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Disavowing an Implied Term of Fairness

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ABSTRACT

In the Court of Appeal decision in *Burn v Alder Hey* (*Burn*), there are obiter suggestions that the employment contract contains an implied term that would require the employer to act fairly during a disciplinary process. In a recent article in this journal, Collins and Golding (the authors) endorse this direction of travel and explore what they see as a number of advantages that would accrue for employees (and other workers) should the courts hold that such a term is indeed part of the law of contract. This article seeks to argue that recognition of the term would be misguided.

1. INTRODUCTION

In the Court of Appeal decision in *Burn v Alder Hey* (*Burn*), there are *obiter* suggestions that the employment contract contains an implied term that would require the employer to act fairly during a disciplinary process (the mooted term).[1] In a recent article in this journal, Collins and Golding (the authors) endorse this direction of travel and explore what they see as a number of advantages that would accrue for employees (and other workers) should the courts hold that such a term is indeed part of the law of contract.[2] In this short note, I take issue with the claim that such a development would enhance the protection currently afforded at common law. I would maintain that, in fact, the mooted term would do little (if anything) to alter the rights and obligations of the parties to an employment contract or any contract of a similar nature. The modern law of the employment contract already evinces a strong concern with procedural fairness.

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[1] [2022] ICR 492.
[2] P. Collins and G. Golding, 'An Implied Term of Procedural Fairness During Disciplinary Processes: Into Employment Contracts and Beyond?' *ILJ* (published online 22.12.2023)

In *Burn*, the claimant was subject to an internal investigation and the parties were in dispute over the extent of her right to see documentation held by the employer. Under the express terms of the contract it was said that 'the practitioner must be given the opportunity to see any correspondence relating to the case'. The High Court held that the employer had complied with the requirements of this term.[3] The claimant, in addition, argued that the failure to provide the documents sought also amounted to a breach of the implied term of mutual trust and confidence. This argument was rejected. A traditional analysis of the relationship between express and implied terms was adhered to and, as a result, it was not permissible to extend the employee's rights by way of implication: 'To permit the Claimant to see the documents, nonetheless, would be to allow her to use the implied term of trust and confidence to modify the express terms of the contract'.

The Court of Appeal affirmed the decision of the High Court but was able to do so simply with regard to the express terms. Nevertheless, Underhill LJ went on to state that 'there may not on the orthodox view be a general implied duty on an employer to act fairly in all contexts; but such a term is very readily implied in the context of disciplinary processes'.[4] The learned judge added that he agreed with the observation of Singh LJ that 'there may be a narrower basis for an implied term that disciplinary processes will be conducted fairly, which is not conceptually linked to the implied term of trust and confidence'.[5] Somewhat surprisingly neither judge offers any explanation as to why the mooted term would be 'readily implied'; nor is there any exploration of why an obligation that is additional to mutual trust and confidence is needed.

The authors do not see *Burn* as taking the law in the direction of substantive fairness and endorse the views of Singh LJ in that respect.[6] I would very much agree that would not be a sensible course of action. The common law has traditionally set its face against intervention even where the terms of the contract might be thought to be unconscionable unless a procedural defect could be identified.[7] The 2020 Supreme Court decision in *Uber Technologies v Heller* suggests that an exception to this position may have emerged in Canada where good faith has become an 'organising norm'.[8] The

[3] [2021] EWHC 1674.
[4] *Burn*, n. 1, [35].
[5] *Burn*, n. 1, [47]. Elisabeth Laing LJ agreed with both judgments.
[6] *Burn*, n. 1, [46].
[7] See D. Brodie, 'Voice and the Employment Contract', 349-50, in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014).
[8] *Uber Technologies v Heller* 2020 SCC 20.

wisdom of the Canadian approach though is, in my opinion, more than open to question.[9]

