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The Psychological Contract and Implied Contractual Terms: Synchronous or Asynchronous Models?

Abstract

For longer than most people would think, over forty years, ⁱ organisational psychologists ⁱⁱ have been defining and characterising the employment relationship in terms of the psychological contract. Across the same period ⁱⁱⁱ judges have through their decisions in legal cases been setting down implied terms that apply to all contracts of employment. Accompanying this development certain commentators, drawn from both academic ^{iv} and practitioner ^v backgrounds have been analysing these terms in considerable detail.

In this paper the nature and importance of the concept of the psychological contract will be analysed ^{vi} and its application will be considered in the context of the most important implied terms in the contract of employment. The underlying question is how complimentary and compatible are these concepts? This will be fully considered through analysis of the effect of their combination in explaining or de-limiting the employment relationship and the contract of employment. It is contended that this research is important as it analyses the nature and impact of two different contractual models that characterise and regulate the employment relationship. These models are drawn from two separate disciplines and as far as this commentator is aware this is the first time this specific form of analysis has been undertaken.

Introduction

What follows is an overview of the psychological contract, its impact and how it operates in the workplace. This will be followed by looking at the impact of the most important implied terms in employment contracts that provide rights to employees and consideration and comparison of the corresponding rights under the psychological contract.

The Psychological Contract

It is somewhat problematic to define this concept because it has been derived from ideas put forward by researchers which are not easily encapsulated in a definition.

The consensus appears to be that it represents the full set of beliefs that employees have concerning the continuing exchange relationship with their employer. In other words everything he or she can expect from the employer and everything that the employer can expect of him or her. Of course this will be difficult to define and will vary between individuals depending on the job itself, the type of contractual relationship that exists between them (e.g. part time, fixed term, open ended contracts) and the nature of the industry or profession the employee is employed in. What is put in writing by the employer about the rights and obligations of the job or said or given in writing or orally expressed to the employee either prior to his being employed (e.g. at interview) or on his starting employment and during his employment will also be important. Of course employees may have a vast number of these beliefs and it may be impossible to identify them all. “The psychological contract is much broader than a legal or employment contract: “it may have literally thousands of items ...although the employee may consciously think of only a few.

.. vii

The terms in an employment contract are often explicit (verbally or even written down) or implicit (like implied terms) and are usually legally binding. On the other hand psychological contracts are highly subjective and often lack any formality or clarity and are not legally binding on the parties. Despite this they will often exert a strong influence on behaviour precisely because they are based on the beliefs of the parties and in particular the

views of employees concerning the nature of the employment relationship they are working under.

Under the psychological contract employees may believe justifiably or unjustifiably that if they behave in a particular way at work (e.g. work unpaid overtime, volunteer to carry out a difficult task) then certain outcomes will be forthcoming from the employer (e.g. promotion or recognition in some other way).^{viii} The psychological contract has emerged as an important framework for understanding employees' wellbeing, attitudes and performance. Unfortunately it is in reality often a subjective process where managers and employees have a different understanding of policies and practices of the employer. This in turn can lead to them interpreting and applying the psychological contract in accordance with their own beliefs and can result in at best misunderstanding and poor communication and at worst outright conflict. An appreciation of how these agreements or disagreements are reached and their impact on the parties' behaviour is essential.

From the earliest stages of the recruitment and selection process through appointment and then continued employment and then finally termination of the contract employees receive signals from their employer or manager about what they can expect and often they will 'read between the lines' to make sense of what they are told. They will also listen to their colleagues and observe workplace behaviour (e.g. the determinants of success) and continuously alter their psychological contract in response to these factors.

Nature and Scope of Psychological Contracts

It was MacNeil who distinguished *transactional contracts* where employees do not expect a long lasting relationship with their employer or organisation but, instead view their employment as a transaction in which, for example, long hours and extra work are provided in exchange for high pay, and training and development from *relational contracts* which are viewed as long-standing and implicitly depend on trust, loyalty and

job security.^{ix} However, it was Rousseau, a recognised authority on psychological contracts,^x who alongwith other researchers went on to refine these concepts.^{xi}

So transactional contracts tend to involve a specific exchange which is for a limited term and where the negotiated terms tend to be narrow, explicitly agreed and recorded in a contract or some other written agreement. An example might be where a specific level of pay or reward is given where a specific performance target is met. Whereas relational contracts tend to be continuous, possibly open-ended, broad in scope and more subjective in their interpretation by the parties.^{xii} More comprehensive in nature than transactional contracts they encapsulate exchanges over personal, sociological and economic aspects of employment and are firmly rooted in principles of trust and good faith.^{xiii} The negotiation of these contracts tends to be implicit based on the on-going perception of the parties over time and responding to changes in behaviour or attitudes of one or both of the parties (e.g. to issues such as job security or promotion possibilities).

Although it might be convenient to analyse contracts under each of these headings the reality is there is considerable overlap between these kinds of contracts. There are important aspects of contracts which could apply to both such as pay and the distinction between them may not always be clear. They can be viewed as representing either end of a continuum of contracts with other contracts falling between such as a 'balanced contract' made up of elements of both.^{xiv} The preferred approach is to interpret and apply the relational and transactional contracts together in each case. It is out of the scope of this article to give this matter further consideration here particularly because it has been fully analysed elsewhere.^{xv}

Researchers have utilised the concept of the psychological contract in a variety of ways^{xvi} but it is important to recognise that there are significant aspects of all definitions of the psychological contract which include the following elements:

The contract is based on the incorporation of beliefs, values, expectations and aspirations of both the employee and employer and includes beliefs based on explicit or implicit promises and obligations. Although expectations on both sides are not usually explicit (exceptions will often be transactional contracts) there is usually an implied agreement between the parties and there is an implicit assumption that the deal they have made is fair and made in good faith (rational contracts).

