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Implied Terms and Human Rights in the Contract of Employment

Joe Atkinson*

Abstract

This article considers the potential for implied terms in the contract of employment to protect employees' human rights. The slim prospects of legislative action in this area make it important to consider common law means of protecting human rights at work. Part two begins by setting out the function of implied terms in the contract of employment, and the various ways human rights can affect the legal regulation of the employment relationship. Part three considers the extent to which the implied term of trust and confidence can protect employees' human rights. While there are numerous points of overlap between trust and confidence and human rights, both the scope of the implied term and the level of protection it provides means that it is currently an inadequate mechanism for protecting human rights at work. Part four then assesses the prospects of a new human rights term being implied into the contract of employment using the existing tests for terms implied 'in fact' and 'in law', and develops a prima facie case in favour of implying a human rights protective term into all employment contracts as a default rule.

1. Introduction

The position of authority and control occupied by employers creates the potential for them to have severely detrimental impacts on employees' human rights. This raises the question of whether and how human rights should be protected in the workplace. The need to safeguard employees' human rights from infringement by employers is largely taken as the normative

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premise of this article, which focuses instead on the issue of *how* to protect human rights at work. Specifically, this article assesses the potential for implied terms in the contract of employment to be used as a vehicle for protecting the human rights of employees. It considers the relationship between the implied term of trust and confidence and human rights, as well as the prospects of a new human rights term being implied into the contract of employment.

The possibility of using implied contractual terms to protect human rights has been raised by several labour law scholars,¹ but is yet to be fully considered in the literature. This article aims to fill this gap. The analysis concentrates on those rights included in the European Convention on Human Rights (ECHR or 'Convention') and incorporated into UK law via the Human Rights Act 1998 (HRA), and references to 'human rights' should be taken as referring to Convention rights. This approach is adopted because Convention rights have the largest impact on domestic law, and the best prospect of being protected by implied terms. However, the arguments developed in this article might potentially also be made in relation to social rights, many of which are more directly relevant to the workplace than Convention rights.²

¹ B. Hepple, 'Human Rights and Employment Law' (1998) 19 *Amicus Curiae* 19; D. Brodie, 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37 *ILJ* 329; A. Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve' (2010) 32 *CLLPJ* 729; S. Deakin and G. Morris, *Labour Law* (Oxford: Hart, 2012), 364; H. Collins and V. Mantouvalou, 'Human Rights and the Contract of Employment' in M. Freedland and others (eds.), *The Contract of Employment* (Oxford: Oxford University Press, 2016); G. Morris, 'Protection of Employees Personal Information and Privacy in English Law' in R. Blanpain, H. Nakakubo and T. Araki (eds.), *Protection of Employees' Personal Information and Privacy* (Alpen aan den Rijn: Kluwer, 2014).

² See for example, the rights contained in Part III of The International Covenant on Economic, Social and Cultural Rights, and Title IV of The EU Charter of Fundamental Rights.

Furthermore, the 'integrated approach' to ECHR interpretation means that an implied term protecting Convention rights could also protect some elements of employees' social rights.³

Given the need to secure employees' human rights against infringements by employers, a choice must be made between the legal frameworks available for achieving this. The most obvious mechanism is the enactment of abstract rights in a country's constitutional framework. While it is rare for constitutional rights to apply directly to private relationships,⁴ they often have indirect horizontal effect.⁵ Less obviously, general legislation and the common law can also be important sources of human rights protection. Human rights will often need detailed specification by legislation or the common law,⁶ and, as Alan Bogg points out 'a structure of discrete legal rights' can have the 'cumulative effect' of realising human rights.⁷

English law contains a patchwork quilt of workplace human rights protection; a mix of constitutional,⁸ statutory,⁹ and common law frameworks.¹⁰ Despite often not being thought

³ V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *HRLR* 529.

⁴ South Africa being the notable exception.

⁵ A. Young, 'Mapping Horizontal Effect' in D. Hoffman, *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011).

⁶ N. Jääskinen, 'Fundamental Social Rights in the Charter—Are They Rights? Are They Fundamental?' in S. Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart, 2014).

⁷ A. Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in V. Mantouvalou, *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2014).

⁸ The Human Rights Act 1998.

⁹ The Equality Act 2010; Modern Slavery Act 2015; Companies Act 2006, s.414C; Data Protection Act 2006; Investigatory Powers Act 2016; Protected Disclosures Act 1998; Health and Safety at Work etc Act 1974; Trade Union and Labour Relations (Consolidation) Act 1992.

¹⁰ The tort law action for misuse of private information is the clearest example, *Campbell v MGN Ltd* [2004] UKHL 22; for discussion of tort and human rights see J. Wright, *Tort Law and Human Rights* (Oxford: Hart, 2017).

of in terms of human rights, these nonetheless function to safeguard human rights at work, albeit in a piecemeal and uncoordinated manner. Further research is needed on the adequacy of these frameworks for securing workers' human rights, and there may well be a need for reforms. The law of unfair dismissal for example, has repeatedly been criticised for failing to adequately protect human rights at work.¹¹

While a range of legal mechanisms could be used to protect human rights at work, at present there is no real prospect of new statutory protections being introduced, so it is important to explore non-legislative means of achieving this goal. The current Government shows no sign of taking action, and the last Labour Government voted down a 'Corporate Social Responsibility Bill' that would have introduced corporate liability for human rights infringements.¹² As new legislative protections of employees' human rights are unlikely to be forthcoming, this article focuses on the under-researched issue of the role that implied contractual terms can play in protecting human rights at work. Part two provides context for the substantive analysis, including on the function of implied terms and the different ways in which human rights can affect the legal regulation of the employment relationship. Part three examines the implied term of mutual trust and confidence as a vehicle for protecting human rights. It is argued that, although some infringements of employees' Convention rights will also amount to breaches of trust and confidence, the implied term does not currently provide adequate protection for human rights at work. Part four develops a *prima facie* case for

¹¹ P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (forthcoming) *ILJ*; H. Collins and V. Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 *MLR* 909; V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *MLR* 912.

¹² Bill 129, 53/2.

implying a new human rights protective term into the contract of employment as a default rule. This may be preferable to adapting the implied term of trust and confidence to better protect human rights. An implied human rights term would be in line with the demands of fairness and justice, reflect societal expectations about employer conduct, and help maximise the social and economic value of the employment relationship. The article concludes by identifying some areas for further research on the use of implied terms as a human rights protective mechanism.

2. Implied Terms and Human Rights

The contract of employment has been described as the cornerstone of labour law,¹³ and has a good claim to be the central concept of the discipline.¹⁴ As contract is likely to continue as the dominant conceptual framework for labour law,¹⁵ it is important to consider what role the contract of employment can play in protecting employees' human rights. The initial prospects for contractual protection of employees' Convention rights do not look good. Employers' superior bargaining power allows them to dictate the terms of the contract, meaning employment contracts are unlikely to contain express terms guaranteeing human rights. Nevertheless, it might be possible for Convention rights to be protected by implied terms,

¹³ O. Kahn-Freund, 'Legal Framework' in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain: Its History, Law, and Institutions* (Oxford: Blackwell, 1954), 47.

¹⁴ H. Collins, 'Contractual Autonomy' in A. Bogg and others (eds.), *The Autonomy of Labour Law* (Oxford: Hart, 2015); M. Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003).

¹⁵ S. Deakin, 'The Standard Employment Relationship in Europe—recent Developments and Future Prognosis' (2014) *Soziales Recht* 89.

which could impose a duty on employers to respect the rights of their employees. While it would be possible for a human rights protective term to be implied into the contract of employment by statute,¹⁶ this article examines the extent to which the common law rules of implied terms can protect employees' human rights. Before this however, it is worth providing some context on the function of implied terms, as well as the different ways that human rights may affect the contract of employment.

Implied contractual terms have several important functions. The first is to fill the gaps that inevitably arise in contractual agreements. Gaps will exist in the express terms of a contract where the parties have agreed upon the legal rule that should apply in the circumstances but neglected to include it in the express terms, or purposefully remain silent because they could not agree on an express term. Often however, gaps will arise when the parties have not given any thought to the rule that should apply in a particular contingency, as it is impossible for even the most sophisticated contracting parties to anticipate and specify terms for every possible future event. The express terms of every contract will therefore necessarily leave some things unsaid, and the primary function of implied terms is to supply legal rules that fill these gaps. Given the need to supply legal rules for incomplete contracts, the question is *how* and *when* to imply rules into contracts, not *whether* to do so. This is especially true for 'relational' contracts, meaning those that form the basis of an ongoing relationship rather than a one-off exchange,¹⁷ as these are more likely to be left

¹⁶ For a discussion of statutory implied terms see A.C.L. Davies, 'Terms Inserted into the Contract of Employment by Legislation' in M. Freedland and others (eds.), *The Contract of Employment* (Oxford: Oxford University Press, 2016).

