SECURING THE PROTECTION OF AN EMPLOYEE BY IMPLYING TERMS IN AN EMPLOYMENT CONTRACT.

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An Obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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DECLARATION

I Sumaili Wanga S., of computer number 25059726, do hereby declare that the contents of this Dissertation are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

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ABSTRACT

This dissertation considers the role that implying terms in an employment contract has in helping to secure the rights of an employee who is, compared to the employer, at a lower bargaining power. In approaching this subject matter of the research, the essay starts by looking at the position under common law and furthermore, the domestic laws that have been put in place in order to provide for terms that may not be expressly stated in the employees employment contract but are still binding to both parties by law. It also considers how the incorporation of collective agreements that have been made by the employer and the employee’s union, can curtail this high bargaining power of the employer.

The dissertation through research and interviews found that, Common law, domestic statutes and collective agreements do, to a large extent, help in securing the rights of an employee but despite these efforts, the employer is always and will always be at a higher bargaining power than the employee. According to the findings of the research, lack of knowledge of the rights that an employee has by virtue of being in employment has caused the employer to perpetually take advantage of the employee.

As such, this essay recommends, amongst other things, that the Ministry of Labour and Information should ensure that they carry out sensitization programmes country wide to help educate employees on their rights.
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This paper is dedicated to my whole family but more especially to my daddy, Dr F.K.M Sumaili, who has from a very young age till today, told me how important education was. He has always encouraged me to be a ‘reader’ and he has wanted this for me for a very long time. I also say thank you for the time you went to sleep after 3 oclock in the morning, just because you wanted to help me with this very paper. “This one is for you daddy, I love you.”
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LIST OF ABBREVIATIONS AND ACCRONYMS

1. HC - High Court
2. SC - Supreme Court
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CHAPTER ONE

1.1 INTRODUCTION

Traditionally, the dealings between employer and employee are founded upon the Individual contract of employment. A contract of employment will consist of a number of terms and conditions and it is impossible for that contract to be contained within a single document consisting of all these terms. These terms may be either express terms or implied terms. Express terms are those terms which have been agreed between the parties, either orally or in writing. Implied terms on the other hand are not stated in the contract but are regarded as implied into every contract of employment simply by virtue of the employment relationship.

1.2 STATEMENT OF THE PROBLEM

The courts have recognized the inherent inequality in the bargaining relationship between the employer and employee. This means that the employer may choose to include in the contract of employment express terms that are convenient for him and detrimental to the employee.

Due to the fact that the employee is at a lower bargaining level than the employer, the courts and other sources of law, such as Common Law and Statutes, are prepared to imply terms to control the Employers express powers under the contract. It is impossible for the contract on the onset to cover absolutely every eventuality and therefore the need to imply terms into the contract is important.

The rationale of this study is to analyse the extent to which these implied terms protect the rights of the employee.
1.3 SIGNIFICANCE OF THE STUDY

This study is imperative to show that the bargaining power of an employer when entering into a contract of employment is not absolute. There are unseen terms in an employment contract that are found in statutes that can be implied into the contract. There are implied terms at common law, Statutes and also terms that can be agreed upon in Collective Agreements by Trade Unions.

This study will demonstrate the underlying importance of these implied terms in mitigating the employee against any adverse expressed terms in a contract of employment.

1.4 OBJECTIVES

1. Explain implied terms under Common Law that are specifically meant to protect the employee.
2. Explore and reveal how these implied terms under Common Law may protect the Employee.
3. Consider the implied terms as a result of the operation of certain Statutes in particular the Employment Act and the Industrial and Labour Relations Act
4. Explore and reveal how these implied terms under these Statutes may protect an employee who often has little say or input in negotiating the express terms of the contract.
5. Consider the role of Trade Unions and their contribution in the protection of the rights of employees through Collective Bargaining and subsequent implication of these terms into the contract of employment.
6. Discover how the Courts have used and enforced these implied terms in coming to favourable decisions for the employees.
1.5 SPECIFIC RESEARCH QUESTIONS

1. To what extent do the implied terms under common law offer protection to the employee?


3. How do Trade Unions through collective bargaining offer protection to employees and how does this equalize the high bargaining power of the employee?