What is important in determining the continuation of the psychological contract is the extent to which these beliefs, values, expectations and aspirations are perceived to be met or violated and the extent of trust that exists within the relationship. What follows is a brief consideration of how the psychological contract can be managed and what the consequences are for breach of its terms.

Managing the Psychological Contract

An understanding of how psychological contracts operate in the workplace is important if the employer is going to try and manage it. There is no doubt that human resources practitioners and managers are increasingly utilising psychological contracts in the workplace to manage the employment relationship^{xvii} but it is not always certain how they are using it.^{xviii} The employer may want to influence or shape his employees' beliefs through application of the psychological contract in order to avoid conflict with employees or ensure that they are committed to fulfilling the organisational objectives. However, managing the psychological contract effectively can be difficult and requires employers to be aware of, and recognise, individual employee's attitudes and beliefs. So it involves

equipping line managers with the knowledge and resources they need to understand how they are part and parcel of their relationship with each employee they manage. Because of the nature of transactional contracts it might be easier for employers to monitor and implement them. With relational contracts they need to be aware of the beliefs or aspirations of individual employees over time which can be highly subjective. It may only become apparent to employers what the attitudes of employees are through talking to them formally (e.g. through performance review meetings) or informally. xix

An example of how the psychological contract can be utilised to manage change in the workplace was illustrated by the Safeway takeover in December 2003. Safeway plc was a leading UK food retailer that was the subject of a takeover by Morrisons plc. ^{xx} When the Safeway staff heard about this takeover it would have been natural for them to have been concerned about their future employment and the future of the business and resigned and gone elsewhere. However, the two companies ensured that by taking a number of measures the expected exodus of staff did not happen. One of the reasons was the companies paid careful attention to management of the psychological contract in the business. They concentrated on the expectations between the business and the staff and through this approach they were able to avoid a breakdown in the psychological contract by maintaining an open dialogue and a continuing contractual relationship that staff could understand and relate to. ^{xxi} There are of course critics of this takeover not least the unions and the employees that lost their job as a result of it (around 1,200) however, the impact of the takeover appears to have been relatively good with better than expected staff retention and morale.

The following quote helpfully identifies some of the problems with this process: ...” the psychological contract can shift over time – possibly rapidly. Whether or not this is the case, there is a question of reconciling the expectations of employee and employer.

mismatch can be a source of conflict, de-motivation and disaffection...in terms of successful delivery of the psychological contract, much will depend on organisational size and the grades of staff concerned. So, larger organisations with developed human resource policies may be more successful.”^{xxii} What follows is an analysis of the nature and effect of breach of the psychological contract.

Breach of the Psychological Contract

It is important to know when a breach of the psychological contract has occurred and the impact it has on an individual employee because this knowledge can help employers circumvent serious problems arising in the workplace. “Breach is probably the most important idea in psychological contract theory as it is the main way of understanding how the psychological contract affects the feelings, attitudes and behaviour of employees.”^{xxiii} If an employee believes that the employer has breached agreed terms under the contract his reaction depending on the perceived seriousness of the breach will range from acceptance, mild complaint, withdrawal of effort or goodwill and the last resort, handing in his notice. Where employees hold strong beliefs in their entitlements under the psychological contract and they discover that what had been promised to them by their employer will not be forthcoming they can feel cheated or violated or that they have wasted their time working for them.

It will not be easy to deal effectively with breach of the psychological contract especially where employees are highly upset or especially aggrieved. Line managers can play a crucial role here as their awareness of the individual and their psychological contract will help them understand why the employee believes the contract has been breached. “Breach of the psychological contract can seriously damage the employment relationship. It won’t always be possible to avoid breach of the psychological contract but employees are more

likely to be forgiving where managers explain what has gone wrong and how they intend to deal with it. The contract may need to be renegotiated.”^{xxiv} Although breaches of the psychological contract can sometimes seem trivial to employers or people outside the contract they are still likely to be significant to the individual who experiences them. It could be important that line managers recognise this and clarify from time to time what the parties’ expectations and beliefs are under the psychological contract.

A leading commentator on psychological contracts believes that too much attention has been paid on the impact of breach and more time should be devoted to analysing why the high degree of mutuality of purpose exists between the parties. “Rousseau believes that too much time has been spent examining the breach/ violation of the psychological contract and that research into fulfilment of the contract has been neglected. Specifically, the future of research will include trying to identify and understand those factors which give rise to ‘mutuality’, the agreement of commitments between employer and employee. Contemporary researchers and interested parties need to appreciate the fact that there is already a fair amount of mutuality in the workplace. Employees and managers do agree on more things than on which they disagree with regard to the nature of the terms of the contract and the commitment involved. Future research will hopefully shed light on the factors that account for this, albeit partial, mutuality.”^{xxv} A question that is often raised is ‘is the psychological contract an effective means of monitoring and regulating the employment relationship’ and the answer of the commentators in this field seems to be in the affirmative although it is generally recognised that there is scope for a lot more research on aspects of this phenomenon.”^{xxvi}

The CIPD are clearly of the opinion that the psychological contract is readily distinguishable from a contract of employment and more useful than a contract of employment for determining the practicalities of the relationship of the parties and

influencing their behaviour within the employment relationship. “The psychological contract can be distinguished from the legal contract of employment. The latter will, in many cases, offer only a limited and uncertain representation of the reality of the employment relationship. The employee may have contributed little to its terms beyond accepting them. The nature and content of the legal contract may only emerge clearly if and when it comes to be tested in an employment tribunal.”^{xxvii} This rather negative opinion of the role of the contract of employment represents the starting point for looking at it in detail and considering the extent to which it can play a part in defining, monitoring and controlling the employment relationship. The analysis will concentrate on implied terms that generally have a more far reaching impact on the parties’ behaviour than express terms. The more important implied terms that provide rights to employees will be considered and the corresponding rights under the psychological contracts will also be considered.