¹⁷ D. Brodie, 'Relational Contracts' in M. Freedland and others (eds.), *The Contract of Employment* (Oxford: Oxford University Press, 2016); I. McNeill, *The New Social Contract: An Inquiry Into Modern Contractual Relations* (New

underdetermined due to the difficulty in accounting for long-term contingencies. In addition to being gap-fillers, implied terms can 'establish a particular context for interpretation' and so function as guides for the construction of express contractual terms.¹⁸ Furthermore, some implied terms are better understood as providing a default 'operating system' for particular categories of contract, rather than simply aiming to fill gaps left by the express agreement.¹⁹

Cabrelli identifies three ways in which legal rules can 'seal' incomplete contracts; supplying mandatory rules that cannot be displaced by express terms, inserting 'individualised default terms...on a contract-by-contract basis', or implying 'standardised default terms' into particular categories of contract.²⁰ Each of these approaches are present in English law. Mandatory norms are sometimes inserted into contracts by legislation, but the focus here is on common law implied terms. There are two categories of common law implied term in English law; those implied 'in fact' into individual agreements on a case by case basis, and those implied 'in law' as default terms into all contracts of a particular type.²¹ Courts often frame implied terms as being expressions of the parties' unstated or 'presumed' intentions.²²

Haven: Yale, 1980); M. Eisenberg, 'Relational Contracts' in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995).

¹⁸ H. Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 *ILJ* 2, 8.

¹⁹ D. Cabrelli, *Employment Law in Context: Text and Materials* 2nd ed. (Oxford: Oxford University Press, 2016), 172; H. Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in H. Collins, P. Davies and R. Rideout (eds.), *Legal Regulation of the Employment Relation* (London: Kluwer, 2000).

²⁰ D. Cabrelli, 'Comparing the Implied Covenant of Good Faith and Fair Dealing with the Implied Term of Mutual Trust and Confidence in the US and UK Employment Contexts' (2005) 21 *IJCLIR* 445, 455.

²¹ H. Beale (ed.), *Chitty on Contracts* 32nd ed. (London: Sweet & Maxwell, 2017), chs 14–0004; H. Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *CLP* 297; *Societe Generale, London Branch v Geys* [2012] UKSC 63, Lady Hale at [55].

²² *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108.

This is a somewhat plausible view of what the courts are doing for terms implied in fact, which are inserted into individual contracts as ‘ad hoc gap fillers’,²³ where necessary for ‘business efficacy’ or because the term is ‘so obvious that it goes without saying’.²⁴ However, terms are often implied where the parties did not reach agreement, or gave no thought to the legal rule that should apply, and it is misleading to frame these as giving effect to the parties’ unstated intentions.²⁵ Furthermore, terms implied in law operate as ‘general default rules’ for all contracts of a particular type,²⁶ and although these might be argued to give effect to the parties’ presumed intentions, perhaps based on what reasonable people would intend or expect,²⁷ even this is ‘somewhat artificial’.²⁸ When courts imply terms in law they decide which legal rules should be regarded as necessary incidents of a particular type of contract,²⁹ and are effectively developing a default common law ‘regulatory framework’ that applies unless the parties expressly agree otherwise.³⁰ This category of implied terms therefore form the regulatory background, or ‘decision architecture’,³¹ against which parties are free to contract. Rather than reflecting the intentions of the contracting parties, terms implied in law embody

²³ *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, Lord Steyn at 458-9.

²⁴ *The Moorcock* (1889) 14 PD 64; *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206; *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; *Marks and Spencer plc v BNP Paribas Securities* [2015] UKSC 72.

²⁵ H. Collins, *The Law of Contract* 4th ed. (Cambridge: Cambridge University Press, 2003), 245–246.

²⁶ *Equitable Life Assurance Society v Hyman*, Lord Steyn at 459.

²⁷ R. Austen-Baker, *Implied Terms in English Contract Law* (Cheltenham: Edward Elgar, 2017), 3.45; J. Steyn, ‘Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *LQR* 446.

²⁸ H. Beale (n 21), 14–003.

²⁹ *Lister v Romford Ice and Cold Storage* [1956] UKHL 6; *Liverpool City Council v Irwin* [1977] AC 239; *Societe Generale, London Branch v Geys* (n 21).

³⁰ H. Collins, ‘Implied Terms in the Contract of Employment’ in M. Freedland and others (eds.), *The Contract of Employment* (Oxford: Oxford University Press, 2016), 472.

³¹ R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale, 2008).

broader policy concerns and principles,³² and can aim to ‘ensure certain minimum standards’.³³

The need to supply legal rules to seal contractual agreements is particularly apparent in the contract of employment. As well as being relational in nature, employment contracts are ‘incomplete by design’ to ensure employers have the managerial flexibility they need to govern the workplace.³⁴ Because of this, a ‘great deal of the contractual relationship between employer and employee is governed by implied terms’,³⁵ and implied terms play a key role in regulating the employment relationship. A wide range of terms are implied into the contract of employment,³⁶ which taken together mean employment contracts will generally be construed in line with the principle that obligations should be ‘fair and reasonable’.³⁷ An implied term requiring that employers respect employees’ human rights could be an important mechanism for protecting human rights at work. Such a term would limit employers’ authority to issue instructions that breach employees’ human rights, allow claims for constructive dismissal following breaches of human rights, and, subject to some additional hurdles, make infringements of employees’ rights actionable breaches of contract that could lead to injunctions or damages.

³² *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, Dyson LJ at [36]; H. Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (n 21); E. Peden, ‘Policy Concerns behind Implication of Terms in Law’ (2001) 117 *LQR* 459.

³³ R. Austen-Baker (n 27), 2.22-2.23.

³⁴ H. Collins, ‘Justifications and Techniques of Legal Regulation of the Employment Relation’ (n 19).

³⁵ *Societe Generale, London Branch v Geys*, Lady Hale at [56].

³⁶ See S. Deakin and G. Morris (n 1), ch 4.

³⁷ M. Freedland (n 14), 186–187.

Although the focus of this article is on implied terms, there are other ways that contract law may help safeguard employees' human rights. Human rights can be used as interpretive principles to guide the construction of contracts,³⁸ and in some jurisdictions terms that are contrary to human rights principles can be declared void by the courts.³⁹ Furthermore, Demeyere argues that because the contract of employment regulates the wage-work bargain, employers' managerial prerogative under the contract should only extend to matters related to this bargain, and not include authority over employees' human rights.⁴⁰ This appears to achieve a similar result to an implied human rights term, but by the negative means of restricting the power conferred on employers under the contract of employment. There is much to be said for this suggestion. But although it limits the authority of employers to issue instructions contrary to human rights, this approach does not establish positive protection for employees; an employer who interfered with their employees' human rights would overstep their contractual authority, but not necessarily breach the employment contract. If human rights are to be protected by the contract of employment, then a human rights protective clause must be incorporated into the contract, either expressly or impliedly.

In addition to contract law, there are multiple other ways in which human rights can affect the legal regulation of the employment relationship. Jääskinen draws on Finnish doctrine to identify six different effects that fundamental rights may have in a legal system. As well as being the basis of direct *claim rights* or a reason for *derogating* from existing law,

³⁸ In *Smith v Trafford Housing Trust* for example, the EAT interpreted express terms narrowly due to the adverse impact they would otherwise have on the employees' human rights, [2012] EWHC 3221 (Ch), at [66]-[72].

³⁹ South Africa is one example, see *Barkhuizen v Napier* 2007 5 SA 323, [28]-[29].

⁴⁰ G. Demeyere, 'Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate' (2010) 36 *QLJ* 299.

human rights can also guide legal *interpretation*, confer some additional *competence* to lawmakers, provide a *mandate* for taking certain actions, or impose a *programmatic duty* to fulfil the right to the greatest extent possible.⁴¹ Many of these effects are present in the English legal system. For example, the HRA creates direct claim rights for public sector workers against their employers, and the development of common law fundamental rights may also provide some direct protection for workers.⁴² The duty imposed by s.3 of the HRA means human rights have an interpretive effect on employment legislation, as seen in unfair dismissal law.⁴³ Human rights can also provide a mandate for the introduction of legislation related to employment, and for public bodies such as the Equality and Human Rights Commission. Finally, within the sphere of EU law at least, human rights protected by European law may have a derogatory effect on domestic regulation of the employment relationship.⁴⁴

The proper role of human rights in the English legal system, and particularly their impact on private law, continue to be live issues.⁴⁵ One question is what form of ‘indirect horizontal effect’ is created by the courts’ duty to act consistently with Convention rights under s.6 of the HRA. To what extent must the courts reshape the common law to protect

⁴¹ N. Jääskinen (n 6).

⁴² *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51; A. Bogg, ‘The Common Law Constitution at Work: *R (on the Application of Unison) v Lord Chancellor*’ (2018) 81 *MLR* 509.

⁴³ *X v Y* (2004) ICR 1634; Although cf. P. Collins, ‘The Inadequate Protection of Human Rights in Unfair Dismissal Law’ (n 11).

⁴⁴ *Costa v ENEL* [1964] ECR 585; *Küçükdeveci v Swedex GmbH & Co* [2010] EUECJ C-555/07.

⁴⁵ See for example, M. Kumm, ‘Who’s Afraid of the Total Constitution - Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341; H. Collins, ‘On the (In)compatibility of Human Rights Discourse and Private Law’ in H. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014); D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011).

