

# Mutual trust and confidence (mtc) in an employment contract



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Mutual trust and confidence (MTC) is a central term in implied terms of an employment contract.[1]MTC is an implied term which dictates that the employer will not conduct himself in such a way as to destroy or seriously damage the relationship of confidence and trust between the employer and employee.[2]The common law development of MTC was influenced by legislation,[3]statutory procedure for unfair dismissal and also had an impact on the way judges view MTC.

The foundations for the implied term of MTC were laid down by *Addis v. Gramophone Co. Ltd* [4]which set out that in wrongful dismissal cases, there was no compensation in common law action for 1) the manner of dismissal, 2) the injured feelings, or 3) losses sustained from post dismissal.[5]The notion of MTC was not established in this case, but this case later helped explore the implied term of MTC. *Courtaulds Northern Textiles Ltd v Andrew* [6]gave MTC a narrative formulation.[7]MTC also arose out unfair dismissal and constructive dismissal claims, where the claimant wished to establish constructive dismissal and had to show there had been a breach of contract. [8]However, this could not always been proved and therefore there was a shift and people started arguing the employers behaviour undermined the employment relationship.[9]The term of MTC was formally recognised in *Malik v. BCCI* ,[10]where it was described it as a ' portmanteau obligation' by Lord Nicholls[11]and also opened up the opportunity to claim damages for undermining MTC.[12] *Malik* [13]ultimately contradicts the third limb in *Addis* [14]as it allowed compensation for stigma damage. The second limb from *Addis* [15]was also challenged in *Gogay V Hertfordshire County*  
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[16]when a care worker was suspended following accusations of child abuse and, from this, suffered from a psychiatric illness. The care worker was awarded damages for the breach of MTC; going against *Addis* [17]which stated there was no remedy at common law for injured feelings.

However, both *Addis* [18]and *Malik* [19]arose from claims during the course of employment. The question arises whether there can be a common law remedy for at the time of the dismissal. This is answered in *Johnson v Unisys* [20]where it was identified that in the common law of wrongful dismissal, there cannot be a remedy for a breach of MTC at the time of dismissal. This rule was fashioned into the 'Johnson Exclusion Zone' which is where common law claims based on a breach of MTC were pre-empted by the statutory claim for unfair dismissal.[21]Some academics have showed contention towards the 'Johnson Exclusion Zone'. Collins highlights that, in regard to unfair dismissal claims, the exclusion zone cannot be manoeuvred around, if the claim can be met by the statutory law of unfair dismissal or if the claim cannot be met by statutory law, the exclusion zone still applies.

[22]It was also stated in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [23]that " the ' Johnson exclusion area' has been productive of anomalies and difficulties".[24]

Furthermore, more recent cases such as *Bournemouth University Higher Education Corp v Buckland* [25]and *Tullett Prebon Plc v BGC Brokers LP* [26]have confirmed how fundamental MTC is, especially in the eyes of the court.[27] *Buckland* [28]demonstrated that apart from Johnson,[29]the statutory context of MTC cannot be invoked to dilute the impact of the common law regime.[30]Furthermore other cases have developed the law, in <https://assignbuster.com/mutual-trust-and-confidence-mtc-in-an-employment-contract/>

regard to constructive dismissal cases. *Leeds Dental Team Ltd v Rose*,<sup>[31]</sup> in consideration of *Tullett*,<sup>[32]</sup> required Tribunals to endeavour to find the employer's intention; whether they had the intention to act in such a way as to destroy MTC with the intention to permit the employee to terminate the contract.<sup>[33]</sup>

The values of public law have also had a role in the emergence of MTC. MTC aims to guard against an abuse of power by the employer and protects the employee from an imbalance of power and an undermining of the relationship, mirroring the public law principles of regulating the power of public bodies. Brodie highlights this, underpinning that "the most notable impacts of the implied obligation has been the way in which it has restricted an employer's discretionary powers... public law also serves to regulate the powers and discretions of public bodies".<sup>[34]</sup> MTC also mirrors the values of public law as, as decided in *Johnson*,<sup>[35]</sup> the employers' power to dismiss is unfettered by implied duty. The rationale for this, as highlighted by Barmes, is that "judicial imposition of fetters on dismissal powers would unconstitutionally undermine the legislative prohibition on unfair dismissal... it would give a common law cause of action to claimants who had been excluded by Parliament from eligibility to bring a statutory claim."<sup>[36]</sup> Again, this stops an imbalance of power and an autocratic relationship between employer and employee. Natural justice also plays a role in MTC. Natural justice demands fairness and non-bias decisions and is a common law rule.<sup>[37]</sup> Natural justice fits in with MTC as there is an obligation of MTC that "renders illegitimate decisions and behaviour adjudged to be unacceptable in the modern workplace",<sup>[38]</sup> trying to create a fair balance between the