The Contract of Employment

There are pronounced differences between psychological contracts and contracts of employment. The former clearly covers a wider range of things and is based on the importance of understanding and managing the beliefs and attitudes of the parties in an employment relationship. The latter tends to involve the more formal aspects of the contract and ultimately can be enforced through semi-legal (grievance or disciplinary procedures) or legal remedies. This is certainly true of the express terms in the contract but with the advent of implied terms the coverage of employment contracts has broadened considerably and encompasses more practical considerations for employers (such as maintaining trust and confidence of employees and taking reasonable care for their safety).

Express Terms

Although express terms (written or oral) do undoubtedly have some impact on the behaviour of the parties in an employment relationship this will often be limited because they tend to be more formal covering specific aspects of the contractual arrangement. However, where they are sufficiently detailed they can represent the basis for the employment relationship and delineate the rights and obligations of both the parties. Express terms will usually cover the specifics of the contract such as: hours of work, pay, holidays, sickness arrangements, job title, nature of work etc ^{xxviii} and will often be presented to employees in the standard terms of the employer for their acceptance or refusal. There are undoubtedly gaps in key information for employees when presented with express terms. These gaps might arise when an employer fails to cover a key aspect of the contract or fails to assist his employees in understanding how the express terms will work in practice and their impact. Another problem with express terms being presented in the standard terms of employers is that this contradicts the fundamental principle in the law of contract that both the parties should be free to choose the terms they want. The reality is that often prospective employees are faced with accepting the standard terms of an employer or not getting the job. Employment law tries to offset this problem by inter alia introducing implied terms into the contract of employment. “In addition to what is encompassed by the express terms of the contract, the legal terms engendered by the employment relationship are defined by implied terms ...” ^{xxix}

It is contended that these implied terms are more significant in terms of this analysis and what will follow is a brief explanation of the main duties that apply and then consideration of how these same issues are dealt with under the psychological contract.

Implied Terms

These terms are implied through judges decisions under the common law and often in the absence of express terms dealing with the matter (or sometimes irrespective of the existence of an express term) ^{xxx} are incorporated automatically into every contract of employment. These terms usually have the effect of placing rights and obligations on both the employer and employee and take the form of duties.

There are various duties imposed on employees towards their employer e.g. (1) duty for them to cooperate with the employer in the carrying out of his contractual duties (2) duty to turn up and be available for work (3) duty of good faith/trust including not disclosing trade secrets (4) duty to obey reasonable and lawful orders and (5) duty to account to the employer for any profit or commission they receive. Attention in this article is necessarily concentrated on employees' attitudes and perceptions under the psychological contracts and the implied terms that offer employees' rights provided by an employer because these aspects of management and law are most closely related.

It is therefore unnecessary to consider the employee's duties to their employers in detail here except where they relate to the duties imposed on employers towards his employees.

Duties Imposed on Employers towards Employees

There are a number of duties imposed on employers towards their employees ^{xxxi} namely:

(1) Duty to pay wages (2) Duty to indemnify employees (3) Duty to maintain their employee's trust and confidence (4) Duty to take reasonable care for their employees' safety (5) Duty to have a grievance procedure (6) Duty to provide employees with a

suitable working environment (7) Duty to support an employee in a position of authority etc. A brief description of the most important of these implied terms (and most relevant to the discussion) follows along with discussion as how these areas of employment are dealt with under the psychological contract.

(1) Duty to pay wages

Wages will often will be set and determined by express terms in the contract and irrespective of the contractual duty to pay them in line with express terms the employer under the implied term must also pay wages to his employees in return for them turning up and being available for work This is undoubtedly from the employee's perspective one of the most important of an employer's implied duties. An employer has an implied duty to pay all his employees for the work they have completed. They would normally be paid at the rate specified in the contract but where no provision is made for this they should be paid the *quantum meruit* (market rate for that profession). This duty is now qualified by statute specifically: the Equal Pay Act 1970, wages provisions in various sections of the Employment Rights Act 1996^{xxxii} and the National Minimum Wage Act 1998. Although these statutory measures are undoubtedly significant in their impact on wages their influence on wages will be discussed in broad terms because the article is concentrating on the common law rules.

As long as the employees are willing to work an employer must pay them wages even if no work is available, unless their contract says otherwise. The consideration for pay is for being available for work rather than actually performing it, unless a specific provision in the contract provides otherwise. However, the onus is on the employer to show that there is a term relieving the employer of the normal obligation to pay: see the decision of the EAT (Lord Johnston presiding) in *Beveridge v KLM Ltd.*^{xxxiii} Here the employee was available for work and therefore his employer could not lawfully withhold pay.

Of course as well as this there is a requirement under the Equal Pay Act 1970 that women are paid the same as men in circumstances that they are doing like work (the same or broadly similar work) work rated as equivalent (under a job evaluation scheme) or work of equal value with that of a man. Despite the evidential problems with this kind of claim and the inherent problems with the legal process and remedy the rules have played in a part in encouraging equality of treatment in terms of pay. Increasingly there is the added expectation of the courts particularly, the European Court of Justice, that employers' systems of remuneration should be transparent (e.g. clear and unambiguous) in its operation.

The wages legislation under the ERA 1996 makes deductions and/or reductions in wages unlawful which helps ensure that only deductions authorised by statute or agreed in writing by an employee are made to wages. The National Minimum Wage Act 1998 ensures that the majority of the low paid within British society are provided with a minimum wage.

Where collective agreements are in place between employers and trade unions then wages can also be determined by them albeit any agreement reached on wages through collective bargaining will not tend to be legally enforceable.