Convention rights when adjudicating disputes between private individuals? Young identifies no fewer than seven potential models of indirect horizontal effect.⁴⁶ These range from ‘strong’ forms of indirect effect, which require the courts to create new common law actions that ensure Convention rights are protected,⁴⁷ to more moderate forms that require the courts to adapt existing causes of action,⁴⁸ or develop the law incrementally in line with Convention rights.⁴⁹ The stronger the model of indirect horizontal effect under the Human Rights Act, the more scope human rights have to influence the common law regulation of the employment relationship.

It is vital that we understand all the various interplays between human rights and the employment relationship, and there is an excellent body of scholarship exploring the connections between human rights and labour and employment law. This article however, is concerned with the narrower, and as yet under-researched, issue of the protection of Convention rights using implied terms in the contract of employment.

3. Mutual Trust and Confidence and Human Rights

Although a specific human rights term is yet to be implied into the contract of employment, it is possible that existing implied terms have the effect of protecting employees’ Convention rights. The implied duty for employers to provide a safe and reasonably suitable working

⁴⁶ A. Young (n 5).

⁴⁷ W. Wade, ‘Horizons of Horizontality’ (2000) 116 *LQR* 217.

⁴⁸ M. Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ (1998) *Public Law* 423.

⁴⁹ G. Phillipson and A. Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 *MLR* 878.

environment for example, could partially protect employees' right to life.⁵⁰ Implied duties relating to wages may similarly protect employees' right to property to some extent. However, such terms can provide only piecemeal protection of employees' human rights. The analysis here therefore focuses on the implied term of mutual trust and confidence, as the sole existing implied term with the potential to provide more comprehensive workplace human rights protection. The implied term of trust and confidence creates a broad normative standard for behaviour at work, and there are good reasons to think that this standard could encompass human rights protection. Despite numerous overlaps with Convention rights however, trust and confidence falls short of what is needed to safeguard employees' human rights, at least as currently formulated and applied.

(A) Mutual Trust and Confidence

The development of the implied term of mutual trust and confidence has been one of the most striking features of employment law in recent decades. Although developed in the context of constructive dismissal, the term of trust and confidence marks out a 'general standard of behaviour' required by the contract of employment.⁵¹ Specifically, the term requires both parties 'not, without reasonable and proper cause, to act in such a way as would be calculated or likely to destroy or seriously damage the relationship of trust and confidence existing between the employer and its employees'.⁵² When deciding whether an employer has breached the term the court or tribunal consider the employer's conduct as a whole, to

⁵⁰ *Waltons & Morse v Dorrington* [1997] IRLR 488.

⁵¹ M. Freedland (n 14), 159.

⁵² *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84; *Malik v BCCI* [1998] AC 20.

‘determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it’.⁵³ Trust and confidence is sometimes referred to as an obligation of good faith or fairness,⁵⁴ but when deciding whether the term has been breached courts must apply the ‘unvarnished *Mahmud* test’.⁵⁵ They must therefore determine whether the employer has, without reasonable and proper cause, conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust. This formulation makes clear that there are two prerequisites for the term to be breached. First, the relevant conduct must be likely to destroy or seriously damage the employment relationship, and second, there must be no reasonable and proper cause for the behaviour.⁵⁶ The second strand of the implied term is important because it means that not all behaviour likely to destroy trust and confidence will breach the implied term. An employer who treats their employees in a way that is objectively likely to destroy trust and confidence will not breach the term if they have ‘reasonable and proper cause’ that justifies their behaviour.⁵⁷ It is misleading however, to view ‘reasonable and proper cause’ as a defence for breach of trust and confidence; the term is unitary, so the question of reasonable and proper cause is not distinct from the question of whether there has been a breach of the implied duty. That said, reasonable and proper cause is often discussed separately ‘for ease of analysis’.⁵⁸

⁵³*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666.

⁵⁴ *Imperial Group* [1991] 1 WLR 589, Browne-Wilkinson VC at 597; *Eastwood v Magnox Electric plc* [2004] UKHL 35, Lord Nicholls at [11].

⁵⁵ *Buckland v Bournemouth University Higher Education Corp* [2010] 4 All ER 186.

⁵⁶ *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727.

⁵⁷ As in *Sharfudeen v T] Morris Ltd t/a Home Bargains* EAT 0272/16.

⁵⁸ *IBM v Dalgleish* [2017] EWCA Civ 1212, [300].

The courts and tribunals have applied the normative standard of trust and confidence in a wide range of circumstances, making its content difficult to pin down. The term covers 'the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited'.⁵⁹ Precisely how trust and confidence strikes this balance is 'notoriously unclear',⁶⁰ but Bogg has argued that there are several distinct elements of the term's content. First, the term provides protection against some forms of dignitarian injury, second, the term imposes limits on the use of discretionary contractual powers, and finally, the term promotes the rule of law at work by protecting various aspects of employees' reasonable expectations.⁶¹ The view of trust and confidence as an overarching standard that encompasses other more concrete duties is questionable,⁶² but it is certainly true that the courts have found that a wide variety of employer conduct is capable of destroying the relationship of trust and confidence.

The 'breathtaking'⁶³ scope of trust and confidence raises the question of whether the term is capable of protecting employees' human rights. Given that the term protects against 'harsh and oppressive behaviour', as well as 'any other conduct which is unacceptable today as falling below the standards set by the...term',⁶⁴ it is possible that it encompasses

⁵⁹ *Malik v BCCI* (n 52), Lord Steyn at [46].

⁶⁰ S. Deakin and G. Morris (n 1), 4.4.

⁶¹ A. Bogg, 'Good Faith in the Contract of Employment' (n 1); A. Bogg, 'Bournemouth University Higher Education Corporation v Buckland: Re-Establishing Orthodoxy at the Expense of Coherence?' (2010) 39 *ILJ* 408.

⁶² D. Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' (2005) 34 *ILJ* 284.

⁶³ A. Bogg, 'Good Faith in the Contract of Employment' (n 1), 754.

⁶⁴ *Malik v BCCI* (n 52), Lord Nicholls at [38].

Convention rights. The potential for trust and confidence as a vehicle for protecting human rights was originally identified by Hepple, who argued that as courts are required to act compatibly with ECHR rights under the HRA 'the duty of trust and confidence also embodies a duty to respect the convention rights of an employee'.⁶⁵ Several scholars have since mentioned the possibility of mutual trust and confidence being used to protect human rights,⁶⁶ with Deakin and Morris believing it 'highly likely' that human rights infringements by employers would also breach the implied term.⁶⁷ If employer infringements of Convention rights do necessarily breach trust and confidence then the implied term can be seen as a human rights protective mechanism.

It makes sense at a normative level for trust and confidence to protect employees' human rights. It is hard to see how employees can have trust and confidence in an employer who has the power to arbitrarily interfere with their human rights at any time. The belief that your employer will respect your human rights intuitively seems to be a prerequisite for a functioning employment relationship.⁶⁸ Furthermore, both the implied term and human rights can be conceived as protecting against dignitarian injuries. Finally, mutual trust and confidence protects the legitimate expectations of employees, and prevents employers from

⁶⁵ B. Hepple (n 1), 22–23.

⁶⁶ D. Brodie (n 1), 334–335; A. Bogg, 'Good Faith in the Contract of Employment' (n 1), 733; H. Collins and V. Mantouvalou, 'Human Rights and the Contract of Employment' (n 1), 205; G. Morris, 'Protection of Employees Personal Information and Privacy in English Law' (n 1), 74.

⁶⁷ S. Deakin and G. Morris (n 1), 364.

⁶⁸ Although see F. Reynold, 'Bad Behaviour and the Implied Term of Mutual Trust and Confidence: Is There a Problem?' (2015) 44 *ILJ* 262, doubting whether mutual trust is truly necessary for most jobs.

abusing their position of power in ways that violate reasonable societal expectations.⁶⁹ The courts apply a contextual approach to determine the relevant standard, which is capable of incremental change,⁷⁰ and this should arguably now include the reasonable expectation that employers respect employees' Convention rights.

(B) Trust and Confidence as Human Rights Protection

There is not space here to consider the extent to which the implied term of trust and confidence functions to protect each individual Convention right. Instead, several illustrative examples of Convention rights infringements that also breach the implied term are given. Despite these overlaps however, the implied term is currently an inadequate mechanism for protecting employees' human rights. The term's content is not fully aligned with human rights, so the two standards are capable of diverging, and the 'reasonable and proper cause' element of the term means the protection it offers falls short of that required for Convention rights. The implied term therefore requires further development if it is to safeguard employees' human rights effectively.

There are some obvious examples of Convention rights the violation of which would also breach the implied term of trust and confidence. These include the rights to life, freedom from torture and degrading treatment, and freedom from slavery and forced labour. Employer conduct that fails to respect these rights will almost certainly attract liability under

⁶⁹ D. Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' (n 62). However, legitimate expectations are not the dominant factor in determining whether the term has been breached, *IBM v Dalgleish* (n 58).