employers and employees. However the notion of natural justice within MTC is not entirely favoured. Neuberger stated that he does “ not consider it right to import the rules of natural justice, which are connected with judicial decisions and some administrative decisions, into the purely contractual relationship of employer and employee”.[39]

Although the notion of MTC is one which is instrumental to the employment contract, it does have limitations. Firstly, MTC is arguably too broad, it encompasses too many obligations. MTC was described as being an “ overarching obligation implied by law as an incident of the contract of employment”.[40]However academics such as Cabrelli disagree with this statement and postulates that “ there is no evidence for the emergence of the implied duty of mutual trust and confidence as an umbrella principle.”[41]Conversely, the broad nature of MTC could be considered a positive aspect. Irving maintains that MTC is “ a flexible and fundamental concept, is likely to retain its importance whilst evolving further with the changing nature of employment relationships”.[42]The flexibility of this term means it can change with and adhere to the needs of society. The Court of Appeal has sought to reduce the extensiveness of MTC.[43]In *Johnson* [44]injury arising dismissal was removed the overarching feature of MTC, although this did not extinguish its input when assessing damages. [45]Despite that this was removed from the extensive list of things MTC encompasses, the removal of this is also a limitation. The principle that came from this is called the ‘ Johnson exclusion zone’ and is a limitation as it does not allow employees to recover damages for injuries sustained from the way they were dismissed even if it ; wrongful or unfair. Lord Nicholls identified

three problems from this; 1) a duplication of proceedings, one for common law action and the other for statutory action, 2) the existence of a boundary line means that in some cases an ongoing course of conduct may have to be split, 3) boundary lines may cause strange results.[46]MTC, and the search for a boundary line in the 'Johnson exclusion zone', has also created tension between the common law and the statutory procedure. This was highlight in *Eastwood* ,[47]where it was underpinned that “ the practical consequences of the boundary between common law and statutory rights and remedies are unsatisfactory and merit urgent attention by the Government and the legislature”.[48]

There seems to be similar view from the judiciary concerning MTC. Lord Hoffman underpins that the statutory scheme of unfair dismissal does not allow parallel law development, as it would agonistic to Parliament's intention, and therefore further development of MTC would be impossible. [49]Brodie highlights that the view of the judiciary is that “ the appropriate mechanism for regulation is provided by the law of unfair dismissal; hence restricting the proper ambit of the term of mutual trust and confidence.”[50]Brodie also underpins that not allowing statutory compensation limits to circumvent Parliament's intention has a wider public interest, and is not just about equitable remedies.[51]So on this; it seems that the courts view on MTC is that it should keep well within the ambit of Parliament's intentions, however in doing so, could prohibit the development of MTC.

To conclude, it is therefore clear that the evolution of MTC has been influence by unfair dismissal legislation and Parliament's intention and has <https://assignbuster.com/mutual-trust-and-confidence-mtc-in-an-employment-contract/>

ties with Public Law values such as natural justice. The 'Johnson Exclusion Clause' has brought with it a lot of limitations as well as the statutory procedures which limit the common law remedies and arguably MTC from further developing fully. Furthermore, the judges seem to be more concerned with providing a remedy in line with Parliament's intention rather than providing a common law remedy that is equitable which also could arguably be limiting the development of MTC fully and properly.