Another important aspect of wages which tends to be restricted to employees is sick pay. Irrespective of any statutory requirement on employers to pay certain of his employees^{xxxiv} sick pay^{xxxv} there may also be a duty under a common law implied term to provide sick pay to employees where it is custom and practice in the industry or where looking at the knowledge of the parties when the contract was made it is expected. The tribunal can also look at the behaviour of the parties during the contract but if after this it is still not clear what the intentions of the parties were the court is entitled to imply that sick pay should be paid.

What is the cumulative effect of the common law and statutory rules on wages?

Any system of remuneration operated by an employer in order to comply with the law should operate smoothly e.g. paying staff when they attend for work, be fair (and accordingly free of inequality of treatment and unlawful deductions) and not involve breach of the requirement for payment of the minimum wage. How does this compare with the expectations of the employee in terms of remuneration under the psychological contract?

Psychological Contract and Pay

The rational psychological contract has traditionally offered employees not only a high degree of job security, but also a high degree of stability through a generous pension and a suitable reward package. The transactional psychological contract does not concern itself with job security but does hinge on a suitable remuneration package. However, in the current economic climate and in particular with the recession the resulting cutback in staff^{xxxvi} and the changing nature of employment from typical working arrangements to atypical ones (e.g. part time, fixed term, casual, agency work)^{xxxvii} security of employment has been severely undermined. This has increased the emphasis on remuneration and the need for employers to offer pay and conditions that will attract and retain good people. It is important that employees believe that their pay is 'fair' particularly in comparison with other employees.

A relational contract is more likely to involve utilisation of long term rewards or incentives in terms of pay in order to facilitate the interests of the individual being aligned with the long-term performance of the organisation. Although pay is undoubtedly important in these contracts so is job security and career development (including investment in training and development) as a reward for long service.

In the transactional contract the relationship between employees' performance and risk taking and rewards (e.g. incentives and performance payments) is much more direct and pronounced. These payments will tend to be payable over a short term or be 'one off' and be linked to achievement of specific short term goals which may be encapsulated in hiring for specific tasks or short, temporary contracts. Where problems can arise with the psychological contract and pay is where the organisation introduces a revised pay system as has been seen recently in the public sector. So changes in the pay structure or method of payment can have serious impact on the morale and motivation of affected employees particularly when they are not viewed as beneficial by them.

Duty to provide work?

With the current economic downturn it may prove difficult for employers to always provide employees with work. In normal circumstances under the common law the employer is not obliged to provide work as long as he pays his employee his wages.^{xxxviii} There are exceptions to this rule, particularly where work is essential to maintain public reputation (as in the case of acting, for example) or where the work being undertaken is a requirement for wages being paid (e.g. commission only employment).^{xxxix} In the case of highly skilled employees the courts could be willing to make an exception and imply a duty on an employer to provide a reasonable amount of work in order that the employee maintains his skills. This implied term could be very relevant when deciding the enforceability of garden leave clause in a contract where it would lead to diminution in an employee's marketable skills. In *Clayton & Waller v Oliver*^{xl} an actor who had been given the lead role in a musical production, and was then removed from the role and offered a substantially inferior one, was entitled to seek damages due to the employer's actions

which had damaged his reputation. The employer in not providing his employees with work could be viewed by them as breaching of the terms of their psychological contracts but only where it is unreasonable in the circumstances and in particular where it is accompanied by the loss of other rights (e.g. pay). Of course often an employer's response to the downturn of work will be to change the nature of jobs e.g. putting employees on part time, fixed terms and temporary contracts, or outsourcing their jobs to external agencies.

(2) Duty to maintain trust and confidence

It has been generally recognised that the most important implied term in the employment contract is the implied term of mutual trust and confidence.^{xli} One reason for its prominence is that it is framed in general terms, so it can be applied to most situations. It has strengthened the position of employees by filling gaps in the law not covered by legislation or the common law so that employers can no longer rely on the absence of legal rules in the contract of employment to protect them if their conduct is so bad it undermines the employment relationship. This is an important, wide-ranging duty of the employer not to do anything that will jeopardise the position of trust and confidence between him and his employees. In the early cases the issue was often concerned with the procedural irregularities of the employer. In *Robinson v Crompton Parkinson*^{xlii} the employee was an electrician of many years standing who was wrongly, unfairly and improperly accused of theft from his employer. After he was acquitted in a criminal court he sought an apology from his employer. When it was not forthcoming he left and claimed constructive dismissal on the basis of his employer's breach of the term of trust and confidence and this claim was upheld. In this case it was stated^{xliii} that "in a contract of employment and in conditions of employment, there has to be mutual trust and confidence between master and servant.

Where the employer has behaved in a way which is contrary to that mutual trust ... it seems to us to say that there is conduct which amounts to repudiation of that contract.” In *Post Office v Roberts*^{xliv} a senior official wrote a bad report on his employee, judging her to be unfit for promotion. This was written without proper consideration of the employee’s record. It led to her being refused a transfer to another branch, although the reason for the refusal was not made known to her for some time. She left her employment and an Industrial Tribunal found she had been unfairly dismissed on the basis of a breach of the implied term of trust and confidence. The Employment Appeal Tribunal (EAT) in this case held: that it was not necessary to show that the breach of this implied term involved deliberation, intent or bad faith. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.^{xlv}

Where employers have operated an unfair system of remuneration this has been covered by the term as in the case of *Clark v Nomura International plc*^{xlvi} where the High Court held employers operating a discretionary bonus schemes in an irrational or perverse manner were in breach of the term. In *Transco plc v O'Brien*^{xlvii} the employee was denied the opportunity to enter into a revised contract of employment with enhanced redundancy terms, which were offered to 75 other permanent workers. Transco did not offer the terms to O'Brien because at the time he was not considered a permanent employee. The Court of Appeal decided that this was a breach of the term of mutual trust and confidence. To deprive one member of a large workforce of the same benefits as his colleagues is likely to seriously damage the relationship of trust and confidence between that employee and his employer.