⁷⁰ *ibid.*

criminal and tort law, but it will also amount to behaviour that destroys trust and confidence. Consider, for example, the Article 3 right to freedom from torture and inhuman or degrading treatment or punishment. The courts have found breaches of trust and confidence in a range of circumstances where employers have treated their employees in a humiliating and degrading manner, including sexual harassment and bullying,⁷¹ verbal abuse or derogatory comments,⁷² and public reprimands of employees.⁷³ In *Hilton International Hotels (UK) Ltd v Protopapa* the employer breached trust and confidence term by rebuking an employee in a way that was ‘humiliating, intimidating and degrading’.⁷⁴ These decisions indicate that behaviour that is classed as degrading under Article 3 of the ECHR will also destroy trust and confidence, namely treatment that arouses ‘feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance’.⁷⁵ Threats of violence or physical assaults such as those found to infringe Article 3 would similarly breach the implied term.⁷⁶ Employer conduct that violates employees’ Article 2 right to life, or Article 4 right to freedom from slavery and forced labour would invariably also breach trust and confidence. While in practice the primary redress for such infringements would be under the criminal law they are also breaches of the implied term of trust and confidence.

⁷¹ *Reed v Stedman* [1999] IRLR 299 (EAT).

⁷² *Horkulak v Cantor Fitzgerald International* [2003] IRLR 756; *Isle of Wight Tourist Board v Coombes* [1976] IRLR 413 (EAT).

⁷³ *Morrow v Safeway Stores Ltd.* [2002] IRLR 9 (EAT).

⁷⁴ [1990] IRLR 316 (EAT).

⁷⁵ *Ireland v UK* [1978] 2 EHRR 25.

⁷⁶ *Gäfgen v Germany* [2010] ECHR 759; *Cesaro v Italy* application no. 6884/11.

It is more difficult to ascertain the degree to which trust and confidence overlaps with other Convention rights, but there are many instances where the courts have found a breach of the implied term in circumstances that also protect employees' Convention rights. The Article 8 right to private and family life serves as a good example. In *UB (Ross Youngs) Ltd v Elsworthy*, the implied term of trust and confidence was breached when an employer introduced a new shift pattern that meant a husband and wife would rarely be at home together.⁷⁷ The Employment Appeal Tribunal (EAT) upheld the view that the shift pattern would result in 'the virtual suspension of his or her marital relationship for the term of his or her employment' and 'the imposition of such an intolerable situation must destroy any trust and confidence' in the employment relationship. The ease with which the shift pattern could have been rearranged to avoid any adverse impact on the employees' home life meant there was no reasonable and proper cause for the behaviour. Following *Elsworthy*, employers who create an 'intolerable situation' in the sphere of employees' home or family life, without reasonable and proper cause for doing so, will breach the implied term of trust and confidence. This creates considerable scope for overlap with Article 8, which protects against disproportionate employer interferences with the private and family lives of employees.⁷⁸ The imposition of medical treatment is another area where the implied term of trust and confidence protects an aspect of employees' right to private life. In *Bliss v South East Thames Regional Health Authority* the employer's act of requiring a surgeon to undergo a medical examination without reasonable cause was found to breach trust and confidence,⁷⁹ and the

⁷⁷ [1993] UKEAT 264/91.

⁷⁸*Schüth v Germany* [2011] 52 EHRR 32; *Markin v Russia* [2013] 56 EHRR 8; *Barbulescu v Romania* [2017] IRLR 1032.

⁷⁹ [1985] IRLR 308.

European Court of Human Rights (ECtHR) has similarly held that forced medical tests, or treatment without fully informed consent, may violate Article 8.⁸⁰ Requiring employees' to undergo medical examinations or compulsory drug testing could therefore breach both the right to private life and the implied term of trust and confidence.

The protective scope of the implied term of trust and confidence also overlaps with elements of other rights, including freedom of association and expression. Brodie cites *Wilson v UK* as a situation where an infringement of employees' Article 11 right to freedom of association also breaches the implied term,⁸¹ arguing that offering incentives to employees for not joining a union is a breach of trust and confidence in addition to a disproportionate interference with the right to freedom of association.⁸² A more recent example is *Stevens v University of Birmingham*, where the implied term provided a right for Professor Stevens to choose who accompanied him to an investigatory meeting.⁸³ This builds on *Leeds Dental Team Ltd v Rose*, where the EAT found that a refusal to allow an employee to choose who represented them at a disciplinary hearing would contribute to a breach of trust and confidence.⁸⁴ The ECtHR has held that the right to free association includes a right to representation by one's union when regulating relations with employers,⁸⁵ and *Stevens* and *Rose* demonstrate at least some overlap between the implied term and this aspect of Article 11.

⁸⁰ *Glass v UK* [2004] ECHR 103; *MAK v UK* [2010] ECHR 363.

⁸¹ [2002] IRLR 568.

⁸² D. Brodie (n 1), 334–5.

⁸³ [2015] EWHC 2300.

⁸⁴ [2014] ICR 94.

⁸⁵ *Wilson and Palmer v UK* [2002] ECHR 552, [46].

There are several circumstances where interferences with employees' Article 10 right to freedom of expression can breach trust and confidence. Article 10 may be violated if employers impose disproportionate disciplinary sanctions on employees for exercising their freedom of expression.⁸⁶ Similarly, an employer who suspends, demotes, or otherwise subjects an employee to a detriment based on their expression is potentially acting in a manner which destroys mutual trust and confidence. The employer's decision in *Smith v Trafford Housing* to demote an employee for posting their inoffensive political views about same sex marriage on social media, should be regarded as a breach of trust and confidence as well as a breach of an express term of the contract.⁸⁷ In addition, the ECtHR has used Article 10 to protect speech during industrial disputes,⁸⁸ and an employer who suspends or imposes some other detriment on an employee for exercising their freedom of expression during a trade union campaign would likely be acting in a manner that destroys trust and confidence. Finally, both Article 10 and the implied term of trust and confidence require some protection for whistle-blowers.⁸⁹

But despite these instances of trust and confidence protecting human rights, the implied term is not currently an adequate mechanism for safeguarding employees' rights. Two things are required for an employer to breach the term; (1) conduct likely to destroy or seriously damage the relationship of trust and confidence and, (2) no reasonable and proper cause for the conduct. Both these strands present problems for the protection of human rights.

⁸⁶ *Vogt v Germany* (1996) 21 EHRR 205; *Veraart v Netherlands* (2006) ECHR 1018.

⁸⁷ *Smith v Trafford Housing Trust* (n 38).

⁸⁸ *Fuentes Bobo v Spain* (2001) 31 EHRR 50; But see *Palomo Sanchez v Spain* [2011] ECHR 1319, where the Grand Chamber declined to protect speech.

⁸⁹ *Guja v Moldova* (2011) 53 EHRR 16; *Heinisch v Germany* (2014) 58 EHRR 31; *Governors of Exeter School v Wright* EAT/354/99.

As previously noted, the question of breach of trust and confidence is unitary, so strictly speaking it is wrong to think of these as distinct questions. However, courts often adopt a two-stage approach to assessing breaches of the term, and consider each question separately for ease of analysis, and this approach is adopted here for the same reason.

The first strand of the implied term is problematic from a human rights protective standpoint because the courts have not aligned the standard of 'conduct likely to destroy or seriously damage trust and confidence' with Convention rights. The extent of overlap between Convention rights and trust and confidence is therefore uncertain. Indeed, while the courts have not directly addressed the relationship between trust and confidence and human rights, they have repeatedly made clear that the test for breach of trust and confidence is independent of, and must be kept separate from, other legal standards. There is therefore no guarantee that human rights infringements will amount to behaviour likely to destroy or seriously damage trust and confidence. For example, in *Amnesty International v Ahmed*, the EAT refused to find that acts of discrimination automatically breach mutual trust and confidence. While 'many if not most' instances of unlawful discrimination will be breaches of trust and confidence they 'will not automatically be so'.⁹⁰ This makes clear that the test for a breach of discrimination law cannot be used as a proxy for determining whether there has been a breach of trust and confidence. Not only does this create a possible disjunction between trust and confidence and employees' Article 14 right to non-discrimination in the enjoyment of their Convention rights, but the reasoning in *Ahmed* also applies to the relationship between human rights and mutual trust and confidence more generally. The two may often overlap,

⁹⁰ [2009] IRLR 884, [71].

but will not necessarily do so. In *Buckland v Bournemouth University* the Court of Appeal made it similarly clear that the test for breach of the implied term should not be elided with the reasonableness test used in unfair dismissal.⁹¹ The courts' reluctance to align trust and confidence with other legal standards means that Convention infringements will not necessarily fall within the scope of the implied term, and it follows from this that the term is not a secure mechanism for protecting human rights.

It is possible that, while in theory the implied term of trust and confidence can diverge from human rights standards, in practice, all rights infringements by employers will also be conduct objectively likely to destroy trust and confidence. This depends on the implied term's content. If trust and confidence provides broad dignitarian protection it may be that breaches of employees' Convention rights will always destroy trust and confidence. However, those who interpret the term more narrowly, for instance as being concerned with 'mainly or even wholly procedural' matters,⁹² might argue that the possibility of divergence is more than just theoretical. Several cases appear to support the latter view that the implied term is out of step with Convention rights. For instance, the right for employees to choose who accompanies them to meetings with their employer conferred by the implied term in *Stevens* is more constrained than the broad right to union representation in dealings with employers under Article 11. The implied term only protected Professor Stevens' right to choose his representative because none of the representatives designated by the employer's policy were appropriate. Therefore, an employer who denied an employee the opportunity of union representation, but had a policy in place which provided other procedural safeguards, might

⁹¹ [2010] EWCA Civ 121.