2. THE COMMON LAW AND PROCEDURAL FAIRNESS

Traditionally, the common law was not concerned with procedural fairness. Lord Reid memorably stated in 1964 in *Ridge v. Baldwin* that 'the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract' and that position continued to hold sway for quite some time.[10] It certainly still represented the prevailing ethos by the time of *Malloch v Aberdeen Corporation* in 1971; a decision referred to by the authors.[11] However, they go on to suggest that *Malloch* will 'shortly be outdated' and, in a similar vein, it is also claimed that the mooted term would be a 'significant development'. However, common law recognition of procedural fairness (at least in employment cases) was a reform that occurred many years ago once it became apparent that it was a core element of the implied term of mutual trust and confidence. This was demonstrated as early as 1978 in *Robinson v Crompton Parkinson* where it was held that an employer who falsely accuses, without reasonable grounds, an employee of theft will be guilty of a breach of the term.[12] By the early years of this century, there was a plethora of case law to evidence that the common law had repented where natural justice is concerned.[13] This is cogently illustrated by the Court of Appeal decision in *Gogay v. Hertfordshire CC* which held that the punitive exercise of prerogative powers may be a breach of mutual trust in the absence of due process: the employer would not have lost had they taken the trouble to establish that there was reasonable cause to suspend.[14] In a similar vein in *Eastwood v Magnox,* Lord Steyn said that 'the exercise of the power to suspend must be exercised with due regard to trust and confidence (or fairness)'.[15]

[9] On recent Canadian developments more generally see D. Brodie, 'Canadian Jurisprudence and the Employment Contract' (2022) 51 *ILJ* 626.
[10] [1964] AC 40.
[11] [1971] 1 WLR 1578.
[12] [1978] ICR 401.
[13] See D. Brodie, 'Mutual trust and the values of the employment contract' (2001) 30 *ILJ* 84.
[14] [2000] IRLR 703.
[15] [2005] 1 AC 503, 532. *Stevens v. University of Birmingham* [2015] EWHC 2300 is an application of *Gogay* where the failure to allow the employee to be accompanied to an investigation constituted a breach of contract.

The role assumed by mutual trust in regulating the disciplinary process demonstrates the term's strong affinities with natural justice. This takes on particular importance when we consider the position of detrimental action which arises outwith such a process. In those circumstances, mutual trust still requires that detrimental action should not be taken against an employee, unless they have been made aware of the case against them and, I would suggest, had the opportunity to respond.[16]

Concern with process also extends to situations where someone other than the employer such as an accrediting body is involved. In *Rashid v Oil Companies International,* the question was whether the disciplinary process ending in the removal of the Claimant's accreditation was conducted unfairly and in breach of the rules of natural justice such that the Defendant was in breach of contract.[17] The Claimant was a Master Mariner. It was held that a breach had occurred given that the principles of fairness and natural justice had not been observed: 'when it comes to the question of sanction, a court is very reluctant to interfere with the discretion of a panel comprised of men from within the industry who understand what is required of inspectors, I am not convinced that deference of the same kind is appropriate in determining whether the panel has complied with the rules of natural justice as previously defined'.[18]

Contemporary respect for, and promotion of, procedural justice is also reflected in the increased availability of remedies. In *Alexander – Wight v Barts NHS Trust,* the court granted an interim injunction to prevent an NHS trust from continuing to suspend a midwife.[19] The decision to suspend had been the outcome of a process that had gone 'wholly off the rails': 'It was wholly unfair … for the defendant … to have conducted itself in the way in which the meeting of 16 October was conducted, when the claimant was invited to a meeting without being given any real indication of what

[16] This may be illustrated by *TSB v Harris* [2000] IRLR 157 where a reference revealed that 17 complaints had been made against the employee, of which 4 were upheld and 8 were outstanding. The content of the reference meant that a prospective employer was not prepared to offer the employee a position. The employee had only ever been informed about two of these by her existing employer. It was accepted that there 'is no legal duty … to refer complaints to employees at the point of time when no disciplinary action is contemplated. However, failing to reveal complaints which were later used against the employee amounted to a breach of mutual trust and confidence'.

[17] [2019] EWHC 2239.

[18] Ibid., [81].

[19] [2017] EWHC 3870. *Jahangiri v St George's University Hospitals* [2018] EWHC 2278 provides a further example.

the purpose of the meeting was for, where it might lead, who was to be present, and without being given an opportunity to consider allegations in advance of misconduct, or to be accompanied or represented'.[20] However, long-standing deficiencies in the extent of common law remedies continue to present difficulties as I discuss below.