4. What role does the Court play in the protection of the Employee's rights?

5. Will the bargaining power of the employer ever be equal to that of the employee?

1.6 RESEARCH METHODOLOGY

The methodology that will be used for this research is desk research that is descriptive in nature and having a qualitative measure. It includes a review of literature in books and journals including case law on the subject. In very restricted cases, unpublished literature was consulted.

1.7 THE NATURE OF A CONTRACT OF EMPLOYMENT

The general principles applicable to the law of contract are equally relevant to employment, and reference should be made to the standard works on the law of contract for details. Offer and acceptance are required together with consideration. In practice, the offer is usually from the employer and acceptance is by the employee. Consideration takes the form of paying wages and
doing the work respectively. The parties must intend that the agreement is binding and there is clear intention to create legal relations.

The formation of the contract may well take place as a result of an interview. The employer then sends an offer of appointment, which the prospective employee is asked to sign and return. Sometimes however, the offer may be oral and acceptance may even be by conduct, in that the employee turns up at the appointed time and place and begins work. There is no need for the contract to be in writing in order for it to be binding.

Therefore, it can be said that the contract of employment may be embodied in a written document, may be wholly oral, may need to be deduced from the parties’ conduct or may be partly in one of the forms and partly in another. Although it is not usually problematic whether or not there is a contract, where the contract is not written it is often difficult to be sure of the precise terms. This is not merely because proof of an oral agreement is more difficult, but, more important, because in an oral hiring, very little may have been expressly agreed between the parties.

To supplement what has been expressly agreed between the parties the law may treat rules derived from various other sources as part of the contract of employment. Such sources include terms implied by Common law, Statute, relevant collective agreements, customs and practice and or by employer’s works rules.¹

Traditionally, the contract of employment has been a matter for the parties to agree. They are free to negotiate their own terms, although it has always been clear that the inequality of bargaining power between employee and employer means that the phrase ‘Freedom to contract’

¹ Paul Dobson, Business Law (London: Sweet and Maxwell. 1997) 254
has been increasingly circumscribed by legislation whose purpose is to protect employees and the vulnerable employers in particular. The various strands of discrimination law form part of this protection.\(^2\)

**Implied Terms**

Contracts of employment tend to be flexible and in the absence of written terms the following may be implied:

1. **Implied in fact.** A term may be implied because it gives business efficacy to the contract.

2. **Custom and Practice.** The way in which things are done and have been done in the past, in the workplace and elsewhere, will sometimes give rise to a contractual term based upon ‘custom and practice’. For such a term to be recognized, it must be ‘reasonable, certain and notorious’ and there must be nothing in the express or necessarily implied terms of the contract to exclude it. As to certainty, what is necessary is that the term must be capable of being stated precisely. It will be notorious if it is generally known by the workforce which does not mean that the particular worker whose contract is being scrutinized must have known of it. In the leading case of *Sagar v Ridehaigh and Son Ltd*\(^3\), Sager was a weaver whose weekly age was calculated in accordance with agreed principles based on the amount and type of cloth woven. On the occasion in question, the company deducted an amount in respect of 3 yards of cloth containing a fault which rendered it unmerchantable although such deductions were not included in agreed principles. It was held that since many mills in the area made deductions for substandard work brought about by lack of care on the part of the employees, such a term was implied.

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\(^3\) [1931] 1 Ch. 310
in the contracts of employment. It was observed by Romer L.J., an employee entering the company’s service,

Upon the same terms as the other weavers employed by them...must be deemed to have subjected himself to those terms whatever those terms might turn out to be.⁴

3. **Implied by Law.** Some terms may be implied at Common law or Statute.