⁹² A. Sanders, 'Fairness in the Contract of Employment' (2017) 46 *ILJ* 508, 528.

not be acting in a manner likely to destroy trust and confidence despite violating Article 11. Another example relates to freedom of religion; an employer who introduces a dress code that prohibits religious jewellery in the workplace does not seem to be acting in a manner likely to destroy trust and confidence, but may well be infringing the right to freedom of religion.⁹³ Finally, trust and confidence may sometimes undermine employees' freedom of expression rather than protect it. In *Matúz v Hungary* the ECtHR found that Article 10 protected an employee's communication of confidential information.⁹⁴ In contrast, not only would the implied term not protect the employees' expression in these circumstances, but the employee's act of communicating confidential material would itself likely breach trust and confidence.⁹⁵ These examples suggest that the implied term only partially protects employees' Convention rights. At the very least, the extent of overlap remains uncertain, so the implied term is not a secure mechanism for protecting human rights. It is possible that in future the courts may explicitly align the term's content with Convention rights. This development would improve workplace human rights protection, and could be justified by reference to the indirect horizontal effect of Convention rights created by s.6 of the HRA. Until this happens however, trust and confidence cannot be relied upon to protect employees' human rights.

Furthermore, even if the broad interpretation is correct and all human rights infringements are objectively likely to destroy trust and confidence, the 'reasonable and proper cause' element of the implied term prevents it from fully protecting Convention rights.

⁹³ *Eweida and Others v UK* [2013] ECHR 37.

⁹⁴ [2014] ECHR 1112.

⁹⁵ *Tullett Prebon Plc & Ors v BGC Brokers LP & Ors* [2011] EWCA Civ 131, Kay LJ at [42]. See also *Chapman v Smith t/a Foxby Hill Nursing Home* ET Case No.2601079/07.

It allows employers to argue they have reasonable and proper cause for conduct that infringes employees' rights. The threshold for employers justifying their behaviour is lower than the level of protection needed for human rights, so there will be circumstances where employers violate employees' Convention rights but avoid breaching the implied term of trust and confidence. This result may be avoidable for 'absolute' Convention rights, but undermines the implied terms protection of 'qualified' Convention rights.

Interferences with absolute Convention rights cannot be justified on any grounds, but the second strand of trust and confidence means that employers do not breach trust and confidence if they can demonstrate a reasonable and proper cause for their behaviour. The implied term would clearly fail to adequately protect Convention rights if employers are able to justify interferences with absolute rights. However, the courts could avoid this result by finding that there is no possible 'reasonable and proper cause' for interfering with employees' absolute rights. This is already the position in respect of employer conduct that breaches an express term of the contract. Employers who breach an express term cannot avoid being found in breach of trust and confidence by arguing that they have a reasonable and proper cause for their behaviour.⁹⁶ The courts would likely apply the same reasoning to absolute Convention rights, as interferences with absolute rights will breach the criminal law and employers should not be permitted to argue that they had a reasonable and proper cause for unlawful conduct.

The effect of the 'reasonable and proper cause' strand of the implied term poses a bigger problem for the majority of Convention rights that are not absolute rights. Interferences with qualified rights can be justified where they are 'necessary in a democratic society', which

⁹⁶ *Mostyn v S&P Casuals Ltd* UKEAT/0158/17.

the courts determine using the proportionality test. However, when deciding whether employers had a 'reasonable and proper cause' for behaviour that destroyed trust and confidence, the courts apply a lower level of scrutiny than required by the proportionality test. Trust and confidence therefore falls short of adequately protecting qualified Convention rights.

Interferences with qualified Convention rights should only be justifiable if they are proportionate, meaning they are in pursuit of a legitimate aim, there is a rational connection between the interference and that aim, no less intrusive means are available, and the burden imposed by the interference is not disproportionate to the aim.⁹⁷ In contrast, the Court of Appeal has stated that recent case law, including the Supreme Court decision in *Braganza*,⁹⁸ indicates that a test equivalent to *Wednesbury* reasonableness should be applied to decide whether an employers' discretionary acts breached their duty of trust and confidence.⁹⁹ The court must therefore ask whether the employer had taken all relevant (and no irrelevant) matters into consideration, and whether the decision was one that no reasonable decision-maker could have reached.¹⁰⁰ When considering reasonableness the court must bear in mind all the circumstances of the case, including the company's economic position or other business reasons.¹⁰¹

⁹⁷ *Bank Mellat* [2013] UKSC 39.

⁹⁸ *Braganza v BP Shipping Limited and another* [2015] UKSC 17.

⁹⁹ *IBM v Dalgleish* (n 58), [36]-[45].

¹⁰⁰ *ibid*, [232]. It is unclear whether this is compatible with *Buckland*, but the two may possibly be reconciled on the basis that *Dalgleish* acknowledges that *Wednesbury* is not always the appropriate test for determining breaches trust and confidence.

¹⁰¹ *ibid*, [336].

Using *Wednesbury* reasonableness to assess whether employers have a reasonable and proper cause for their conduct allows them to justify interferences with employees' human rights in circumstances where this would not be permitted by the proportionality test. There is a longstanding debate over the relationship between proportionality and *Wednesbury* reasonableness, but while both tests 'involve considerations of weight and balance',¹⁰² and it may be possible to apply *Wednesbury* more intensely when human rights are at issue,¹⁰³ there are important differences between the two standards. Proportionality review is more structured, and demands more intense scrutiny of decisions.¹⁰⁴ *Wednesbury* reasonableness is not an adequate substitute for the protection provided by proportionality review, as Elliott argues, under the *Wednesbury* test 'a court may simultaneously conclude that a decision which infringes an individual's human rights is incoherent and lacking in adequate justification, but that it is not unlawful'.¹⁰⁵

The shortcomings of using *Wednesbury* reasonableness to protect human rights are particularly acute in the employment context, where it will often be reasonable from an employer's perspective to prioritise their own business interests over employees' Convention rights.¹⁰⁶ For example, an employer who suspends or disciplines an employee for refusing to

¹⁰² *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2015] AC 455, Lord Mance [54]; P. Craig, 'The Nature of Reasonableness Review' (2013) 66 *Current Legal Problems* 131.

¹⁰³ *R v Ministry of Defence, ex parte Smith* [1996] QB 517, Bingham MR at 554; *R v Department of Education ex p Begbie* [2000] 1 WLR 111, Laws LJ at 1130; P. Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] *Public Law* 60.

¹⁰⁴ A.C.L. Davies and J.R. Williams, 'Proportionality in English Law' in S. Ranchordas and B. de Waard (eds.), *The Judge and the Proportionate Use of Discretion A Comparative Administrative Law Study*.

¹⁰⁵ M. Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] *CLJ* 301, 305.

¹⁰⁶ Employer conduct that objectively destroyed trust and confidence was justified on economic grounds in *Faieta v ICAP Management Services Ltd* [2017] EWHC 2995 (QB).

cover up a religious necklace, or remove a tattoo,¹⁰⁷ does not breach the term if they can identify business reasons that mean their behaviour was not *Wednesbury* unreasonable. The recent case of *Barbulescu v Romania* provides a more concrete example. The disproportionate workplace surveillance in that case, namely the reading of an employee's personal correspondence sent from a work messenger account in contravention of company policy, is undoubtedly conduct objectively likely to destroy trust and confidence. But it would not breach the implied term. The monitoring was introduced to check compliance with company policy and investigate potential misconduct, and this would count as reasonable and proper cause under the current approach.¹⁰⁸ Employer surveillance will fail the proportionality test if there are less intrusive courses of conduct that the employer could have taken to achieve their aims, as in *Barbulescu*, but it will be more difficult for the court to conclude that surveillance was arbitrary or so unreasonable that no reasonable employer would do it.

Although the courts' current interpretation of 'reasonable and proper cause' prevents trust and confidence from protecting qualified Convention rights, the term could be interpreted in a manner that better protects these rights. This could be done by incorporating a proportionality test into the implied term when employees' human rights are at stake. If the courts interpreted 'reasonable and proper cause' as meaning 'proportionate cause' in situations that engage employees' Convention rights they would be able to scrutinise employer conduct more closely. This would bring the level of protection provided by the implied term into line with what is necessary for Convention rights.

¹⁰⁷ H. Collins and V. Mantouvalou, 'Human Rights and the Contract of Employment' (n 1).

¹⁰⁸ J. Atkinson, 'Workplace Monitoring and the Right to Private Life at Work' 81 *MLR* 688, 699.

The relationship between trust and confidence and human rights is yet to be directly determined by the courts, but as the law stands the implied term is not an effective mechanism for protecting employees' Convention rights. In time, the implied term may be developed to protect human rights more effectively. This would require the courts to automatically deem violations of Convention rights as 'conduct likely to destroy trust and confidence', and to apply a strict interpretation of 'reasonable and proper cause' when employees' human rights are at stake. With these changes, the implied term of trust and confidence could become an important mechanism for protecting human rights at work. In the absence of these developments however, it may be possible to imply a new human rights protective term into the contract of employment.