Where an employer has provided an unfair or misleading reference concerning a former employee to a prospective employer this has also been treated as a breach of the term. In the case of *TSB Bank v Harris*^{xlviii} it was held the bank had breached the implied term of

mutual trust and confidence of his employee Harris by giving a reference to her prospective employer which mentioned complaints against her of which she was unaware and which she had not been given any opportunity to answer. This was despite the fact the bank was required to make disclosures about any disciplinary action under the rules governing the regulation of the financial services industry. The EAT pointed out the bank could have discussed the complaints with Harris and given her a chance to put her case before making the disclosures.

It was decided in *BG plc v O'Brien*^{xlix} that it is not necessary to show that the employer intended repudiation of the contract. The Employment Tribunal must look at the employer's conduct as a whole and decide reasonably and sensibly that the employee could not be expected to put up with it.¹ In the case of *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)*^{li} the House of Lords held that the bank breached the term when it carried out fraudulent business practices, the stigma of which, prevented former employees from obtaining employment elsewhere. The court ruled for the first time that it was possible for employees to recover damages for ongoing financial loss unlike previously where damages had been limited to the notice period. It was also held that it is not necessary for the behaviour complained of to be targeted at the victim. An employee need not know of the employer's trust-destroying conduct while still employed (he may only find out after he has left).

The cases cited may appear to have little in common but what is a constituent element of them all is treatment of an employee by their employer which is unfair, perverse or prejudicial and derives from the employer's position of power over them. Employers that fail to manage decisively and abuse their managerial discretion or operate procedures and systems without fairness or transparency will find it difficult to avoid claims if by doing so they put employees in a difficult or impossible position. Delay in managing a problem will

also be a crucial element in mutual trust and confidence claims, especially where it has an adverse effect on the employee. Where an employer breaches this or any other implied term the employee should raise an internal grievance about it and where the employer fails to resolve the issue it would give an employee the right based on the employer's repudiation of the contract to sue for breach in the courts or (in the event the contract has come to an end) bring an action for breach of contract before an employment tribunal.^{lii} The breach of this term can also be utilised to underpin an action for constructive dismissal^{liii} which is dependent on the employer breaching the terms of the contract.^{liv} This is particularly relevant here as the action arises where an employee is so badly treated by his employer that he is entitled to resign with or without notice in response. What is required is that the employer's action or inaction goes to the root of the contract and demonstrates that he no longer intends to be bound by the terms of the contract.^{lv}

While this action is relevant to serious instances of behaviour such as physical bullying or a unilateral change to contractual terms it can also apply to less serious breaches which are carried out over a period of time e.g. harassment or abuse on the basis of the last straw principle that they were entitled to treat the final incident as the final straw.^{lvi}

Psychological Contract and Trust and Confidence

With respect to trust and confidence between the parties in transactional contracts it seems likely in most cases that there is little beyond the trust that the other party in the contract will fulfil their explicit or implicit commitment e.g. pay a bonus for finishing the project on time. However, the element of trust and confidence in relational contracts with their continuous, open-ended and comprehensive nature will be much more substantial. As

the following quote suggests trust underpins the whole nature of the psychological contract and its continuance.

This position of trust can be based on a prospective employee's understanding or knowledge of the integrity or reputation of the organisation he is going to work for. Or once employed it will derive from an employee's dealings with the employer over a period of time. Trust comes, in part, from judgments about integrity that are based on the perceived consistency of another's actions and the extent to which another's actions are congruent with his or her words. "As a general positive attitude toward another social entity, trust acts as a guideline, influencing one's interpretation of social behaviours within a relationship. Trust is thus likely to play a significant role in the subjective experience of psychological contract breach by one's employer: Trust in one's employer may influence an employee's recognition of a breach, his or her interpretation of that perceived breach if it is recognized, and his or her reaction to that perceived breach." ^{lvii}

Robinson in her article ^{lviii} suggests that trust plays a significant role in the subjective experience of psychological contract breach by one's employer. She maintains that employees with low levels of trust are likely to be more vigilant in identifying breaches and more likely to perceive a breach even when there is none because such a finding would be consistent with low levels of trust. A lack of trust results in employees losing confidence that their contribution will be reciprocated as promised by the employer.

When an employee perceives a contract breach by the employer, he or she perceives an inconsistency between the employer's words and actions. As a result, the employee loses confidence that the contributions made today will be reciprocated, as promised, by the employer in the future. The link between performance and outcomes is undermined, and the employee's motivation to contribute to the firm declines." ^{lix} Trust is present in all psychological contracts and it underpins transactional and relational obligations

respectively. Knowing the basis for this trust and its impact on the employee in particular could contribute to employers better managing the employment relationship. Of course any significant perceived or actual breach of trust and confidence of employees will often lead to them responding through non-cooperation, absenteeism and ultimately resignation.^{lx}

(3) Duty to take reasonable care for employee's safety

Employers are under a duty to take reasonable care for the safety of all their employees. There is an almost identical delictual duty (under the law of negligence) which employees are more likely to utilise. Employers must provide a safe place of work, a safe system of work, safe plant and appliances and safe and competent fellow workers. If an employer fails to take reasonable care to protect an employee from a foreseeable injury by failing to provide any of the above, he or she could be found to have breached the 'duty of care'. This duty now extends to taking reasonable care not to cause employees psychiatric harm through bullying or harassment or through the nature or the quantity of the work they have to undertake.

An employee must establish the following to be successful in such a claim: that the employer broke the duty of care owed to the employee that he could have reasonably foreseen injury resulting from the breach of duty and the employee suffered personal injury as a result of the breach

In cases involving psychiatric injury the cases tend to be decided on the issue of reasonable foreseeability. Did the employer know or should he have known^{lxi} that the employee was suffering psychiatric problems because of issues in the workplace? The approach the courts have taken to this is to expect employees to inform employers of their problems before they are held accountable.^{lxii} A breach of the employer's duty to take reasonable care of their

employees' safety may amount to a fundamental breach of the employment contract which is a sufficient basis for the employee to resign and claim constructive dismissal.