Words 1479

Bibliography

Primary Sources:

Cases:

Addis v. Gramophone Co. Ltd. [1909] A. C. 488

Bournemouth University Higher Education Corp v Buckland [2010] EWCA Civ 121; [2011] Q. B. 323

Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84

Eastwood v Magnox Electric Plc [2004] UKHL 35

Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58

Gogay V Hertfordshire County [2000] EWCA Civ 228; [2000] IRLR 703

Johnson v Unisys [2003] 1 AC 518

Leeds Dental Team Ltd v Rose [2014] I. C. R. 94

Malik v. BCCI [1997] I. R. L. R. 462

Mclory and Others v Post Office [1993] 1 All ER 457

Tullett Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131; [2011] I. R. L. R. 420

Woods v WM Car Services [1981] ICR 666

Legislation:

Employment Rights Act 1996

Secondary Sources:

Books:

Pitt, G, ' *Pitt's Employment Law*' (2016, 10th ed, Sweet & Maxwell),

Samuels, H and Webley, L, ' *Public Law: Texts, Cases, and Materials* ' (2015, OUP) 3rd Ed

Journals:

Barnes, L, ' Common Law Implied Terms And Behavioural Standards At Work' [2007] ILJ 35

Barnard, C ' Cherries: one bite or two?' [2006] CLJUK 27



Barnard, C and Merrett, L, 'Winners And Losers: Edwards and The Unfair Law Of Dismissal' [2013] C. L. J 313

Brodie, D, 'Legal coherence and the employment revolution' [2001] Law Quarterly Review 604

Brodie, D, 'Mutual Trust And Confidence: Catalysts, Constraints And Commonality' [2008] ILJ 329

Brodie, D, 'Mutual Trust And Confidence: Further Clarification' [2011] Employment Law Bulletin 2

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

Collins, H, 'Compensation For Dismissal: In Search Of Principle' [2012] ILJ 208

Irving, D, 'The role and development of mutual trust and confidence as an implied term of the contract of employment' [2008] Coventry Law Journal 22

Julie's Enterprise Limited's (JEL) company handbook gave the company the right to change the contents of the handbook and introduce new policies, depending on the business. However, generally there cannot be a variation of terms unilaterally. Lord Justice Asquith stated on the matter of unilateral changes, that "[a]n unaccepted repudiation is a thing writ in water"[52]underpinning the need for a bilateral variation of terms. JEL's right to change contents of the handbook and policies is analogous to *Bateman v Asda* [53]where Asda created an express term in the employee's contracts

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that stated they reserved the right to change and amend their handbook unilaterally. Both the courts agreed that Asda could reserve the right to change the handbook unilaterally as long as the term is clear and it is not unreasonable manner so far as to breach the term of mutual trust and confidence. Therefore following this, JEL has the right to amend the handbook, however changing the handbook to incorporate random full body searches could be seen as unreasonable and a breach of mutual trust and confidence.

S95 of the Employment Rights Act 1996[54](ERA) underpins the nature to which someone can be dismissed. An employee can be dismissed with or without notice if the contract has been terminated by the employer.

[55] Commonly the dismissal is not effective until has been communicated by the employer and the employee had acknowledged it, as confirmed in *Gisda Cyf v Barratt*. [56] The verbal dismissal from Jeremy can be seen as being communicated and therefore it can be said that Lizzie acknowledged it. The dismissal must also be clear and explicit. If it is ambiguous the courts must enquire as to what the reasonable man would understand as a dismissal. In *Futty v D and D Brekkes Ltd* [57] the employer told the claimant ' if you do not like the job, you can fuck off' and this was construed by the claimant as being equivocal to a dismissal. However, this was not construed as a dismissal but as a resignation as the complainant found another job.

It also has to be established whether Lizzie can claim for unfair or wrongful dismissal. Wrongful dismissal is concerned with a dismissal in breach of contract. There are two conditions that need to be fulfilled to have a successful claim; 1) there was a termination of a contract without or with  
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inadequate notice and 2) the employer was not justified in doing so.[58]On the other hand, unfair dismissal is concerned with a dismissal that is unfair and is statutory. Under the ERA it states that “[a]n employee has the right not to be unfairly dismissed by his employer.”[59]To claim for unfair dismissal, there must be a qualifying period of employment of at least one year, as her employment is prior to 6 April 2012.[60]As Jeremy had no good reason for dismissing Lizzie, or followed a disciplinary process, it can be seen as unfair.[61]There are aspects of Lizzie’s dismissal that were wrongful and unfair.