**Common Law**

Under Common law, it is generally held that an employer must comply with four major implied terms which include:

**A duty to pay wages.**

This is an area which is heavily regulated by statute. Nevertheless, perhaps the most obvious contractual duty to which the employer is subject is that of remunerating the employee. In the absence of agreement on the amount which he is to be paid, there is still a right to reasonable remuneration (which according to the statute, must be at least at the level of the national minimum wage for those who qualify).⁵

**A duty to exercise reasonable care for the Safety of the Employee.**

The employer has a duty to provide a safe system of work, adequate material and premises, and competent fellow employees. In the case of *Wilsons and Clyde Coal Co v English⁶*, Mr. English was employed in mine working when he was injured by machinery. The employer maintained that he had employed a colliery agent, as they

⁴ Sprack, *Employment Law and Practice*, 23
⁵ Sprack, *Employment Law and Practice*, 25
⁶ [1938] A.C. 57
were required to do by law and since part of the agents role was safety of the mine, the agent rather than the employer was liable. It was held that the responsibilities for health and safety of employees must lie with the employer. Duties may be delegated but the responsibility remains with the employer. This duty extends not only to physical safety but to the avoidance of actions which will cause psychiatric damage, e.g. caused by stress as a result of the amount of work which they are required to do. Under the law of contract, the case of *Sutherland v Hatton*, for an award for psychiatric illness or injury caused to the employee by stress at work, the Court of Appeal set out the boundaries to this aspect of the employer’s duty. The central test laid down was, ‘is a harmful reaction to the pressures of the work reasonably foreseeable, with regard to the individual in question?’

**A duty to provide a grievance procedure.**

This is an implied term (though not for Unionised Employees) that the employer should provide the employee with a reasonable opportunity to resolve a legitimate grievance. It should be noted that there is a statutory grievance procedure which is applicable to all employees and which has important consequences both in terms of procedure and with respect to compensation in the event of a subsequent tribunal claim. These statutory grievance procedures are implied into the contract of employment.

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A duty of mutual trust and confidence.

This is, as the label makes clear, a two-way obligation, but it arises more frequently in the context of an allegation by the employee that the employer has failed to comply with the duty, often as the foundation for a claim of constructive dismissal. It is applicable in a variety of contexts, e.g. where there is harassment or victimization by the employer, or a middle manager is undermined in front of his subordinates by a senior manager, or a refusal to afford a reasonable opportunity to obtain redress for a legitimate grievance. As it was put by the Court of Appeal in Woods v WM Car Services (Peterborough) Ltd, the employers must not, "without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between employer and employee."

In this case, Ms. Woods worked in a senior administrative role but following a takeover, she was required to take a cut in salary and work longer hours. When she refused to comply, she was given additional duties and her job title changed. It was held that there is implied in a contract of employment, a term that the employers will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
Statute

When considering Statutes, there are certain terms which are implied into the employment contract as a result of the operation of statute, such as repatriation. Pursuant to section 13(1) of the Employment Act\(^9\) whenever an employee has been brought from a place within Zambia to a place of employment by the employer, or by an employment agency acting on behalf of the employer, the employer shall pay the expenses of repatriating the employee to the place from which he was brought.

Another example under the Act is the provision on maternity leave. It provides that "subject to any agreement between the parties, or any other written law, providing for maternity leave on conditions not less favorable that are provided for in this section, every female employee who has completed two years of continuous service with her employer from the date of first engagement or since the last maternity leave taken, as the case may be, shall on production of a medical certificate as to her pregnancy signed by a registered medical practitioner, be entitled to maternity leave of twelve weeks with full pay."\(^{10}\)

The effect of implying this provision to the contract of service is that if the employee can satisfy the requirement of having completed two years of continuous service with her employer, she will enjoy this condition regardless of any express provision stipulated in the contract of employment. This is due to the fact that maternity leave is a statutory requirement.

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\(^9\) Chapter 268 Laws of Zambia
\(^{10}\) Chapter 268 Laws of Zambia Section 15 A (1)
The Role of the Courts in Protecting Employees Rights

According to Bell\textsuperscript{11}, it is a rule in contract that an implied term will not take precedence over a clearly stated express term. This was seen in the case of \textit{Mumba v Zambia Fisheries and Fish Marketing Corporation}\textsuperscript{12} where it was held that, where parties have embodied the terms of contract into a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document except on certain exceptions such as Government directives. In this case, the plaintiff claimed damages for breach of contract of employment entered into between him and the defendant company. It was held that the plaintiff did not breach the terms of the contract but that the contract was frustrated by Government directives. The contract of employment therefore ceased to be binding on the implementation of the Government directives.