The entrenchment of procedural fairness was to be limited by *Johnson v Unisys* (*Johnson)* but only where termination of the employment contract is concerned.[21] Thus we find that in *Eastwood v Magnox Electric,* the House of Lords held that 'if before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal…'.[22] *Eastwood* requires that the employer act fairly during any disciplinary process. A decision to the contrary would have been incompatible with the rationale of the implied obligation of mutual trust and confidence; as Lady Smith explained in *King v University of St Andrews.*[23] The authors take the view that judicial confirmation of the mooted term would mean that 'More pressure is placed upon the courts to review, adjust, or overturn their reasoning' in *Johnson.*[24] This strikes me as very optimistic. The extension of *Johnson* in *Edwards v Chesterfield Royal Hospital* to bar a claim in damages arising from the breach of an express term demonstrates that *Johnson's* grip over the termination process is stronger than ever.[25]

The claims made in terms of the transformative impact of the mooted term do not stand up to scrutiny once adequate recognition is given to the fact that an utterly core tenet of mutual trust and confidence is procedural fairness. The extent and significance of the case law bears this out; as does the longevity of the term's concern with this dimension of employment relations. Respect for procedural justice has already been placed 'at the heart

[20] Ibid., [26].
[21] [2003] 1 AC 518.
[22] *Eastwood*, n. 15, 528.
[23] [2002] IRLR 252, 255. Lady Smith points out that since disciplinary proceedings may or may not culminate in dismissal, if ultimately there 'was a decision not to dismiss then the implied duty of trust and confidence would obviously apply to the continuation of the ongoing working relationship between employer and employee. It is hard then to see how and why, bearing in mind the purpose of the implication of the duty, it should be regarded as suspended whilst the employer carries out the critically important task of assessing whether good cause for dismissal has been shown. For an employer to act in breach of that duty during an assessment which has the potential either to reinforce or to terminate the contract of employment would clearly be highly destructive of and damaging to the relationship between them'.
[24] P. Collins and G. Golding, n. 2, 23.
[25] [2012] 2 AC 22.

of the common law governing the contract of employment' and the mooted term would not fill an 'important gap'. The authors do acknowledge that 'clear themes of natural or procedural justice [are] to be found in the case-law of the duty of trust and confidence' but, in my view, do not go on to accord anything like adequate weight to that assessment.[26]

3. THE SIGNIFICANCE OF *BRAGANZA V BP SHIPPING*

The authors maintain that the most significant factor leading to the recognition of procedural fairness in *Burn* is 'the imposition of obligations, through the common law, that constrain the exercise of contractual discretions by the more powerful party'.[27] *Braganza v BP Shipping* is seen as the high point of that development.[28] It seems likely that the position taken was inspired by the following dictum of Singh LJ in *Burn*: 'the law has already taken the step of introducing some concepts of public law into the employment contract, so that the employer's decision-making process in a case such as *Braganza v BP Shipping Ltd* … to be reasonable in the *Wednesbury* sense … *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* … In my view, if the law were to imply a term into the contract of employment that disciplinary processes must be conducted fairly, that would be a short step which builds on *Braganza*'.[29]

Both the foregoing dictum and the consequent academic endorsement constitute a bold claim in the face of the extensive mutual trust and confidence case law on procedural fairness. If the mooted term has any form of juridical basis it is surely a context-specific version of mutual trust and confidence and one that is entirely derived from the latter term. The authors' treatment of *Braganza* also disregards the fact that control of discretion is another core tenet of that term. This has been apparent since early mutual trust cases such as *United Bank v Akhtar*.[30] I would not deny that *Braganza* is an important decision but will go on to suggest that its true significance for procedural justice lies in the realm of standard of review.

In *Braganza v BP Shipping,* the court had to assess the propriety of the way in which the employer had conducted a factual investigation.[31] Judicial

[26] P. Collins and G. Golding, n. 2, 6.
[27] P. Collins and G. Golding, n. 2, 4.
[28] [2015] UKSC 17.
[29] *Burn*, n. 1, 48.
[30] [1989] IRLR 507.
[31] [2015] UKSC 17.

control took place by way of the implication of a term that the power concerned should be exercised not only in good faith but also without being arbitrary, capricious or irrational. Such a formulation had been deployed in numerous employment cases in the past but *Braganza* broke new ground by holding that the standard of review was the same as that in cases reviewing the decisions of public authorities: 'It is right, therefore, that the standard of review generally adopted by the courts to the decisions of a contracting party should be no more demanding than the standard of review adopted in the judicial review of administrative action'.[32]

