IMPLIED TERMS IN EMPLOYMENT CONTRACTS (I)

Preparation:

In order to prepare for this seminar you should read material from one or two of the textbooks cited below. You should then ensure that for each case listed in the reading you can provide:

a) A summary of the relevant facts  
b) The issue decided  
c) The decision

You should also look at and consider the three questions which will be discussed in class.

Reading:
Selwyn chapters 3 & 10 & pp. 534-541*  
Deakin & Morris pp. 217-337 and 347-350*  
Painter and Holmes pp.111-192*  
Honeyball & Bowers chapter 3*  
Pitt, pp. 129-147 and 443-455*  
Smith & Wood pp.120-202*

Advanced Reading:  
D. Brodie, The Employment Contract: Legal Principles, Drafting, And Interpretation (Oxford: OUP, 2005) at 49 - 103  
D. Brodie, The Contract of Employment (Thomson/W Green, SULI, 2008) chapters 7, 8, 9, 10 & 11

Journal Articles:  
Lindsay J., “The implied term of Trust and Confidence” (2001) 30 ILJ 1  
Douglas Brodie, “Mutual Trust and the values of the Employment Contract” (2001) 30 ILJ 84*  
David Cabrelli, “Discretion, Power and the Rationalisation of Implied Terms” (2007) 36 ILJ 194  
Employer’s Implied Duties

1. Duty to provide work?
   Devonald v Rosser & Sons [1906] 2 KB 728*
   Browning v Crumlin Valley Collieries Ltd [1926] 1 KB 522*
   Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB 647 [1940] 4 All ER 234*
   Langston v AUEW [1974] I All ER 980
   Bosworth v Angus Jowett & Co Ltd [1977] I RLR 374
   William Hill Organisation Limited v Tucker [1998] 1 IRLR 313*
   SG&R Valuation Service v Boudrais [2008] IRLR 770*
   Standard Life Health Care Ltd v Gorman [2010] IRLR 233*
   Christie v Johnston Carmichael [2010] IRLR 1016

2. Duty to pay wages/remunerate?
   Devonald v Rosser & Sons [1906] 2 KB 728*
   Browning v Crumlin Valley Collieries Ltd [1926] 1 KB 522*
   Miller v Hamworthy Engineering Ltd [1986] IRLR 461
   Wright v Weed Control Ltd. [2008] All ER (D) 235 (Feb)

3. The Duty of an employer to exercise care and provide a safe system of working
   3A. Duty to exercise care:
   Wilsons & Clyde Coal Co. Ltd v English [1938] AC 57*
   Lister v Romford Ice & Cold Storage Co. [1957] AC 555
   Spring v Guardian Assurance [1994] 3 All ER 129*
   Walker v Northumberland County Council [1995] 1 All ER 737*
   Sutherland v Hatton [2002] IRLR 263*
   Fyfe and McGrowther Ltd v Byrne [1977] IRLR 29
   Bracebridge Engineering Ltd v Darby [1990] IRLR 3

   3B. Duty to provide a safe system of work:
   Pagano v HGS [1976] I RLR 9
   British Aircraft Corp Ltd v Austin [1978] I RLR 332
   Graham Oxley Tool Steels Ltd v Firth [1980] IRLR 135
   Lane v Shire Roofing Co (Oxford) Ltd [1995] IRLR 493
4. Duty to exercise care for the economic and financial well-being of employee?
Deyong v Shenburn [1946] 1 All ER 226
Reid v Rush & Tompkins Group plc [1989] 3 All ER 228 [1990] ICR 61
Scally v Southern Health and Social Services Board [1992] 1 AC 294, HL
Spring v Guardian Assurance plc [1995] 2 AC 296
Crossley v Faithful & Gould Holdings Limited [2004] IRLR 377*

5. Duty not to suspend?
Bird v British Celanese Ltd [1945] KB 336 [1945] 1 All ER 488*
Gogay v Hertfordshire County Council [2000] IRLR 703 (CA)
Mezey v St Georges Mental Health NHS Trust [2007] IRLR 244

6. Duty to provide support?
Cresswell v Board of Inland Revenue [1984] ICR 508 [1984] IRLR 190*

7. Implied duty of mutual trust and confidence
Malik v BCCI SA [1997] IRLR 462*
Gogay v Hertfordshire County Council [2000] IRLR 703 (CA)*
Johnson v Unisys Ltd [2003] 1 A.C. 518 (HL)*
Eastwood v Magnox Electric plc [2004] IRLR 733*
London Borough of Walham Forest v Omilaju [2005] IRLR 35*
Doherty v British Midland Airways Ltd. [2006] IRLR 90
Baldwin v Brighton & Hove City Council [2007] IRLR 232
Commerzbank AG v Keen [2007] IRLR 132*
RDF Media Group v Clements [2008] IRLR 207
Aberdeen City Council v McNeill [2010] IRLR 374
Buckland v Bournemouth University Higher Education Corp. [2010] IRLR 445*
Tullett Prebon plc v BGC Brokers LP [2011] IRLR 420*

8. Implied Term that Decision to Award or not Award Discretionary Bonuses is not to be made Irrationally, Perversely or contrary to Good Faith
Clark v BET plc [1997] IRLR 348
Clark v Nomura International plc [2000] IRLR 766
Mallone v BPB Industries Ltd. [2002] IRLR 452
Horkulak v Cantor Fitzgerald International [2004] IRLR 942*
Commerzbank AG v Keen [2007] IRLR 132*
Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA [2010] IRLR 715

9. Implied Term that the Employer will not Terminate the Employment of an Employee in order to Avoid an Express Term regarding the Making of Certain or Conditional Payments to the Employee
Aspden v Webbs Poultry & Meat Group (Holdings) Ltd. [1996] IRLR 521*
Jenvey v Australian Broadcasting Corporation [2002] IRLR 520
Takacs v Barclays Services Jersey Ltd. [2006] IRLR 877*
10. Duty to Co-operate?
Takacs v Barclays Services Jersey Ltd. [2006] IRLR 877

11. Duty Not to Pay in Lieu of Notice?
Morrish v NTL Group Limited 2007 S.C. 805; 2007 S.L.T. 1074*

Questions:
1. Is it possible to list the employers' implied duties?
2. Is the list of employers' duties closed?
3. What are the sources of the employer's implied duties?
Nature of contract will depend on nature of job.