The courts recognize that in reality the individual often has little say or input into the express terms of the contract which are often offered on a standard form “take it or leave it” basis. This can be seen in the case of \textit{Jones v Associated Tunneling Co. Ltd}\textsuperscript{13} where the employer implied a term requiring an employee to work anywhere within a reasonable daily commuting distance from his home. It may not be realistic to expect the employee to object to it and risk provoking argument, dismissal or rejection of their application. In this case, the courts recognize that in reality the individual often has little say or input into the express terms of the contract which are often offered on a standard form ‘take it or leave it’ basis.

\textsuperscript{11} Andrew Bell, \textit{Employment Law} (London: Sweet and Maxwell, 2007) 214
\textsuperscript{12} [1980] Z.R. 135
\textsuperscript{13} [1981] I.R.L.R. 477
In the case of Johnston v Bloomsbury Health Authority\textsuperscript{14}, the court was not able to agree that an express term for a junior doctor to work excessive hours should take priority over an implied duty of care on the part of the employer.

The courts have also warned against the strict use of legal precedent in determining the outcome of cases involving employment relationships. Edmund Davies L.J., stating in the case of Wilson v Racher\textsuperscript{15}:

Reported decisions provide useful but only general guides, each case turning upon its own facts… (Older cases) may be wholly out of accord with current social conditions. What would today be regarded as almost an attitude of Czar- serf, which is found in some of the older cases where a dismissed employee failed to recover damages, would I venture to think be decided differently today.

**The Concept of Collective Bargaining**

Another source of implied terms can be derived from Collective Agreements. In his book, the great Indian Philosopher, politician and lawyer Mahatma Ghandi had the following to say:

Man is an engine whose motive power is soul. The largest quantity of work will not be done when the motive force; that is to say the will or spirit of the creature, is brought to its greatest strength by its own proper fuel, namely by the affections… Assuming any given quality of energy and sense in master and servant, the greatest material result obtainable by them will not be through antagonism to each other but through affection from each other.\textsuperscript{16}

From the above quotation, man is conceptualized as having inevitable conflict with other men who hold higher positions in the means of production and labour relations. With the development

\textsuperscript{14} [1992] Q.B. 333

\textsuperscript{15} [1974] I.R.L.R. 114

\textsuperscript{16} Mahatma Ghandi, *The Story of my Experiment with Truth* (New Delhi: The Indian Law Institute,1968) 56
of man in labour skills and production, history has proved that the employment of man by man was the natural consequence. However, because the worker sold his labour to his employer, the interests of the employer tended to supersede that of the worker. This was mainly due to the fact that capital rested in the hands of a minority class, whereas the majority had to accede to being employed.\footnote{Anderson Roberts, “Collective Bargaining with Reference to the law of Collective Agreements and Collective Disputes in Zambia.” (LLB dissertation., University of Zambia, 1988-1989), 30-33}

The term ‘collective bargaining’ was first coined by economic theorist Mrs Sidney Webb and has been used to denote the process of negotiation between an employer or employers and a group of employees in determining the conditions of work.

The concept of ‘collective bargaining’ was therefore, an attempt to reconcile the interests of the employer and his employees in order to foster a better working relationship between the two parties.

These Collective agreements made between trade unions and employers were traditionally the main source of terms and conditions of employment for the majority of workers. In entering a contract of employment the bargaining power of the potential employee is much less than that of the employer: the worker needs the job more than the particular employer. The main purpose of Trade Unions is to redress this balance by harnessing the collective power of all the employees. The employer may be able to resist the demands of the individual but will have to pay attention to a body representing the whole workforce.\footnote{Gwyneth Pitt. Employment Law (London: Sweet and Maxwell. 2007) 68}
From the outset, it should be emphasized that the Industrial Relations Act which is the present statute regulating Collective bargaining in Zambia, makes a distinction between ‘collective bargaining’ and ‘collective agreements’.\textsuperscript{19}

A collective agreement is defined as, “An agreement negotiated by an appropriate bargaining unit in which the Terms and Conditions of or affecting the employment and remuneration of employees are laid down.”