4. A New Human Rights Term

If trust and confidence fails to develop into an effective mechanism for protecting human rights, the courts might imply a new term requiring that employers respect their employees' human rights. This may actually be preferable to bringing human rights within the ambit of trust and confidence, as it would allow the term of trust and confidence to continue in its current form as a distinct and general normative standard,¹⁰⁹ one that aims to introduce 'a norm of civility in managerial activities'.¹¹⁰ A new term would also avoid the baggage of trust

¹⁰⁹ D. Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' (n 62).

¹¹⁰ A. Bogg, 'Good Faith in the Contract of Employment' (n 1), 756.

and confidence,¹¹¹ as well as any uncertainty over its future.¹¹² Finally, implying a specific human rights term may be more straightforward than adapting trust and confidence to protect Convention rights.

A new human rights term could be formulated at various levels of abstraction. At the most abstract, a term could be implied requiring employers respect the autonomy and dignity of workers. This would involve the courts assessing whether an employer's actions violated a workers' autonomy or dignity, rather than focussing on whether any specific right has been infringed. Collins and Mantouvalou believe that it is 'possible, perhaps even probable' that such a term will soon be recognised at common law.¹¹³ At a less abstract level, a term could be implied that requires employers to respect those human rights of employees contained in the ECHR and HRA. This would cover largely the same ground as the term discussed by Collins and Mantouvalou, but would require the courts to identify which right had been interfered with, and assess the proportionality of interferences where necessary. Finally, the courts might imply discrete terms protecting individual human rights, rather than a single overarching term. The argument here is directed at the possibility of an overarching term being implied requiring that employers respect employees' Convention rights. That said, much of the analysis could apply to the other possible formulations.

¹¹¹ A. Sanders (n 92), 529.

¹¹² In *Braganza* at [104], Lord Neuberger found it 'difficult to accept' trust and confidence requires more than the normal commercial expectation that parties would act with 'honesty, good faith and genuineness' and avoid 'arbitrariness, capriciousness, perversity and irrationality'. It has been suggested, following this, that trust and confidence may converge with good faith and become less distinctive, G. Anderson, D. Brodie and J. Riley, *The Common Law Employment Relationship: A Comparative Study* (Cheltenham: Edward Elgar, 2017), 136.

¹¹³ H. Collins and V. Mantouvalou, 'Human Rights and the Contract of Employment' (n 1), 206.

For a human rights term to be implied into the contract of employment it must pass the established tests for implying terms ‘in fact’ or ‘in law’. A term implied in law, as a default rule in all contracts of employment, would be the more effective way of protecting employees’ rights. However, both categories of implied term are considered here, for the sake of completeness, as well as because terms often transition from being implied in fact to law, and the courts sometimes fail to properly distinguish between the two categories.¹¹⁴

(A) A Human Rights Term Implied in Fact?

Although there has been some confusion regarding the necessary conditions for a term to be implied in fact,¹¹⁵ the Supreme Court recently clarified the correct approach in *Marks and Spencer v BNP Paribas*.¹¹⁶ In that case Lord Neuberger spoke approvingly of the ‘clear, consistent and principled approach’ of earlier cases,¹¹⁷ which had developed five tests that a proposed term must pass to be implied in fact:

- (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it

¹¹⁴ H. Collins, ‘Implied Terms in the Contract of Employment’ (n 30); *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 is a recent example of this.

¹¹⁵ P. Davies, ‘Recent Developments in the Law of Implied Terms’ [2010] *LMCLQ* 140.

¹¹⁶ *Marks and Spencer plc v BNP Paribas Securities* (n 24); J. McCunn, ‘Belize It or Not: Implied Contract Terms in *Marks and Spencer v BNP Paribas*’ (2016) 79 *MLR* 1090.

¹¹⁷ *ibid*, [21].

must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.¹¹⁸

Lord Neuberger endorsed these principles for implying terms in fact, but made some additional comments on their application, three of which are worth noting here. First, the assessment of whether something is so obvious that it goes without saying is to be answered from the point of view of a reasonable person in the position of the parties at the time, rather than the actual parties' real or hypothetical intent. Second, the tests are cumulative, except that 'business necessity and obviousness ... can be alternatives in the sense that only one of them needs to be satisfied'. Third, when deciding whether a term is 'necessary', the court must assess what is needed for the contract to avoid absurdity and be 'commercially or practically coherent'.¹¹⁹

Terms implied in fact depend on a particular contractual and factual matrix, making it difficult to know whether a court might use these principles to imply a human rights term into a contract of employment. It is nevertheless possible to speculate on how such a term might fare. It would clearly pass the first test of reasonableness, as it is entirely reasonable to expect employers to respect employees' human rights. For present purposes it is also assumed that the contract contains no express terms contradicting an implied human rights term. The other tests are more problematic, as a human rights term may well be incapable of clear expression, and would likely fail the tests of necessity or obviousness.

¹¹⁸ *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, 26.

¹¹⁹ *Marks and Spencer* (n 24), [21].

It might not be possible to express an implied term that employers respect the human rights of their employees' with sufficient clarity. Terms implied in fact must be capable of being defined with sufficient precision to give reasonable certainty of operation,¹²⁰ but a human rights term would require the courts to engage in a broad assessment of the scope and content of the protected rights, inevitably making its operation uncertain. The multiple possible formulations of a new human rights term also indicates that it is not sufficiently certain.¹²¹ In *Newcastle upon Tyne NHS Foundation Trust v Haywood* the Court of Appeal refused to imply a term into an employment contract determining when notice would be counted as served, because there were too many ways it could be framed.¹²² Following this, the fact that a human rights term could either be formulated as protecting dignity, the rights contained in the HRA, or the individual right at issue, will make the courts reluctant to imply a human rights term in fact.

Even if a human rights term can be formulated with sufficient certainty, it is difficult to envisage the courts finding it necessary for business efficacy, or as sufficiently obvious to pass the officious bystander test. A term requiring employers respect the human rights of employees does not meet the high threshold of necessity the courts use when implying terms in fact. The strictness of this necessity test is demonstrated by *Vision Events Ltd v Mr Gregor Richard Paterson*, where the EAT held that it was not necessary to imply a term requiring payment for accrued flexi-time on dismissal because the contract functioned fine without the

¹²⁰ *Luxor v Cooper* (n 22); *Torre Asset Funding Ltd v Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch).

¹²¹ *Port of Tilbury (London) Ltd v Stora Enso Transport* [2009] EWCA Civ 16, [25].

¹²² [2017] EWCA Civ 153, [132].

term.¹²³ The courts would similarly not regard a human rights term as necessary for coherence or the avoidance of absurdity. A human rights term would likewise struggle to pass the officious bystander test, which requires that had the term been suggested to the parties when they agreed the contract they would both have responded ‘Oh, of course’.¹²⁴ The term must be ‘so obvious that it goes without saying’ in the eyes of both parties,¹²⁵ and it is not enough that the term would have been adopted had it been suggested at the time.¹²⁶ A human rights term is not obvious in this sense, as it is possible that reasonable people in the position of employer and employee would give different answers to the officious bystander question.¹²⁷ A reasonable employer might well say ‘of course I am not going to infringe my employees’ human rights, but that is not part of our contract’. In addition, if a contract is a carefully drafted document that uses standard terms, as is increasingly the case with employment contracts, this will count against an implied term being regarded as sufficiently obvious.¹²⁸ Finally, the fact that there are several alternate formulations of an implied human rights term makes it unlikely that any one of them will be regarded as sufficiently obvious to pass the officious bystander test.¹²⁹ Given these barriers, the chances of a court implying a new human rights term ‘in fact’ are slim.

¹²³ UKEATS/0015/13/BI.

¹²⁴ *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592.

¹²⁵ *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206.

¹²⁶ K. Lewison, *The Interpretation of Contracts* 6th ed. (London: Sweet & Maxwell, 2015), 6.09.

¹²⁷ *Mediterranean Salvage & Towing Ltd v Seamar Trading & commerce Inc* [2009] EWCA Civ 531.

¹²⁸ *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd* [2009] EWHC 739.

¹²⁹ *Chantry Estates (South East) v Anderson* [2010] EWCA Civ 316.

(B) A Human Rights Term Implied in Law?

The prospects for a human rights term being implied in law are better, and a good case can be made for reading human rights into the contract of employment using the legal principles applicable to this category of terms. A new human rights protective term would reflect the strong principled grounds we have for ensuring employees' human rights are protected at work, embody the emerging consensus that these rights must be protected against infringements by employers, and maximise the social and economic utility of the employment relationship.

Terms implied 'in law' are read into all contracts of a particular type as default rules, and function more like substantive rules of law than terms grounded in the presumed intent of the parties. Because of this, the tests for implying terms in law are less exacting than those for terms implied in fact. If a term cannot be formulated with sufficient precision to pass the obviousness or business efficacy tests this does not prevent it from being implied in law.¹³⁰ Furthermore, while the language of necessity has been used in discussions of how terms are implied in law, the threshold is not one of strict necessity, and is easier to satisfy than the test of 'necessary for business efficacy' used to imply terms in fact.¹³¹ Rather than asking whether a term is necessary for the contract to function coherently, courts instead decide whether a term is a 'necessary incident' of the particular type of contract.¹³² This involves judgements on issues of 'justice and policy',¹³³ and consideration of 'questions of reasonableness, fairness and

¹³⁰ *Lister v Romford Ice and Cold Storage* (n 29).