Braganza reaffirms the validity of a long-standing body of case law which subjects the employer's prerogative to judicial control. The novelty of the decision is that it advocates a convergence of approaches between public and private law. Does recourse to the world of public law suggest that the extent of judicial control is likely to change or increase? This is difficult to say but while there is reason to suggest that the law is some way short of being settled it cannot be assumed that the extent of judicial intervention will alter where employment disputes are concerned. On the one hand, the Supreme Court in *Braganza* advocates a common position across public and private law. On the other hand, the appropriate approach is regarded as context specific. The employment contract is viewed as being different in nature from a commercial contract as Lord Hodge pointed out in *Braganza*: 'The personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts'.[33] At the same time 'The scope for such scrutiny differs according to the nature of the decision which an employer makes'.[34]

Employment decisions since *Braganza* do not suggest that there has been a material change in judicial approach in employment cases.[35] In the context of a dispute over bonuses, for example, it has been said that the more elaborate formulation in *Braganza* adds little to the approach established through the application of mutual trust and confidence which is that a contractual discretion must not be exercised irrationally.[36] It is also very important to acknowledge that, as Lord Hodge pointed out, the nature of the decision under challenge is very much material. *Braganza* was concerned

[32] Ibid., [19].
[33] Ibid., [55].
[34] Ibid., [56].
[35] See *IBM v Dalgleish* [2017] EWCA Civ 1212.
[36] *Brown v Neon Management Services* [2019] IRLR 30, [83]

with the way in which the employer satisfied himself that a particular set of facts existed. Such an enquiry is readily susceptible to judicial scrutiny: 'an employer's decision-making should be subject to scrutiny that is … [not] … any less intense than that which the court applies to the decision of a public authority which is charged with making a finding of fact'.[37]

Questions of procedural justice more widely are also likely to be just as susceptible to judicial scrutiny. The gravity of the allegations in some instances may mean that due process is particularly important. Bogg highlights, with reference to wrongful suspension, that a 'more intensive review is appropriate in *Gogay,* given the catastrophic consequences of unfounded allegations of child sexual abuse for the employee's reputation and psychological well-being'.[38]

4. THE DISTINCTIVE MERITS OF THE NEW TERM

The novelty of the mooted term apart, how might it aid an employee or worker? It is said that an employee who fails to meet the qualifying period for unfair dismissal would gain the benefit of procedural protection but they would already be able to look to mutual trust and confidence in that regard. It is also said that 'there are a variety of situations where an individual would benefit from the protection of the duty of procedural fairness but may not fall within the remit of unfair dismissal law'.[39] A number of examples are given (including suspension) but it is very difficult to see how, in all those that are mentioned, they would not give rise to a breach of mutual trust and confidence.

One point of undoubted distinction between the mooted term and mutual trust is that the 'threshold for a breach of the respective terms…differs'.[40] Procedural failings by the employer which do not amount to a material breach of contract may amount to minor breaches of the new term. As a result, the position of those who cannot demonstrate that the employer's behaviour is sufficiently serious to give rise to a breach of mutual trust and confidence may be improved given the lower threshold set by the mooted term. However, a breach of the latter term which is not sufficiently egregious

[37] *Braganza*, n. 28, [57].
[38] A. L. Bogg, '*Bournemouth University Higher Education Corporation v Buckland*: Re-establishing Orthodoxy at the Expense of Coherence?' (2010) 39 *ILJ* 408.
[39] P. Collins and G. Golding, n. 2, 19.
[40] P. Collins and G. Golding, n. 2, 18.

to be material is unlikely to take the aggrieved employee very far. It will not be possible to resign and claim constructive dismissal. In addition, a claim for damages will not arise if there is no pecuniary loss which will often be the case where there has been an unfair process resulting in a sanction short of dismissal. It is also the case (as discussed below) that a claim for injury to feelings will not be possible.

The authors go on to flag the possibility of obtaining an injunction but again, where the breach is not material, it is extremely unlikely that one would be granted. Lord Hodge in the Supreme Court in *Chhabra v West London Mental Health NHS Trust*[41] made clear that the courts will not grant an injunction where the exercise of disciplinary process gives rise to a minor breach of contract. Earlier decisions such as *Kulkarni v Milton Keynes Hospital NHS Trust* which rejected the 'micro-management' of disciplinary proceedings were seen as correct.[42] However, in *Chhabra* itself an injunction was granted as procedural irregularities meant that it would have been unlawful for the employer to proceed with disciplinary proceedings in respect of gross misconduct.