Under the implied duty to provide a safe working environment, employers are under an implied obligation to provide and maintain so far as is reasonably practicable, a working environment that is suitable for the performance of the contractual duties of employees. This duty may be breached, for example, where an employee is being bullied at work by fellow employees or exposed to passive smoking. In *Waltons & Morse v Dorrington* (1997) IRLR 488 the applicant was a non-smoker, had to work alongside smokers for a number of years but when her office was moved the problem escalated and she complained to her employer. They made some changes, but the situation was not much improved. She made further complaints and then eventually she resigned and claimed constructive dismissal. In finding in her favour the EAT held that there was an implied term that the employer will ensure employees work in an environment reasonably suitable for the performance by them of their contractual duties. In this case a reasonably practical step would have been to ban smoking in the building.^{lxiii}

Psychological contracts and safety of employees

Standards or rules of safety under psychological contracts are derived from the beliefs of the parties in an employment relationship about reciprocal safety requirements inferred from implicit or explicit commitments. Although the literature on psychological contracts in relation to safety is limited, recent research^{lxiv} has sought to identify its impact.^{lxv} One of the most difficult aspects of safety is understanding the role of employee expectations. When an employee has expectations about safety that are different than his employer then serious issues can arise. Research was recently undertaken to determine how psychological contracts were applied to occupational safety. The findings suggested that the

psychological contract of safety impacts on the safety attitudes and behaviour of the parties.^{lxvi}

In other research a study was carried out to develop and test a psychological contract measure for health and safety in different organisational contexts.^{lxvii} Those surveyed were drawn from employees within an NHS organisation, the oil and gas industry, and the road construction industry. The results in each aspect of the study supported their proposed model and the implications for both theory and practice were discussed. Although areas for further research were identified the following quote identifies what was established. “This study ... found positive relationships between Trust, and Safety Climate, and the Psychological Contract, respectively. Line managers can build employees’ trust with respect to health and safety by creating a more positive safety climate (i.e. rewarding and supporting desired role behaviours about health and safety). Higher levels of trust, in turn, should mediate perceptions of the psychological contract ... such that employees who trust their line manager should perceive more psychological contract fulfilment ...”^{lxviii}

Overriding Terms

Although as stated earlier express terms will usually override contrary implied terms various cases have been utilised to ensure that this rule is not misused and that implied terms can intervene to qualify or nullify express terms where they are operated or enforced unreasonably. The following quote summarises the current position pretty well. “Although in orthodox contract law an implied term cannot override an express term,^{lxix} it has been held the express terms must be exercised in the light of those implied and they must be “capable of co-existence.” More recently it has been held that the ‘implied term’ could “supplement” express terms.^{lxx} In *United Bank v Akhtar*^{lxxi} it was stated that the ‘implied term’ controls the exercise of an employer's discretionary use of an express term. It

therefore forms an ‘umbrella’ under which other ‘implications’ fall and under which managerial decision-making may be regulated. “^{lxxii}

Remedies for Breach of Contract

There are two possible remedies for a breach of contract interdicts and damages, although in reality the first of these remedies has limited application in employment law. While damages can be pursued against the party in breach, in practice there are often obstacles to obtaining this remedy.

Under Scottish (and English) law the courts may award an interdict (or injunction) to restrain a wrongful dismissal where the trust and confidence of the employer in the employee’s ability to do their job has not been harmed. In *Pearce v City of Edinburgh Council*^{lxxiii} the Court of Session held that an employee who was suspended pending the outcome of disciplinary proceedings was entitled to seek an interdict restraining his employer from proceeding in accordance with new disciplinary procedures which were in breach of his existing contract of employment. He successfully argued that earlier disciplinary arrangements were applicable in his case. In *Hughes v London Borough of Southwark*^{lxxiv} it was held that an interdict may be granted to restrain employees from working for competitors in their own time or restrain breaches of restrictive covenants after the employment has ceased where failure to do so may lead to disclosure of trade secrets or confidential information.

There is an action that can be brought under statute for breach of contract. Under the Industrial Tribunal Extension of Jurisdiction (Scotland) Order 1994 (SI 1994, No 1624) only employees can initiate claims, the remedy is limited to recovery of damages, the claim must arise or be outstanding on termination of employment, and the maximum payment is £25,000. Otherwise a claim can be brought before employment tribunals under wages

legislation (as per s. 28, 64 & 135 of the Employment Rights Act 1996) or to a court of law for breach of contract.

An employee is unlikely to sue his employer for damages for breach of contract during the course of his employment because he would need to go to court and incur the cost and inconvenience this involves, and he would be fearful (often with justification) of some form of retaliation by his employer. An employer on the other hand is unlikely to sue an employee who has breached the terms of his contract because the employee in breach is often not in a financial position to pay the damages involved. Finally as already seen an employee could be justified in claiming constructive dismissal in response to unreasonable behaviour towards him by his employer which represents a breach of his contract.

With respect to the psychological contract as already discussed breach of it will often lead to the withdrawal of: cooperation by the employee or their service altogether through absenteeism or resignation.

Conclusion

Many commentators in the past have stressed the dissimilarity between these two types of contract. "The employment relationship can be conceived of as having two components: the legal contract of service, which covers the legal relations between the employer and the employee; and the psychological contract, which covers the behavioural relations between the parties. The legal obligations of this relationship are observable and quantifiable outcomes, while the psychological expectations are invisible, but nonetheless real." ^{xxv}

Accordingly, it could be argued that psychological contracts and contracts of employment (and in particular implied terms) are pretty dissimilar and serve very different purposes. This is the prevalent view of bodies such as the CIPD and most other commentators on human resources. In turn the legal fraternity (in particular judges and lawyers) in dealing with employment law disputes have perhaps, not surprisingly, shown little sign of

recognising the importance of the psychological contract and its impact on the contracting parties.