Generally, the law on references is that there is no legal obligation to provide a reference; but if one is given it must be fair.[62]If Lizzie were to think the reference was unfair, she could claim for damages upon proving the unfair reference caused her to suffer a loss.[63]Jeremy stating not to ‘bother asking for a reference’ was therefore neither unfair nor wrongful as Jeremy does not have to provide one.

At common law, no damages can be awarded for matters that arise from it such as psychiatric injury. Lizzie has suffered panic attacks and depression since her dismissal. This is indicative of wrongful dismissal. However, the courts cannot award damages in regard to psychiatric injuries that arise as a result of the dismissal, as per *Johnson v Unisys*. [64]In this, the claimant had won a claim for unfair dismissal and tried to claim for wrongful dismissal, as the claimant had suffered a mental breakdown as a result of the way he was dismissed. However, the majority verdict was that there could be no claim as the judges could not justify developing a common law remedy to employees who suffered from psychiatric illnesses as a result of the way they were

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dismissed. *Johnson* [65] indicates that the judges are not prepared to extend the common law of wrongful dismissal in a way which would extend beyond that of unfair dismissal legislation.[66] However, as per *Eastwood v Magnox Electric Plc* [67] Lizzie could have claimed if the psychiatric injury arose before the dismissal; but this is not the case, so it is unlikely she could claim for psychiatric injury.

Additionally, in Lizzie's employment contract, it was an express term that she would receive 3 months' notice. However Jeremy did not satisfy this and terminated her employment without notice. Under S86 ERA there is a statutory minimum notice period.[68] For each year of employment, there must be one week of notice; if the employment is continuous and more than two years but less than twelve.[69] Therefore, under this statutory minimum, Lizzie should be entitled to at least five weeks' notice. However, Lizzie's notice period was contractually 3 months and as she has not received this, there has been a breach of contract. Therefore it could be said that Lizzie's dismissal was in fact wrongful as this is a breach of contract. Generally, there is no duty to give notice when the employee is in fundamental breach of contract. This is shown in *Pepper v Webb* [70] where the employee's refusal to follow instructions and continued to be insolent was held to be a breach of implied duty and therefore the dismissal was warranted, despite there being no notice.

Lizzie should claim for unfair dismissal. There are three types of remedies, in regard to unfair dismissal: reinstatement, re-engagement and compensation.

Reinstatement is governed under S114 ERA and means an employer has to treat the complainant as if he had not been dismissed;[71] effectively when <https://assignbuster.com/mutual-trust-and-confidence-mtc-in-an-employment-contract/>

the employee goes back to their job as if they had not been unfairly dismissed. However, it is unlikely she would want this. Moreover, re-engagement is governed under S115 ERA which states that the complainant will go back to the employer but to a different job.[72] Again, it is doubtful she would want this. Additionally, compensation is governed by sections 118 to 124 ERA. S119 underpins the basic award received; 1) Half week's pay for every year of employment when the claimant is aged under 22, 2) Week's pay for work between 22-40 and 3) Week and a half pay for every year over 41.[73] The Compensatory award is governed by S113 and conditions that the court must give an amount that is equitable[74] and includes losses of earnings and any future loss, subject to aggravating circumstances, such as if the complainant had contributed to their dismissal in any way.[75] Damages are subject to deductions; one of the most common deductions is the Polkey Deductions.[76] This deduction occurs when there has been an unfair dismissal as the employer has failed to follow the correct procedure.[77] If the claimant would have been dismissed anyway, the compensation would be reduced as to the likelihood as a percentage deduction.[78]

If Lizzie claims for unfair dismissal, it would be unlikely she could claim for wrongful as well. However, if she wanted to claim for wrongful instead, as it is concerned with the breach of a contract, the purpose of the remedy would be to put the claimant back in a position they would have been in before the breach. Damages in regard to the inability to comply with the express notice period can only stretch as far as the money earned in that period of employment if notice had been given. This is highlighted in *Focsa Services (UK) Ltd v. Birkett* [79] where Justice Clark stated that "the fact [was] that Mr