An explicit judicial policy has emerged that micro-management is not an appropriate role for the courts. In the recent case of *Colbert v Royal United Hospitals,* the Court refused to grant an interim injunction and stressed 'the importance of allowing internal processes to run their course', including any appeals processes, and that there is unlikely to be a breach of contract in which the court should intervene where the contractual disciplinary procedure is 'capable of ironing out [any] unfairness'.[43]

Against that backdrop, the lower threshold for breach will be unlikely to have beneficial practical consequences given the position on remedies. More fundamentally, it casts doubt on the wisdom of lowering the threshold at all. The highly nuanced formulation of the implied term of trust and confidence serves (in the absence of a wrongful course of conduct) to keep minor wrongs/disputes out of the courts and tribunals. The judicial stance on micro-management and minor breaches is a sensible one.[44] As I have indicated, the wisdom of this position is reinforced by the belief that the parties should be encouraged to resolve disputes internally. Such an approach would strike a chord with proponents of relational contracting as it goes

[41] *Makhdum v Norfolk and Suffolk NHS Foundation Trust* [2012] EWHC 4015
[42] *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* [2010] ICR 101.
[43] [2023] EWHC [55].
[44] A similar approach is taken in Ireland: *Minnock v. Irish Casing Co. Ltd. and Stewart* [2007] ELR 229.

towards the preservation of the relationship by encouraging utilisation of internal processes.

5. COMPETING TERMS AND COHERENCE

Recognition of both terms would also mean that confusion would be likely to prevail. How should a claimant who has been unfairly suspended frame their claim at common law? It would appear that (and the same would be true in many cases) the answer would be by reference to either term. If that is the case, there would appear to be absolutely nothing to be gained by recognition of the mooted term. The Court of Appeal in *Yapp v FCO* had to consider similar issues given that the claimant alleged that the harm arose as a consequence of both a breach of mutual trust and confidence and the common law duty of care.[45] The Court of Appeal was concerned that the existence of alternative bases of claim should not affect the outcome. It is submitted that this concern is well founded: 'Implied terms in law tell the parties how they should behave towards one another. They assert the standards of behaviour inherent in the type of relationship entered into. The parties are entitled to demand that the common law sends out a consistent and coherent message as to what is expected of them in a given situation'.[46] *Burn* has the potential to create a much more extensive problem given that the mooted term and mutual trust and confidence occupy very much the same territory whereas the latter overlaps with the implied obligation of reasonable care to a much more limited extent. In those circumstances, the recognition of the mooted term would be likely to lead to attempts to increase the claimant's chances of recovery by finding points of distinction which would be no more than exercises in sophistry. There might though be a real risk of loss of clarity and consistency in the law of the employment contract.

6. OTHER RELATIONSHIPS

The authors suggest that the term's 'real potential would be its implication into other categories of contracts for work'.[47] This strikes me as odd. If the

[45] [2015] IRLR 112.
[46] D. Brodie, 'Health and Safety, Trust and Confidence and *Barber v Somerset County Council*: Some Further Questions' (2004) 33 *ILJ* 261.
[47] P. Collins and G. Golding, n. 2, 1.

principal beneficiaries of a term of procedural fairness are those employed under worker contracts (such as a s.230 (3) (b) contract) it would have seemed more logical to have asked, at the outset, which term should be applied in a contract of that type. The answer would then have turned on what is inherent in its nature. Why is it necessary to create a new term of the employment contract if the real need is to improve the position of those engaged under a different type of contract? Approaching the matter indirectly by way of analogy seems very circuitous; the driver of the Clapham Uber would be greatly perplexed.

It is also the case that the common law landscape is considerably richer where the worker contract is concerned than the authors allow for. In *Spring v Guardian Assurance*, for instance, a broad notion of employment is embraced so that the obligation in respect of references extends beyond those working under an employment contract to include the self-employed and I would suggest that the middle ground constituted by the worker contract would also be included.[48] One might go on to suggest that if a default rule is part of the law of both the contract of employment and that for services it will inevitably be part of the law of the worker contract. Such elements of commonality might be thought to form part of the content of all contracts which concern (or in the case of the contract for services may concern) the provision of work through personal performance.[49]

Matters become more problematic where the issue is whether the personal or social elements of the employment contract would be so extended. The question is posed in acute form if one considers the position of the implied term of mutual trust and confidence; by so doing one goes right to the core of the nature of the contract entered into by the worker. A 'genuine' relationship of self-employment involves a contract that is purely commercial, entered into at arms length, and, in consequence, does not contain the term.[50] The obligation of mutual trust and confidence is at odds with a relationship formed on this basis. In contrast, the implication of the term is premised on the basis that personal relations are involved. The key

[48] [1995] 2 AC 296.