On the other hand, collective bargaining is defined as, “The carrying on of negotiations by an appropriate bargaining unit, for the purpose of concluding a collective agreement.”

The case of \textit{Gascol Conversions Ltd v Mercer}\textsuperscript{20} is an illustration of how a contract of service may be affected by a collective agreement. The plaintiff was engaged to work 54 hours a week. A year after the engagement of the plaintiff, a national collective agreement was reached providing for a basic 40 hour week with overtime when necessary. It was held that the national agreement superseded the terms of the contract of employment because its terms superseded the terms of the later by incorporation.

\textsuperscript{19} Section 3 (1) CAP 517 Of the Laws of Zambia

\textsuperscript{20} [1974] I.C.R. 420
1.8 CONCLUSION

One needs to remember that it will be most unusual for a contract of employment to be contained within one single document. Usually there will be a number of documents which contain various terms of the contract. Often, important terms in the contract will not have been reduced to writing at all but will have been the subject of oral agreement or be assumed by the parties to take a particular form.

It can be seen that Implied Terms in an employment contract are necessary to curtail the employer’s high bargaining power in setting the terms in the contract. Furthermore, where the contract is missing certain vital terms, terms can always be implied into the contract.

It can also be concluded by anyone who has ever worked at a job that there is unequal bargaining power between employer and employee. This is because the employer has many employees: hundreds, thousands, or maybe even tens of thousands. The loss of a single employee to a big employer is only a slight annoyance and is, in fact, an anticipated cost of doing business. The only time when an employer feels the same pain as the employee is when the employees are in a union and the union goes on strike. There is no doubt that unions help to equalize the bargaining power with that of the employer.
CHAPTER TWO

2.0 IMPLIED TERMS UNDER COMMON LAW

2.1 INTRODUCTION

The employer owes the employee certain duties that if breached, entitle the employee to consider himself discharged from the employment relationship and to sue the employer for any loss or damage thereby caused by him.

It is generally advised that an employer must comply with the following implied terms: a duty to pay wages; a duty to provide work; a duty to exercise reasonable care; a duty to provide a grievance procedure and a duty of mutual trust and confidence.

2.1.1 DUTY TO PAY WAGES

Wages are the major consideration for the work done by the employee. This duty of remunerating the employee may perhaps be considered as the most obvious contractual duty to which the employer is subject failure to pay the full amount due is actionable by the employee as an unlawful deduction. In the case of Delaney v Staples1 it was observed inter alia that payment in lieu of notice will not be regarded as wages. However, payment of outstanding bonus or holiday pay is considered to be wages and failure to pay this was of course actionable. In this case, the applicant was summarily dismissed. She therefore, claimed entitlement to commission and holiday pay. She claimed that these were unlawful deductions. The employer’s central argument here was that there was a distinction between a deduction from a payment recognized to be due and a total non-payment resulting from a denial of liability to pay. The court rejected

this argument and held therefore that wages had to be referable to work actually performed or
due to be performed under the contract.

Where there is no express agreement, the employee is entitled to a reasonable remuneration
(which according to statute, must be at least at the level of the national minimum wage for those
who qualify).

One area of potential controversy is whether the employer is bound to pay sick pay. If the written
particulars do not contain terms as to payment during illness, the employee may go to a tribunal to
determine whether it was agreed, it is generally presumed to be payable but not necessarily from
the employers own funds. In Mears v Safe car Security Limited\textsuperscript{2} there was no express term in the
employee’s contract as regards whether or not one was entitled to pay when sick. The Court of
Appeal held that there was no presumption that an employer was obliged to pay sick pay and it
was necessary to look at surrounding circumstances to determine whether there was any such
duty. In Zambia however, the Employment Act\textsuperscript{3} provides for payment when one is sick and it
will be dealt with later when we consider duties of the employer implied by statute.