The psychological contract is at best a broad construct which determines the behaviour of the parties and at worst a management tool to help employers effectively manage their employees. The contract of employment on the other hand is a set of legal rules which to a limited extent influences the behaviour of the parties but which ultimately and more significantly can be used to enforce the rights and obligations of the parties under the contract.

The combined effect of these two types of contract operating alongside each other is impossible to measure. What this article has tried to do is highlight the scope and application of the both types of contracts in certain specific areas and to a lesser extent considered their compatibility.

What is revealed is that the expectations of the parties in respect of the key areas highlighted (remuneration, trust and confidence and safety at work) are remarkably similar. There is often a distinct disparity between the rights the law offers employees and their understanding of these rights and their willingness to utilise them.

The psychological contract could fill this gap left by the law through offering employers and employees a more accessible and workable model which encourages mutuality of purpose and provides a model by which behaviour can be managed to minimise discord or conflict. It is not without its critics and further research needs undertaken to understand and apply it more effectively. However, it undoubtedly has merit and accordingly is increasingly being utilised by human resource managers in different jurisdictions throughout the world.^{lxxvi}

Of course psychological contracts differ from legal contracts with respect to the procedures followed in the event of a breach of the contract. The breach of a legal contract

allows the aggrieved party to seek enforcement in court or before an Employment Tribunal. Where there is breach of a psychological contract no such recourse is available and the employee or worker suffering the breach may choose to respond by withholding cooperation, limiting their contribution in the workplace or withdrawing from the employment relationship.

One commentator has helpfully (and correctly in this writer's view) accentuated the role that the implied terms play in influencing the behaviour of the contracting parties as follows: "First, this has resulted in articulation of behavioural standards that achieve the immensely difficult task of being both meaningful and adaptable. Secondly, underpinning those standards is an ongoing discourse, not about the exigencies of legal categories and technicalities, but about the nature and content of working lives. To be sure, that discourse is played out in large part in courtrooms, tribunals and lawyers' offices. But it also feeds into, and is itself influenced and altered by, working lives as they unfold over time. Taken together, the consequence is that the common law has created liability standards of great potential utility."^{lxxvii}

It is contended by this writer that as both these contracts have in some respects a common purpose it seems an opportune time to reflect on their role and their potential, if any, for combined utilisation in the workplace.

ⁱ Argyris, C. Understanding organisational behaviour. (1960). Homewood, Illinois: Dorsey Press Homans, G C. Social Behavior as Exchange, American Journal of Sociology (1958) Vol. 63 pp 597-606, Gouldner, A W The Norm of Reciprocity: A Preliminary Statement, American Sociological Review (1960) Vol. 25 pp 161-178

ⁱⁱ Albeit in the early stages mostly American commentators.

ⁱⁱⁱ There are examples of earlier implied terms such as the duty to pay wages and the duty to do the whole work under the contract but the most important terms were introduced or developed over this period.

^{iv} Cabrelli, D The Implied Duty of Trust and Confidence, An Emerging Overarching Principle Industrial Law Journal (2005) Vol. 34 No 4 pp 284-307

^v Justice Lindsay The Implied Term of Trust and Confidence Industrial Law Journal (2001) Vol. 30 No. 1 pp 1 - 16

^{vi} Conway, N Briner R B Understanding Psychological Contracts at Work, (2005) Oxford University Press

^{vii} Kotter JP The Psychological Contract: Managing the Joining up Process *California Management Review* (1973) Vol. 15 pp 91-99 at p 92 this extract cited in *Ibid* p 31

^{viii} Reward and benefits: performance of perks over pay rises for improving employee engagement Personnel Today 26 November 2007 www.personneltoday.com

^{ix} Macneil, I.R., 'The Many Futures of Contracts', Southern California Law Review, (1974) Vol. 47 pp 691-816. Macneil, I.R. (1985) Relational contract: What we do and what we do not know. Wisconsin Law Review, 483-525

^x Rousseau, D.M. (1989) Psychological and implied contracts in organizations. Employee Rights and Responsibilities Journal, 2, 121-139. Rousseau, D.M. (1990) New hire perceptions of their own and their employer's obligations: A study of psychological contracts. Journal of Organizational Behavior Vol. 11 pp 389-400

^{xi} Rousseau, D.M. & Wade-Benzoni, K.A. (1994) Linking strategy and human resource practices: How employee and customer contracts are created. Human Resource Management, Vol. 33, pp 463-489.

^{xii} Similar in nature to what was the typical contract of employment

^{xiii} Supra 10 Rousseau 1990

^{xiv} The balanced contract was identified as a result of primary research undertaken by Rousseau Rousseau D M Psychological Contract Inventory: Technical Report (Tech. Rep. N-2) Pittsburgh PA: Carnegie Mellon University

^{xv} Supra 6 Chapter 4

^{xvi} Roehling, M. The origins and early development of the psychological contract construct. Journal of Management History (1997) Vol. 3, pp 204-217.

^{xvii} Guest D Conway N Pressure at Work and the Psychological Contract (2002) CIPD Research Report, London

^{xviii} Supra 6 p 16

^{xix} Wellin, M. Managing the psychological contract: using the personal deal to increase business performance. (2007) Aldershot: Gower.