[49] On the one hand, in neither relation, is there a general obligation to protect the economic interests of the other side. It also may be said that there is a great deal of similarity between a contract of service and one for services where the default rules in respect of allocation of risk are concerned. By way of example, both contracts require that performance will be discharged with reasonable care which ensures that the risk of poor performance lies with either the employee or independent contractor.

[50] *Bedfordshire County Council v Fitzpatrick Contractors* (1999) 62 *Construction Law Reports* 64

question is then to determine the closest analogue to the worker contract. The requirement of personal performance is crucial here and indicates that the relationship is similar in nature to that of employment and, therefore, that mutual trust and confidence should be applicable.

Even if I am incorrect in arguing that mutual trust would be applicable it is undoubtedly the case that any discretionary term would be subject to implied restraint. The authors assert that 'Implying a duty of procedural fairness during disciplinary processes into worker contracts would be a considerable addition to that range of rights and perhaps just the first example of the common law's capacity to mould the obligations and rights of parties to worker contracts'.[51] However, the law of contract as a whole now accepts that discretionary provisions are subject to common law regulation. Writing extra-judicially, Arden LJ (as she then was) observed that 'The kind of rules which developed in the employment context to regulate employer discretion have evolved to become part of mainstream contractual doctrine'.[52] Decisions such as *United Bank* contributed to the general principles of the law of contract adopting a largely standard formulation that a discretion must be exercised not only in good faith but also without being arbitrary, capricious or irrational.

7. DEROGATION

The authors suggest that the mooted term could be useful in filling in gaps in the rules applicable to a particular disciplinary issue.[53] I would agree that an implied term in law can act as an aid to interpretation. Such terms expound the judicial vision of what constitutes appropriate behaviour in the context of employment relations. It is to be expected that they may function as aids to interpretation on occasion.[54] However, there are limits to this role and the relationship between the mooted term and an express term would be no different to that of any other implied term. The outcome in *Burn* would have been just the same had the claimant sought to make her case by reference to the mooted term. The latter term would have been no more potent than mutual trust in a situation where an express term already covered the ground.

[51] P. Collins and G. Golding, n. 2, 2.
[52] *Arden* (2013) 30 *JCL* 199.
[53] P. Collins and G. Golding, n. 2, 20.
[54] And see M.R. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2005), 115-29.

The focus on the mooted term diverts attention from the real concern raised by *Burn* which is the way in which an employer may seek to contract-out of implied obligations by the creation of a written contract that is prolix. The courts have yet to directly address the question whether an employer can contract-out of a fundamental implied term such as mutual trust and confidence. The most likely route to contracting-out is though the one illustrated by *Burn* where the express terms of the contract deal with matters which, if nothing had been said, would have been addressed by the implied term. Occupation of the same space allows the employer to derogate. The issue is likely to continue to arise as the modern employment contract is often extensive and, on occasion, unduly complicated. There may appear to be no space within which implication can operate.

A different approach to *Burn* was taken in *Stevens v University of Birmingham* where procedural justice was regarded as paramount.[55] In *Stevens* the employer was held to be in breach of the term of mutual trust where they refused to allow the employee to be accompanied to an investigatory meeting by a member of his professional association. It should be said that the contract provided for a more limited right of representation. *Stevens* declines to allow the express terms of the contract to offer less by way of procedural protection than would be dictated by mutual trust and confidence. The position taken has been described by one commentator as 'remarkable'.[56] In the Court of Appeal decision in *North West Anglia v Gregg* it was argued that *Stevens* 'was open to the criticism that it allowed the implied term to modify the express terms of the contract, and may have confused the implied term of trust and confidence with a general duty to act fairly'.[57] The Court though did not need to determine the matter; nor did they express a view. It should be noted that *Stevens* was referred to, with apparent approval, by the Supreme Court in *James-Bowen v Commissioner of Police*.[58]

Clarification is called for and I would hope that further juridical evolution will allow us to reach a position whereby derogation is forbidden or at least restricted by the common law. It is of course the case that a term may be rendered mandatory on the basis of public policy.[59] It is to be hoped that such