The parties may agree at what stage absence through illness gives the employer the right to treat
the contract as terminated as the employers usually provide for an express term regulating wages.

\textbf{2.1.1 DUTY TO PROVIDE WORK}

The question, ‘Does the employer have a duty simply to pay wages or is there also a duty to
supply the employee with work’, may seem odd that the question ever arises, but in fact, there

\textsuperscript{2} [1982] I.C.R. 626
\textsuperscript{3} CAP 268 of the Laws of Zambia, section 43(1)
are situations where an employee may not be content to remain at home with pay but without work, not least because this is hardly going to be a permanent situation.  

The classic view is that there is no duty to provide work at Common law: This was observed in the case of Collier v Sunday Referee. In this case, Collier worked as a sub editor on the Sunday Referee Newspaper. Whilst there was still over a year to run his contract, the newspaper was sold to new owners who did not require Collier’s services. His original employers retained him, continuing to pay him his wages on condition that he appeared at the office on a regular basis, even though there was no work for him. In an action for breach of contract, Collier contended that the company had contractual obligation to provide him with work. The court held that only in exceptional cases was there a duty to provide work: where the worker is paid on a commission basis or where the contract contains a term, perhaps implied that the bargain includes publicity. Famously, Asquith J. stated, “Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out.”

However, in the more recent decision of William Hill Organisation v Tucker, Mr. Tucker had been employed by Mr. William for over ten years. He agreed to a contractual term which required him to give up to six months notice should he decide to terminate his employment. Mr. Tucker was offered and accepted a position with another organization and gave one month notice of termination. William Hill required him to abide by the contract term and give six months notice, but stated that although he would continue to receive a salary for the notice period, he

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4 Gwyneth Pitt, Employment Law (London: Sweet and Maxwell), 110  
5 [1940] 2 K.B. 647  
6 Collier v Sunday Referee Publishing Co. [1940] 2 K.B. 647  
was not required to attend work, and consider the six month period as ‘garden leave’ during which he would not be permitted to take up alternative employment.

It was held that although there was no accepted right to work, there was in some circumstances a duty on the part of an employer to provide work in a situation where the employee needed to exercise their skills. This, the court held, was such a case.

This case illustrates that there are exceptions to this duty. These exceptions include, those working on commission basis who would receive no wages if they were not permitted to work, those who would regard publicity as part of their remuneration package, actors, singers e.t.c. and of course like the case above, those who need to continue to perform their job in order to retain certain skills (surgeons perhaps).

2.1.3 DUTY TO TAKE REASONABLE CARE FOR THE SAFETY OF THE EMPLOYEE

At Common Law, the employer is under a duty to take reasonable care for the health and safety of his employees.

The standard of care is “the care which an ordinary prudent employer would take in all the circumstances”. This duty is owed to individuals and consequently a higher standard of duty may be owed to some employees than to others. The employer should provide a safe plant and premises, a safe system of work and reasonably competent fellow employees.8

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8 Andrew Bell, Employment Law (London: Sweet and Maxwell), 105
In *Paris v Stepney Borough Council*\(^9\) it was held that the employer owes a duty of care not only to employees generally, but to each employee as an individual. The facts are that Mr. Paris worked as a cleaner, part of his duties consisted of scrapping rust from the underside of vehicles. It was not normal practice for the employer to provide goggles for this task. Mr. Paris had only one good eye and when a splinter of rust entered this eye, Mr. Paris was totally blinded. Thus in the case of Mr. Paris, the employer should have foreseen there was greater risk of greater injury and acted accordingly.

According to the thin skull rule, an additional exposure in tort liability towards persons who are particularly vulnerable or more fragile than the norm, who may have inherent weaknesses or a pre-existing vulnerability or condition, the tortfeasor takes his victim as he finds them, he compensates for all the damages he caused even if damages are elevated compared to a norm because the plaintiff was thin skulled. This duty is not owed to employees generally but to employees as individuals. It is for this reason that the employer should take reasonable care for the safety of each individual employee.

