

Chapter 3: Express and Implied Terms

Question 1

The contract of employment has typically been regarded as the foundation of the employment relationship. Critically consider whether this remains the case in light of the development of statutory employment law.

Commentary

This question concerns the various sources of employment terms including the contract of employment and statute. Strong students will be able to discuss the incomplete nature of the employment contract. Unlike other commercial contracts, there is typically no end-date and there are understandably parts of the contract that lack certainty such as how a role might evolve over time. This has meant that implied terms have evolved to supplement express terms. You might discuss some of the important implied terms but be careful not to stray too far into a general discussion of the various implied terms as the examiner has asked you to comment on the development of statutory protection. Important developments in statute that should be discussed here include the requirement for a statement of particulars in section 1 of the Employment Rights Act 1996, the statutory protection against unfair dismissal, statutory national minimum wage and working time provisions, and statutory protection against discrimination.

Question 2

Joe is employed as an administrator for a local branch of a national charity. He works in a small team of administrators and reports to the office manager, Shirley. When Joe first joined the charity two years ago, it was apparent that many colleagues did not get on with Shirley and Joe has since learned that there has been a significant turn-over of staff in recent years due to what a colleague told Joe was a 'toxic' work environment.

In the past year Joe has found the working environment to be increasingly hostile and his relationship with Shirley is strained. At his yearly appraisal he mentioned to Shirley that he was finding his workload difficult to manage but Shirley simply said 'welcome to the charity sector'. When he raised his workload again a month later, Shirley became frustrated and asked what Joe wanted. He replied that he needed some support and she rudely said 'don't we all'. After a particularly tough period when Joe was working long hours including weekends, he was signed off work for a few weeks with stress. His GP recommended that his workload be reduced but this never happened. Instead, more work was given to Joe after another administrator left and her job was not filled. Joe has found this latest workload too much to cope with. He also finds that Shirley is short-tempered and recently shouted at him when he was late in meeting a deadline despite the fact that he had worked all weekend and cancelled a family event to try to manage his work. A few months ago Joe broke down in tears at work and was sent home. His doctor has since diagnosed anxiety-related depression and stress. Joe has been on anti-depressants for the past three months but has shown little improvement and his GP has referred him for a specialist psychiatric assessment to determine whether further treatment is needed. He has been dismissed from work on grounds of capability and worries that he will struggle to find other work. Joe has previously always enjoyed good health.

Advise Joe.

Commentary

The central aspect of this question is the implied duty on an employer to exercise reasonable care for an employee's health. It is essential that you are familiar with the line of authority on work-related stress including *Walker*, *Cross*, *Barber* and Hale LJ's judgment in *Sutherland*. You should discuss whether it was reasonably foreseeable for Joe to suffer this kind of harm. Relevant factors include Joe's previous absence for stress, his complaints to his boss about workload, and the increase in work following his return from sick leave. It would also be relevant to mention the possibility of an unfair dismissal claim but there is little here to be able to advise fully on that aspect of the claim. Similarly, it may be possible that Joe is a disabled person for the purposes of the Equality Act but there is insufficient information to be able to advise confidently on this.

Question 3

Explain how and to what extent an employer might prevent a former employee competing with it through reliance on contractual terms. How does the law in this area seek to balance the interests of the parties and the public generally?

Commentary

This question concerns the need to balance the employer's need to protect its legitimate business interests with the employee's right to find alternative employment and practise his or her trade. The employer can do this by attempting to protect its trade secrets (*Faccenda Chicken* is highly relevant) and/or by inserting a restrictive covenant into the contract of employment. There are various types of covenant including non-compete clauses and non-solicitation of employees and clients clauses. You will be expected to consider how the cases have interpreted these clauses and the sorts of factors that the courts will take into account.