[55] [2017] ICR 96.
[56] A. Sanders, 'Fairness in the Employment Contract' (2017) 46 *ILJ* 508, 521.
[57] [2019] ICR 1279, [99].
[58] [2018] ICR 1353.
[59] *Lee v Showmen's Guild* [1952] 2 QB 329.

an approach will be taken where the employment contract is concerned and where key rights conferred by mutual trust are at stake.[60]

8. REMEDIES

The Court of Appeal decision in *Yapp v FCO* demonstrates that common law embodiment of procedural justice is, to some extent, undermined by the position on remedies.[61] Cranston J found that the employer had failed to conduct a preliminary investigation of the allegations before taking the decision to withdraw the claimant from the post.[62] In addition, fair treatment obliged the employer to inform the claimant of the allegations and to take into account his critique of them. This had not happened either. The employer appealed against the finding that the withdrawal from post constituted a breach. It was also contended that even if that finding stood the claimant was not entitled to recover damages for his depression and its consequences. The contrast between the Court of Appeal's assessment of the employer's behaviour and their readiness to award damages is stark. The Court upheld the trial judge's finding that the process had been defective and were clear that the employer's conduct fell well short of what would have been expected: 'it was unnecessary for the FCO to act as precipitately as it did, without any further inquiries of any kind and without even putting the allegations to the Claimant. It is indeed rather surprising to see the FCO making a decision of this gravity on the basis of a single telephone conversation with a politician in the host country: even apart from the question of fairness to the post-holder, one might have expected some consideration of whether the informant might have his own agenda or be otherwise unreliable'.[63] The employer's behaviour constituted a breach of both the express and implied terms of the contract. However, the Court of Appeal went on to hold that the claim for losses caused by the psychiatric harm was too remote. The Court went to emphasise that such losses caused by a breach arising from procedural unfairness will normally be seen as too remote.

A major step forward would be for the common law to depart from *Addis v Gramophone* (*Addis*) so that recovery for injury to feelings would

[60] And see D. Brodie, '*Malik v BCCI*: The impact of good faith' 261-4, in J. Adams-Prassal et al (eds), *Landmark Cases in Labour Law* (London: Bloomsbury, 2022).
[61] *Yapp*, n. 45.
[62] [2013] IRLR 616.
[63] *Yapp*, n. 45, [63].

be permitted and thereby render primary obligations more effective. The obligation of mutual trust and confidence is enforced in the main by way of a claim for constructive dismissal. It is difficult to envisage a claim for pecuniary loss that would arise during the currency of the relationship. Allowing a claim for injury to feelings would be consistent with relational contracting by providing a remedy that facilitated preservation of the relationship. Scope to make an award in respect of non-pecuniary loss is essential in such cases; otherwise, the employee may receive no compensation should they decline to resign. Denial of this possibility conflicts (as does the common law rule in *Addis*) with judicial recognition that the employee's interest in the employment relationship is not purely financial.[64] It also fails to provide a means of deterrence of inappropriate behaviour. In general, the law of obligations does not look kindly on unenforceable obligations. The decision in *White v Jones* to bestow a remedy on the disappointed beneficiary was prompted in part by the recognition that a failure to do so would mean that the negligent solicitor would have to pay nothing.[65] Similar reasoning would be welcome in the employment context.

9. CONCLUSIONS

The common law's stance on procedural justice has changed radically since *Malloch*. Cranston J remarking in *Yapp* in the High Court that 'a golden thread through the case law on fair treatment is that those liable to be affected by a decision must be given prior notice of it so that they can make representations. A corollary is that any representations must be taken into account by the decision-maker. The greater detriment a decision is likely to cause the more demanding these duties'.[66] The authors make a commendable effort to go beyond the *obiter* dicta in *Burn* and demonstrate the value and need for the mooted term. I would submit though that the venture was doomed from the start. The new term can only be given a meaningful role by marginalising the existing term of mutual trust and confidence. In addition, it is difficult to see the practical benefits that might be gained by employees and other workers. It is striking that the authors do not give a single example of a situation where the mooted term would

[64] [1909] AC 588.
[65] [1995] 2 AC 207.
[66] *Yapp*, n. 62, [82].

apply but mutual trust and confidence would not (other than one turning on the lower threshold for breach). *Obiter* dicta are sometimes best left alone. The case law tells us that 'where the authorities contemplate questions of fairness, they do so in the context of the implied term of trust and confidence…'.[67]

[67] *Chakrabarty v Ipswich Hospital NHS Trust* [2014] EWHC 2735, 114.