forms of employment, such as fixed terms contracts, abound which diminish greatly the EmployEE’s stake in the enterprise. In Malik itself judicial cognisance was taken of the fact that ‘Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this.’ 121 In a sense such employment practices constitute the most radical form of contracting-out of fundamental obligations.

115 Auckland Shop EmployEEs Union v Woolworths [1985] 2 NZLR 372.
118 And see Atiyah, op cit at 213.
120 One might also note that Art 6 of the Works Council Directive uses the phrase “negotiate in a spirit of cooperation”.
121 Op cit at 8, per Lord Nicholls.

David Cabrelli, “Post-Termination Covenants in the Spotlight Again” (2004) 33 ILJ 167*

“1. INTRODUCTION
The recent case of Axiom Business Computers Ltd v Frederick which came before the Outer House of the Court of Session in Scotland considered two restrictive covenants contained within a sales director’s terms and conditions of employment. The first covenant restricted her from working for a competitor of her EmployER after the termination of her employment. The second covenant which restricted her from soliciting customers of the EmployER was the subject of much more debate in the Outer House of the Court of Session.

The judgment of Lord Bracadale in Axiom analyses a number of the common law cases on contracts in restraint of trade and raises, in particular, a number of interesting points in respect of the enforceability of restraints on EmployEES from canvassing, soliciting or dealing with customers of their former EmployER. In particular, it again raises the questions as to whether a covenant which attempts to restrict the EmployEE from canvassing customers
(i) with whom they initiated contact or negotiations,
(ii) with whom they had had no contact or dealings, or
(iii) who had been past customers of the EmployER prior to the commencement of their employment, will be treated as enforceable by the courts.
This case note explores these issues and others.
4. CONCLUSION

Axiom reiterates how difficult it is to draft a non-competition covenant in appropriate terms. Surprisingly, Axiom suggests that where a clause prohibiting

(i) the disclosure of non-confidential information and
(ii) the solicitation of the EmployER’s customers is contained within an EmployEE’s contract of employment,

this will render any supplementary further non-competition covenant too wide. In addition, the absence of a temporal restriction and concise description of the market the EmployER was seeking to protect in a noncompetition covenant will be fatal.

Axiom also demonstrates the difference between the treatment of non-competition covenants and those proscribing the EmployEE from soliciting customers of the EmployER. The courts adopt a more relaxed attitude to covenants of the latter type, especially those restricting an EmployEE from canvassing or dealing with prospective customers

(i) with whom they initiated contact or negotiations and
(ii) subject to the cases of Austin Knight and Gledhow, with whom they had had no contact or dealings.

As ever, the enforceability of such covenants will depend on the nature of the EmployER’s legitimate business interest and whether the covenant is no more than adequate to protect such interest.”

Question 1
What happens when express terms and implied terms conflict with each other? Do the express terms of an employment contract always prevail? How does the position differ from general contract law doctrine on the same point?

Implied Terms
- Gap Filling
  - Where there are no Express Terms
  - Where it is so obvious that it would have been included
  - Business efficacy

Express terms trump implied terms (Johnstone, Akhtar)

Exceptions
Express term may be subject to implied term (Akhtar)

“If there are areas where strict adherence to contractual rights can produce inequitable results, traditional contract doctrines may be circumvented. Consequently, the courts have thus developed and expanded the doctrine of the implied term of trust and respect which is sometimes used to override strict contractual obligations, on the basis that the exercise of contractual powers by management is subject to that power being exercised reasonably and not in an unconscionable manner.” (Selwyn, 3.2)

“Under the law of employment, contractual terms are subject to an overriding obligation of trust and respect.” (Selwyn, 3.24)

Junior Doctor
40 hour week + 48 hours overtime

Express term subject to implied term
Express/implied terms must be exercised concurrently

Browne-Wilkinson
Co-existing
Interaction between Express/Implied terms.
Contractual term has to be exercised in recognition of duty of care.

Duty to Exercise Care – Excessive Workload
Concerning: duty to exercise reasonable care, express terms, psychiatric well-being