19 news.bbc.co.uk/2/hi/business/3086625.stm

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^{xxi} The consultancy company Lane 4 that helped Safeway through this transition can be found on www.lane4performance.com

^{xxii} Ed. Willey, B Employment Law in Context (2009) Pearson Publications p 33

^{xxiii} Supra 6 p 62

^{xxiv} CIPD The Psychological Contract (Revised January 2009) see www.cipd.co.uk

^{xxv} Harwood R The Role of the Psychological Contract in the Contemporary Workplace An Interview with Prof. Denise M. Rousseau (2006) <http://www.unfortu.net/~rafe/links/rousseau.htm>

^{xxvi} Guest, D. E. Is the psychological contract worth taking seriously? Journal of Organizational Behaviour, (1998) Vol. 19 (special issue) pp 649-664.

^{xxvii} Supra 22

^{xxviii} The type of detail found in the written statement of particulars detailed in section 1 of the Employment Rights Act 1996

^{xxix} Collins, H *Employment Law* (2003) Oxford University Press p 34

^{xxx} *United Bank v Akhtar* (1989) IRLR 507, EAT

^{xxxii} Although the titles of these duties may vary amongst employment law commentators they all cover the same ground

^{xxxiii} Most notably sections 13 & 14

^{xxxiv} [2000] IRLR 765 para. 9

^{xxxv} Persons paying class 1 national insurance contributions married women and widows paying reduced contributions and part time employees earning more than the lower earning limits.

^{xxxvi} Social Security Contributions and Benefits Act 1992 and the Statutory Sick Pay Act 1994

^{xxxvii} Personnel Today 16 February 2009 BMW axes 850 jobs at Mini plant <http://www.personneltoday.com>

^{xxxviii} Recession forces a million to work part-time Telegraph 19 July 2009 “Almost a million people are being forced to work part-time because they cannot get a full-time job, according to official figures that shed light on the hidden cost of the recession for thousands of families.” <http://www.telegraph.co.uk>.

^{xxxix} Under section 28(1) of the ERA 1996 employers must make guarantee payments to employees with one month’s service when they are laid off work.

^{xl} J. Asquith in *Collier v Sunday Referee Publishing Co* (1940) 2 KB 647: ‘It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my (*domestic*) cook her wages regularly she cannot complain if I choose to take any or all of my meals out.’

^{xli} [1930] A.C. 209 HL

^{xlii} Brodie, D *The Heart of the Matter: Mutual Trust and Confidence* (1996) *Industrial Law Journal* Vol. 25 p 121

^{xliii} (1978) ICR 401 EAT

^{xliiii} By Justice Kilner Brown

^{xliv} (1980) ICR 347 EAT

^{xlv} In *Woods v W/M Car Services* (1981) ICR 666 EAT the EAT summarised the position as follows: ‘In our view it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer or employee.’

^{xlvi} [2000] IRLR 766

^{xlvii} [2002] ICR 721

^{xlviii} [2000] IRLR 157

^{xlix} (2001) IRLR 286 EAT

¹ Employers behaving in an arbitrary, capricious or totally unreasonable manner to employees, in exercise of their contractual discretion, breach their contract; see *Clark v BET* (1997) IRLR 348.

^{li} [1997] ICR 606

^{lii} *Employment Tribunals (Extension of Jurisdiction) Order S.I. 1994/ 1623*

^{liii} S 95 of the *Employment Rights Act 1996*

^{liiii} *Western Excavating Ltd v Sharp* (1978) IRLR 27

^{lv} *Ibid* Lord Denning set down the legal requirements

^{lvi} *Lewis v Motorworld Garages* {1985} IRLR 133, EAT

^{lvii} *Robinson SL Trust and breach of the psychological contract*, *Administrative Science Quarterly*, Dec, 1996

p 2

^{lviii} *Ibid*

^{lix} *Ibid* p 4

^{lx} Atkinson, C *Trust and the psychological contract* *Employment Relations* (2007) Vol. 29 Issue 3 pp 227-246

^{lxi} *Barber v Somerset County Council* (2004) IRLR 475 HL

^{lxii} Sutherland v Hatton (2002) IRLR 263

^{lxiii} Dryden v Greater Glasgow Health Board (1992) IRLR 469 EAT.

^{lxiv} Burns, C Measuring the impact of a psychological contract for health and safety (2007) People Management, 9 August, p 50

^{lxv} Walker A Hutton DA The application of the psychological contract to workplace safety (2006) Journal of Safety Research Volume 37, Issue 5, 2006, Pages 433-441

^{lxvi} Walker, A The application of the psychological contract to occupational safety (2007) PhD Thesis Deakin University, Australia

^{lxvii} Supra 63 findings presented by Burns, C University of Strathclyde, Conchie, S School of Psychology, University of Liverpool at EIASM Workshop on Trust within and between Organisations, October 2007, Amsterdam, pp 1-34

^{lxviii} Ibid pp 31-32

^{lxix} Johnstone v Bloomsbury Area Health Authority [1992] QB 333 LJ Leggett, at para 347

^{lxx} Takacs v Barclays Services Jersey Ltd [2006] IRLR 877 Master Fontaine.

^{lxxi} Supra 27

^{lxxii} Irving D The role and development of mutual trust and confidence as an implied term of the contract of employment (2008) Coventry Law Journal 13 (1) pp 22 – 27 at p 25

^{lxxiii} (1999) IRLR 417 see also Anderson v Pringle Scotland (1999) IRLR 117 OH where an interdict was granted to prevent a dismissal in contravention of a redundancy procedure.

^{lxxiv} (1998) IRLR 55, QBD see also Alliance Paper Group plc v Prestwick (1996) IRLR 25

^{lxxv} Tipples, R, Krivokapic-Skoko B, O'neill G University Academics' Psychological Contracts in Australia and New Zealand available at <http://researcharchive.lincoln.ac.nz> p 3

^{lxxvi} Ed. Rousseau, DM Shalk, R Psychological contracts in employment: cross-national perspectives (2000) Sage Publications

^{lxxvii} Barmes, L Common law implied terms and behavioural standards at work. Industrial Law Journal (2007) Vol. 36 (1) pp 35-50 at p 40

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