**2.1.4 DUTY OF MUTUAL TRUST AND CONFIDENCE**

This is actually, as the label makes clear, a two way obligation, but it arises more frequently in the context of an allegation by the employee that the employer has failed to comply with the duty, often as the foundation for a claim of constructive dismissal. It is applicable in a variety of contexts, e.g. where there is harassment or victimization by the employer, or a middle manager is undermined in front of his subordinates by a senior manager, or a refusal to afford a reasonable opportunity to obtain redress for a legitimate grievance, refusing to assist the employee in cases

\(^9\) [1951] 1 All E.R. 42
of genuine need. As it was put by the Court of Appeal in *Woods v WM Car Services* 10, the employers must not, “without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between the employer and employee.”

Actions of an employer which constitute the breach of mutual trust and confidence need not be directed towards the employee but the issue should be whether the manner in which the bank operated could breach that term in an employee’s contract. In the case of *Malik v Bank Credit and Commerce International* 11 Mr. Malik was dismissed for redundancy when his employer BCCI, went into liquidation. Mr. Malik had worked for the bank for twelve years but because of the adverse publicity surrounding the collapse of the bank, had found it very difficult to obtain suitable subsequent employment. He sought to bring a claim for damages based on breach of mutual trust and confidence caused by the manner in which the bank had managed its affairs.

It was held to be accepted that the bank had operated in a corrupt and dishonest manner but that Malik was innocent of any involvement and it was further accepted that, following the decision in *Woods v WM Car Services*, contracts of employment contain the implied term of mutual trust and confidence.

In another case, *United Bank limited v Akhtar* 12, Mr. Akhtar had been employed by United Bank since 1978. His contract of employment contained a mobility clause, allowing the bank to move him at their discretion to any of their branches. In 1987, he was asked to move from Leeds to Birmingham, at short notice and with no financial assistance. It was held that although the contract contained a mobility clause and the company was therefore, entitled to exercise their

10 [1982] I.R.L.R. 413  
11 [1997] 3 All E.R 1 (HL)  
rights under that clause, the manner in which the company went about exercising their rights breached an implied term of mutual trust and confidence. In this case, the lack of notice, the lack of financial assistance and the apparent refusal to consider Mr. Akhtar’s reasons for refusal suffice as a breach of this duty.

Since the Malik case, the boundaries of the duty to maintain trust and confidence have been explored and extended by the courts to the extent that it has become difficult to distinguish, in practice, the duty of trust and confidence from a more general duty of reasonableness being placed on the employer.

In the recent case of Crossley v Faithful and Gould Holdings Ltd\(^{13}\), the court of appeal rejected the possibility that there is a term implied into every contract of employment that employers must take reasonable care of their employees’ economic well-being.

The facts are that Crossley was a long standing senior employee and director of the defendant company. He was a member of the company’s long term disability scheme and was entitled to benefits in the event that he was ‘totally unable by reason of sickness...to follow his occupation’. When Crossley suffered a nervous breakdown, he received medical advice that he should take early retirement on medical grounds. He then sent a letter to the managing director applying for early retirement. The managing director agreed to continue paying the salary until his retirement date after which he would receive payments under the scheme. The scheme provider exercised its discretion and payments were only made for nine months. An action was brought against the company for damages for breach of an implied term in his contract of employment. This action failed as Crossley had chosen to retire of his own volition and had not been encouraged to do so.

\(^{13}\) [2004] I.R.L.R. 377
by the company. Also, he held a senior position within the company and could have been reasonably expected to be aware of the schemes terms even though the company had not explicitly brought them to his attention.

The question whether this duty arises on employers to bring the relevant term to the attention of their employees will always depend on whether the individual employee could not reasonably be expected to be aware of the existence of such a term without his employer having brought it to his or her attention. In the case above, Crossley would have been reasonably expected to be aware of the relevant terms of the scheme and therefore, the implied duty on the company did not arise.