In most employee/employer contract – brief outline of duties.

Express term V. IMPLIED TERMS

Dispute = is there an express term?
most likely NO

Look at implied terms
Implied terms always evolving
‘Snapshot’ in time at any given moment.

ET – Mandatory V. Non-mandatory
Mandatory e.g. if not contractual term for notice period – covered by statute
Non-mandatory e.g. if not contractual term for pensions – not covered by statute

Questions:
1. Is it possible to list the employers' implied duties?

Employer’s Implied Duties

1. Duty to provide work? – NO
2. Duty to pay wages/ remunerate? – YES
3. The Duty of an employer to exercise care and provide a safe system of working
   3A. Duty to exercise care: - YES
   3B. Duty to provide a safe system of work: - YES
4. Duty to exercise care for the economic and financial well-being of employee? – NO
5. Duty not to suspend?
6. Duty to provide support? – YES
7. Implied duty of mutual trust and confidence – YES
8. Implied Term that Decision to Award or not Award Discretionary Bonuses is not to be made Irrationally, Perversely or contrary to Good Faith – YES
9. Implied Term that the Employer will not Terminate the Employment of an Employee in order to Avoid an Express Term regarding the Making of Certain or Conditional Payments to the Employee – YES
10. Duty to Co-operate? – YES
11. Duty Not to Pay in Lieu of Notice?

Employer’s Implied Duties

1. Duty to Provide Work?
NO general duty
BUT
Exceptions.
An employer is under NO general duty to provide an employee with work.
HOWEVER
The courts have created exceptions to this general rule in certain factual circumstances where the nature of the employee’s work is so important that the employee requires to work at all times in order to:

- Maintain or develop key skill levels; or
- Keep up to date with developments in the industry, sector or trade within which he works.

Furthermore, an employer may also be under a duty to provide work where:

- There was an understanding between the employer and employee that the employee would be given a reasonable amount of work in order that he could enjoy a certain level of earnings; or
- The failure to provide the employee with work may lead to a loss of reputation or publicity on part of the employee.

(Much will depend on the facts and circumstances of the case)

2. Duty to Pay Wages/Remunerate?

Gratuitous contracts DO exist – Internship

Normally Express term

HOWEVER

If no Express term then IMPLIED term.

Entitlement: National Minimum Wage

Reasonable remuneration for that particular job (industry, market conditions etc)

Where an employee is not undertaking work, but is ready and willing to work, he will be entitled to be paid and remunerated.

HOWEVER

EXCEPTIONS to this general rule.

For example, in the absence of an express term to the contrary, the employer may legally hold wages:

- Where the employer requires to close down a place of business through no fault of its own (e.g. Browning); or
- An employee is absent owing to ill-health.

(The employee remains entitled to statutory sick pay).

3. The Duty of an Employer to Exercise Care and Provide a Safe System of Working

Modern starting point

3 fold test:

- Safe equipment and machinery
- Safe procedures MODERN STARTING POINT
- Competent fellow employees
- (Reasonably safe environment)

Fellow employees greatest risk

Practical jokes (Smith v Crossley Bros), incompetence etc.

Often dependent on competency of colleagues.

Can be affected by drink/drugs.
An employer is under a duty to exercise reasonable care in respect of the employee’s physical and psychological well-being. This duty is a contractual duty, but its content is heavily influenced by the duty of care in negligence in the law of tort and delict (in Scotland).

THEREFORE

Whether an employer has breached the implied duty to exercise reasonable care depends on whether the employer has discharged the relevant standard of care and taken the necessary steps.

If the employer has not reached the requisite standard of care, the court will hold the implied duty has been breached.

Issues of causation, remoteness of damage and quantum will equally be relevant in the law of the contract of employment and in the law of tort or delict (Scotland).

3A. Duty to Exercise Care

3B. Duty to Provide a Safe System of Work

3C. Duty to Provide Employees With Reasonably Competent Fellow Workers

4. Duty to Exercise Care for the Economic and Financial Well-being of Employee?

An employer is under NO implied duty to exercise reasonable care for the economic and financial well-being of its employees.

Where:

- A particular term of the contract of employment makes available a valuable right to the employee; and
- That right is contingent upon the employee taking action to avail himself of its benefit; and
- The employee could not, in all the circumstances, reasonably expected to be aware of the term unless it was drawn to his attention,

There is NO general implied duty on the part of the employer to take reasonable steps to bring it to the attention of the employee.

Such an implied duty MAY be owed BUT

This will depend on the facts and circumstances of the case and will not be implied as a matter of law into every contract of employment.

This point was settled in Crossley, despite earlier indications to the contrary in the House of Lords in Spring and Scally.

The exception is the situation dealt with in Crossley, where it was held that an employer is under an implied duty to exercise reasonable care and skill in producing a reference.

5. Duty not to suspend?

6. Duty to provide support?