¹³¹ *K. Lewison* (n 126), 6.02.

¹³² *Scally v Southern Health Board* [1991] IRLR 525.

¹³³ *The Star Texas* [1993] 2 Lloyds Rep 445, 491.

the balancing of competing policy considerations'.¹³⁴ The courts also consider the nature of the parties' contractual relationship and 'the relation in which the parties generally stand to each other'.¹³⁵ Peden argues that courts imply terms in law to 'maximise the social utility of the relationship', with the key question being what is needed for the 'reasonable operation of the type of contract concerned'.¹³⁶ Phang also sees reasonableness as the driving force behind terms being implied in law,¹³⁷ whereas Collins argues that the relevant considerations are efficient risk allocation and fairness.¹³⁸ In sum, courts imply terms in law as default rules into particular types of contract based on judgements about what is reasonable, fair, and efficient, given the nature of the contract and the relationship between the parties, and having regard to the more specific and granular policy considerations relevant to the type of contract in question.¹³⁹

These principles for implying terms in law support the creation of a human rights term as a necessary incident of the contract of employment. First, an implied term that imposes a duty on employers to respect employees' Convention rights accords with the demands of fairness and justice. Second, it is in line with modern expectations about reasonable conduct in the employment relationship. Third, an implied term to respect human rights is needed to

¹³⁴ *Crossley v Faithful & Gould Holdings Ltd* (n 32). Approved by Lady Hale in *Societe Generale, London Branch v Geys* (n 21), at [56].

¹³⁵ *Lister v Romford Ice and Cold Storage* (n 29).

¹³⁶ E. Peden (n 32), 460.

¹³⁷ A. Phang, 'Implied Terms in English Law—Some Recent Developments' [1993] *JBL* 242, 246.

¹³⁸ H. Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (n 21), 320–321.

¹³⁹ E. Peden (n 32); E. Peel, *Treitel on the Law of Contract* 14th ed. (London: Sweet & Maxwell, 2015), 6–043.

maximise the social value of the employment relationship. Finally, the term would have economic benefits, and represents an efficient allocation of risks.

Implying a new human rights term would acknowledge that a fair and reasonable balance of responsibilities in the employment relationship must include a duty for employers to respect employees' human rights. Terms implied in law are used to spell out the reciprocal nature of the employment relationship and produce a reasonable balance between employer and employee.¹⁴⁰ The principled need to safeguard employees' human rights, and the threat employers pose to those rights, therefore provide strong reasons in favour of the implied term. This article has so far taken as its premise the idea that justice and fairness both require that employees' human rights be protected from infringement by employers. However, this might be questioned. After all, human rights are generally seen as rights which apply 'vertically' against the state, rather than 'horizontally' against other individuals. While this is not necessarily the case in philosophical accounts of human rights,¹⁴¹ it certainly remains the dominant model for human rights *law*. If human rights protect individuals against interferences by the state then it is not immediately clear why employees' human rights must be protected from employers. A full normative defence of workplace human rights protection cannot be set out here, but it is worth briefly indicating how it can be justified.

There are direct and indirect routes to establishing the need to protect employees' human rights from infringement by employers. The indirect argument sees this as part of the states' positive obligation to realise and fulfil human rights. States owe positive duties to their

¹⁴⁰ E. Peden (n 32), 479-80; M. Freedland (n 14), 186-187.

¹⁴¹ J. Griffin, *On Human Rights*. (Oxford: Oxford University Press, 2008); J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *CLP* 1.

citizens rather than purely negative duties of non-interference,¹⁴² including positive obligations to realise people's human rights. On this view, human rights have 'indirect horizontal effect' by imposing an obligation on the state to prevent infringements by other individuals. For example, the right to bodily security imposes an obligation on states to introduce and enforce legal protection against assaults by private individuals.¹⁴³ States' positive duties similarly require that employees' human rights be protected against employer interference. This indirect approach to justifying workplace human rights protection also draws support from Henry Shue's argument that states must protect rights from 'standard threats' posed to them.¹⁴⁴ Employers are a standard threat to employees' rights due to the unequal power dynamic that exists between the two parties; their superior position of power allows them to infringe their employees' human rights with 'unfortunate regularity',¹⁴⁵ and the state must protect employees' against this threat.

Although the indirect justification for workplace human rights protection is the most common way of understanding the horizontal effect of human rights,¹⁴⁶ it is also possible to argue that human rights impose direct duties on employers to respect employees' human rights. This is a contentious position, but it has several points in its favour. The majority of theoretical perspectives on human rights do not view states as the sole bearers of human rights

¹⁴² J. Raz, *The Morality of Freedom*. (Oxford: Clarendon, 1986); R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard, 2002). See A. Bogg, 'Only Fools and Horses' (n 7) for a discussion of this duty in the context of labour law.

¹⁴³ *Osman v UK* (1998) 29 EHRR 245.

¹⁴⁴ H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1996), ch 1.

¹⁴⁵ P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (n 11).

¹⁴⁶ J. Thomas, *Public Rights, Private Relations* (Oxford: Oxford University Press, 2015), 30.

duties.¹⁴⁷ Employers can arguably be regarded as bearers of human rights duties because of the power they have over employees,¹⁴⁸ the relationship of dependency that exists between them and employees,¹⁴⁹ the threat they pose to human rights,¹⁵⁰ the fact they are best placed to provide protection,¹⁵¹ or for a combination of these reasons.¹⁵² Both direct and indirect justificatory approaches establish that workplace human rights protection is required as a matter of justice and fairness. If terms are implied in law to provide fair and reasonable default rules for the contract of employment this should therefore include a term requiring employers respect employees' human rights.

In addition to aligning with normative principle, a new human rights term would reflect the expectations of employees' and society as a whole. Implied terms help ensure respect for implicit societal expectations about standards of behaviour at work,¹⁵³ and this should now include the expectation that employees do not leave their human rights at the door when they enter the workplace. There is an emerging consensus, recognised in international human rights law and practice, that employers must respect employees' human

¹⁴⁷ J. Griffin (n 141); J. Tasioulas (n 141); J. Raz, 'Human Rights Without Foundations' in J. Tasioulas and S. Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010).

¹⁴⁸ S. Fredman, 'Equality Law: Labour Law or Autonomous Field' in A. Bogg and others (eds.), *The Autonomy of Labour Law* (Oxford: Hart, 2015); V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *HRLR* 529.

¹⁴⁹ J. Thomas, 'Our Rights But Whose Duties? Reconceptualizing Rights in the Era of Globalization' in T. Kahana and A. Scolnicov (eds.), *Boundaries of State, Boundaries of Rights* (Cambridge: Cambridge University Press, 2016).

¹⁵⁰ D. Bilchitz, 'Corporations and Fundamental Rights: What Is the Nature of Their Obligations, If Any?' in C. Luetge (ed.), *Handbook of the Philosophical Foundations of Business Ethics* (New York: Springer, 2013).

¹⁵¹ J. Griffin (n 141).

¹⁵² Y. Dahan, H. Lerner and F. Milman-Sivan, 'Global Justice, Labor Standards and Responsibility' (2011) 12 *Theoretical Inquiries in Law* 439.

¹⁵³ L. Barmes, 'Common Law Implied Terms and Behavioural Standards at Work' (2007) 36 *ILJ* 35.

rights. The UN Human Rights Committee and the ECtHR both acknowledge states' positive obligation to protect human rights against interferences by individuals,¹⁵⁴ and the ECtHR has repeatedly found that states have positive obligations to protect human rights at work.¹⁵⁵ Positive state obligations to protect human rights are now part of UK law via the HRA.¹⁵⁶ The view that employers have responsibility for the human rights of their employees is also supported by the UN Guiding Principles on Business and Human Rights. Although not a binding instrument, the Guiding Principles contain an important recognition that companies have a duty to respect human rights, including those of employees. This argument for a new implied term is akin to that for implying a 'bridging' term between individual employment contracts and collective agreements. The courts developed this term to reflect the context in which parties were contracting, and align the contract with the 'reality of the parties' relationship'.¹⁵⁷ A new human rights term would similarly reflect the context in which parties are contracting by giving effect to the background assumption that employers must respect employees' human rights.

Further support for an implied term protecting employees' Convention rights comes from the fact that this would maximise the social utility and productive efficiency of the employment relationship. It is hard to see how work can have the social value commonly

¹⁵⁴ UN HRC General Comment No. 20, [2]; A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004).

¹⁵⁵ *Siliadin v France* [2005] ECHR 545; V. Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers' (2006) 35 *ILJ* 395; *Redfearn v UK* [2012] ECHR 1878; H. Collins and V. Mantouvalou (n 11).

¹⁵⁶ *Commissioner of Police of the Metropolis v DSD and another* [2015] EWCA Civ 646.