Birkett was dismissed. In so far as he did not receive his full notice, he is generally entitled to damages to reflect the pay during the notice period and no more.”[80]Lizzie did not receive a notice, even though it was contractual that she should have one and therefore Lizzie could claim for pay she would receive in those three months if she received notice. When the courts are analysing the amount to give in damages, the court also have to consider other relevant factors such as bonuses. Lizzie, as part of remuneration, received a discretionary bonus and received this bonus ordinarily every year, bar last year. Generally, there can be a claim for bonuses if they are contractual, however as Lizzie’s was discretionary there is no duty to give a bonus if not contractual. Moreover, the courts aim to return the employee to the original position before the dismissal. This is fortified in *Lavarack v Woods of Colchester* [81]where an employee had been wrongfully dismissed and did not receive a bonus after dismissal, despite being subject to sporadic discretionary bonuses, as the employers had cut bonuses and raised the wage. The Court of Appeal held that the employers only had to fulfil the contractual obligation as everything else, including bonuses and raised pay, was discretionary.

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Bibliography

Primary Sources:

Cases:

<https://assignbuster.com/mutual-trust-and-confidence-mtc-in-an-employment-contract/>

*Bateman v Asda* [2010] IRLR 370

*Eastwood v Magnox Electric Plc; McCabe v Cornwall County Council* [2005] 1 AC 503

*Focsa Services (UK) Ltd v. Birkett* [1996] IRLR 325

*Futty v D and D Brekkes Ltd* [1974] IRLR 130

*Gisda Cyf v Barratt* [2010] UKSC 41; [2010] 4 All E. R. 851

*Howard v Pickford Tool Co* [1951] 1 KB 417, 421 (Asquith LJ)

*Johnson v Unisys* [2001] UKHL 13; [2003] 1 A. C. 518

*Lavarack v Woods of Colchester* [1967] 1 QB 278

*Pepper v Webb* [1969] 1 W. L. R. 514

Legislation:

Employment Rights Act 1996

Secondary Sources:

Books:

Gweneth Pitt, '*Pitt's Employment Law*' (Sweet & Maxwell, 2016) 10th ed

Websites:

ACAS, '*References: workers' rights*' (gov. uk, 2016) accessed 20 December 2016

<https://assignbuster.com/mutual-trust-and-confidence-mtc-in-an-employment-contract/>

ACAS ' Understanding the Polkey deduction' (ACAS, 2013) accessed 23 December 2016

Gov, ' Dismissal: Your Rights' (gov. uk, 2016) accessed 16 January 2017

Gov, ' Dismissal: Your Rights' (gov. uk, 2016) accessed 16 January 2017

Working Papers:

Deakin, S, ' The Contract Of Employment: A Study In Legal Evolution' (2001) ESRC Centre for Business Research, University of Cambridge Working Paper No. 203, 33 accessed 19 December 2016

---

[1]David Cabrelli, ' The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' [2005] Industrial Law Journal, Vol 34, 284

[2]Woods v WM Car Services [1981] ICR 666; Malik v. BCCI [1997] I. R. L. R. 462

[3]Employment Rights Act 1996

[4]Addis v. Gramophone Co. Ltd. [1909] A. C. 488

[5]Ibid (Loreburn L. C.); Malik v. BCCI [1997] I. R. L. R. 462 (Lord Nicholls)

[6][1979] IRLR 84

[7]Lizzie Barmes, ' Common Law Implied Terms And Behavioural Standards At Work' [2007] ILJ 35



[8]Gweneth Pitt, ' *Pitt's Employment Law*' (2016, 10th ed, Sweet & Maxwell), 1554

[9]ibid

[10]Malik v. BCCI [1997] I. R. L. R. 462

[11]Catherine Barnard, ' Cherries: one bite or two?' [2006] CLJUK 27

[12]Gweneth Pitt, ' *Pitt's Employment Law*' (2016, 10th ed, Sweet & Maxwell)

[13]Malik v. BCCI [1997] I. R. L. R. 462

[14]Addis v. Gramophone Co. Ltd. [1909] A. C. 488

[15]ibid

[16][2000] EWCA Civ 228; [2000] IRLR 703

[17]Addis v. Gramophone Co. Ltd. [1909] A. C. 488

[18]ibid

[19]Malik v. BCCI [1997] I. R. L. R. 462

[20]Johnson v Unisys [2003] 1 AC 518

[21]Catherine Barnard and Louise Merrett, ' Winners And Losers: Edwards and The Unfair Law Of Dismissal' [2013] C. L. J 313

[22]Hugh Collins, ' Compensation For Dismissal: In Search Of Principle' [2012] ILJ 208