¹⁵⁷ S. Deakin and G. Morris (n 1), 4.29.

attributed to it if human rights are not respected in the workplace. Work is widely regarded as an important basis for respect, self-realisation, and wellbeing, as well as being key for citizenship, social inclusion and developing one's capabilities.¹⁵⁸ But it cannot play these valuable roles if employers are free to ride roughshod over employees' human rights. For work to be a basis of respect and self-realisation, workers' dignity and personhood must be safeguarded within the employment relationship. This includes protecting employees' human rights, as key elements of their dignity. Likewise, work cannot provide a basis for social inclusion and equal citizenship if employers control employees' enjoyment of their human rights. Finally, the beneficial effects of work for wellbeing and capabilities will not be realised if employees' human rights are not protected. The protection provided by an implied human rights term is therefore necessary to maximise the social utility of the employment relationship.

Reading human rights into the contract of employment will help the employment contract function efficiently. Relationships of trust are important for efficient production,¹⁵⁹ and employees who know their human rights are subject to the whims of their employer will lack the sense of co-operation that is central to productive enterprise. As with the term of trust and confidence, an implied human rights term would boost efficiency by prohibiting conduct

¹⁵⁸ See generally, V. Mantouvalou (ed.), *The Right to Work The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2014); R. Yeoman, *Meaningful Work and Workplace Democracy: A Philosophy of Work and a Politics of Meaningfulness* (New York: Palgrave MacMillan, 2014); J. White, *Education and the End of Work* (London: Cassell, 1997); S. Deakin and F. Wilkinson, *The Law of the Labour Market Industrialization, Employment, and Legal Evolution* (Oxford: Oxford University Press, 2005), ch 5.

¹⁵⁹ R. Chami and C. Fullenkamp, 'Trust and Efficiency' (2002) 26 *Journal of banking & finance* 1785; S. Brown and others, 'Employee Trust and Workplace Performance' (2015) 116 *Journal of Economic Behavior & Organization* 361; D.E. Guest and R. Peccei, 'Partnership at Work: Mutuality and the Balance of Advantage' (2001) 39 *BJIR* 207.

'likely to diminish the motivation, commitment, and performance of employees and lead them to quit the job, causing the employer considerable costs arising from labour turnover'.¹⁶⁰ Acknowledging and protecting employees' legitimate expectation that employers will respect their human rights gives effect to the 'psychological contract' between employer and employee.¹⁶¹ This is beneficial for efficiency, because disjunctions between the psychological contract and parties' actual contractual obligations or behaviour can damage the employment relationship and endanger productive co-operation. Furthermore, an implied term requiring that employers respect employees' human rights allocates risk efficiently, because employers are the best placed party to ensure that they do not infringe their employees' human rights.

These fairness and policy related arguments in favour of the courts reading human rights into the contract of employment are bolstered by the courts' duty to act consistently with Convention rights.¹⁶² As noted above, the model of indirect horizontal effect created by s.6 of the HRA is disputed. Under the strong interpretations of s.6 however, English courts must adapt the common law to protect Convention rights when adjudicating disputes between individuals. This would require the courts to fashion some common law mechanism that protects employees' Convention rights, for example either by implying a human rights protective term or adapting the term of trust and confidence in the ways suggested above. But even without subscribing to a strong model of indirect horizontal effect, the HRA undoubtedly provides a mandate for the courts to develop the common law in ways which

¹⁶⁰ H. Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (n 21), 322.

¹⁶¹ K. Stone, 'The New Psychological Contract: Implications of the Changing Workplace for Labor an Employment Law' (2000) 48 *UCLA L.Rev.* 519. Trust and confidence also protects the psychological contract between employer and employee, H. Collins, 'Implied Terms in the Contract of Employment' (n 30), 479.

¹⁶² Human Rights Act 1998, s.6.

protect Convention rights,¹⁶³ and this could include using existing common law principles to imply a human rights term into the contract of employment.

Given the seemingly strong case for reading human rights protection into the contract of employment, it might be asked why the courts have not already taken this step. There are several potential reasons for this. First, courts are reluctant to develop general organising principles for contract law where this can be avoided. They prefer ‘piecemeal solutions in response to demonstrated problems of unfairness’,¹⁶⁴ as demonstrated in their treatment of good faith.¹⁶⁵ Second, and relatedly, judges are cautious not to overstep their proper constitutional role, and it may be that they view the creation of an implied human rights term as a legislative act rather than one of common law incrementalism. If this is the case however, then their caution is unwarranted; not only is it possible to justify an implied human rights term using existing common law principles, but s.6 of the HRA provides democratic support for developing the law in this direction. The courts have historically taken a liberal approach to the implication of terms in law, so ‘at least as regards the protection of the Convention rights of the parties to the contract, use of an implied term to achieve compatibility may not be alien to the spirit of the common law technique.’¹⁶⁶ Another reason why a human rights term has not yet been implied into the contract of employment is that we are at an early stage of the law’s evolution in this area. The UN Guiding Principles only recognised the expectation that employers respect employees’ human rights in 2011, and although the HRA was enacted

¹⁶³ G. Phillipson and A. Williams (n 49).

¹⁶⁴ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, Bingham LJ at 439.

¹⁶⁵ *MSC v Cottonex Anstalt* [2016] EWCA Civ 789, [45].

¹⁶⁶ H. Beale (n 21), 1-088.

20 years ago, the extent and implications of the state's positive duties to protect human rights and the indirect horizontal effect of human rights are still being worked through. Furthermore, the question has not been argued or directly addressed in court. It is possible therefore, that in time the courts will come to formulate an implied human rights term as a default rule in the contract of employment.

The argument developed in this section might be thought to have wider application than to the contract of employment. The same points could be made in favour of reading human rights into other contracts to perform work, or it might be argued more broadly still that a default human rights term should be implied into all contracts as a default rule. Human rights would then operate as a general principle of contract law, in a manner similar to how good faith functions in other jurisdictions. It is certainly possible that a default human rights term could be developed in other contexts, but the case for implying a human rights term is particularly strong in relation to the contract of employment. The specific power dynamic that exists in the employment relationship, and the significant role that work plays in people's lives, means that employers must be regarded as a standard threat to employees' human rights in a way that is not true for all contracting parties. Furthermore, arguments that employers are human rights duty-bearers are often (either implicitly or explicitly) premised on an analogy between employers and the state,¹⁶⁷ with the same reasons for imposing human rights duties applying in both cases, and these arguments may not apply to other contractual relationships where this analogy is weaker. This does not mean that human rights should not

¹⁶⁷ E. Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton: Princeton University Press, 2017); H. Landemore and I. Ferreras, 'In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy' (2016) 44 *Political Theory* 53.

be used more widely in contractual interpretation and construction. On the contrary, this would be a positive development. It is simply to say that the case for implying a specific term protecting human rights is strongest in the employment context.

5. Conclusion

Implied contractual terms have the potential to be an important part of the patchwork quilt of workplace human rights protection that exists in English law. While the term of trust and confidence is not currently an adequate mechanism for protecting human rights, it could be adapted in several ways to better fulfil this role. Alternately, it was suggested that the courts should seriously consider implying a new human rights term into contracts of employment as a default rule. This would accord with the demands of fairness, reflect the standard of behaviour implicitly expected of employers in modern society, and maximise the utility of the employment relationship.

There are however, several additional hurdles that need to be overcome if implied terms are to provide effective protection of employees' Convention rights. The first set of objections focus on the institutional and constitutional propriety of using implied terms in this way. It might be argued that the courts are institutionally ill-suited to translating the content of Convention rights from the constitutional to the employment context and striking an appropriate balance of rights and interests between employers and employees.¹⁶⁸ The constitutional legitimacy of courts developing implied terms that protect employees' rights

¹⁶⁸ J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999); J. Waldron, 'Judges as Moral Reasoners' (2009) 7 *IJCL* 2.

may also be challenged, as this could involve judges ‘donning the garb of policy-maker, which they cannot wear’.¹⁶⁹ The highly contested and polycentric nature of employment law policy might mean that Parliament has primary responsibility in this area,¹⁷⁰ with the balance between employer and employee interests being ‘a matter for democratic decision’.¹⁷¹ The second set of objections are instrumental, and claim that implied terms cannot protect human rights effectively. There are several variations of this critique. Many labour lawyers are sceptical of common law interventions in the employment relationship, so would question the capacity of the judiciary to stand up for workers’ interests. It is also possible that the human rights protection offered by implied terms could be negatively affected by employers attempting to contract out of any human rights responsibilities imposed on them,¹⁷² or by terms being pre-empted by legislation.¹⁷³ In the author’s view, it is likely that these constitutional and instrumental hurdles can be overcome, at least in the main. Nevertheless, they do raise legitimate concerns, and further research is needed before we can conclude that implied terms are a sound mechanism for protecting employees’ human rights.

¹⁶⁹ *R v. Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115, Laws LJ at [80].

¹⁷⁰ A.C.L. Davies, ‘The Relationship Between the Contract of Employment and Statute’ in M. Freedland and others (eds.), *The Contract of Employment* (Oxford: Oxford University Press, 2016); A. Bogg, ‘Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court’ (2015) 131 *LQR* 15;

¹⁷¹ *Johnson v Unisys Ltd* [2001] UKHL 13, [37].

¹⁷² However, there will always be space for default rules given the incomplete nature of employment contracts, and implied terms could still protect human rights by functioning as interpretive guides for the express terms.

¹⁷³ As with the term of trust and confidence in *Johnson v Unisys Ltd* (n 171).