The leading judgment, found in *Scally v Southern Health and Social Services Board*[^14^], where under a collective agreement, the employees were entitled, for a limited period, to purchase ‘added years’ of entitlement to make up their pension to the maximum. The House of Lords held that there was to be implied into the employees’ contract of employment an obligation on the employer to take reasonable steps to bring the entitlement to purchase ‘added years’ to the attention of the employees. However, the court was only prepared to allow such duty to arise in narrow circumstances.

In this case, the main point for employers to be concerned about is that the employee cannot, in all circumstances, reasonably be expected to be aware of the term unless it was brought to his or her attention. Simply because one employee could reasonably be expected to be aware of the term without being told does not mean that another employee will be expected to also be aware. Individual employees will require individual treatment. *Crossley* confirms that it is perfectly

[^14^]: [1992] 1 A.C. 294
possible for a senior employee to be expected to be reasonably aware 'of the term in question', whereas a junior employee will not. However, seniority will not always provide the answer as to when employers need to bring the relevant term to an employee's attention and when employers need not. Other factors to be considered may include the complexity of the arrangement, the amount of information already provided to the individual employee, e.t.c. The safest option appears to be that employers should provide as much information as possible to all of their employees, regardless of their role and seniority, about all schemes and arrangements relevant to those employees\textsuperscript{15}.

2.2 IMPLIED TERMS OF A CONTRACT OF EMPLOYMENT PROVIDED FOR UNDER THE EMPLOYMENT ACT

2.2.1 INTRODUCTION

In an effort to neutralize the high bargaining power of the employer, the law steps in to protect the employee in cases where the contract is silent on certain issues concerning the contract of employment or where the employer may perhaps be abusing his power.

One such law that helps to secure the rights of an employee by implying terms into the contract of the employment is the Employment Act\textsuperscript{16}. An interesting aspect of this Statute is that not only does it protect the employee's rights from the vast powers of the employer but it also gives the employee certain incentives that can allow the employee to grow and not be totally dependent on the employer.

\textsuperscript{15} Oliver Brettle, Implied Terms- Just how far the will the courts go? http://www.croner.co.uk/personnel management newsletter/implied terms/courts.html (accessed March 31\textsuperscript{st}, 2012)

\textsuperscript{16} Cap 268 of The Laws of Zambia
2.2.2 TRANSFER OF CONTRACT

Section 35 (2) (a) of the Employment Act provides:

"Before endorsing any particulars of transfer on a written contract of service, the proper officer shall satisfy himself that the employee has fully understood the nature of the transaction and has freely consented to the transfer and that his consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake."

To illustrate further, reference is made to the case of Peter Ng’andwe and Others v ZAMOX Ltd and Zambia Privatization Agency\(^\text{17}\) where the appellants were employees of the 1\(^{st}\) respondent which was a parastatal company. A company called Africa Oxygen Limited acquired a controlling interest in the 1\(^{st}\) respondent. The new owners proposed new conditions and terms of employment for those who were to continue in employment. The appellants were not satisfied with the proposed new conditions and further contended that in terms of Section 35 of the Employment Act, their contracts were not amenable to be transferred to their new employers without their consent. The 1\(^{st}\) respondent proceeded with its proposal and the appellants were requested to complete and sign "the continued employment letters", containing the new terms and conditions of service. In default of such signing, the appellants were deemed to have resigned. The trial judge adjudicated in favour of the respondents and the appellants appealed. It was held following Kabwe v. BP (Zambia) Limited\(^\text{18}\), if an employer varies the basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant on the dates of such variation and must get redundancy payment of the conditions of service so provide for such payment. If the

\(^{17}\) [1999] Z.R. 40
\(^{18}\) [1995] Z.R. 218
conditions of employment provide for an early retirement and not redundancy, then the employee should be deemed to be placed on early retirement.

2.2.3 REMUNERATION, HOURS OF WORK and OVERTIME.

As mentioned earlier, under common law, it is an implied term of any contract of employment that the employer will pay reasonable remuneration for services rendered. Failure by the employer to remunerate the employee in terms of the contract of employment will entitle the employee to sue his employer for breach of contract.

In Zambia, statutory law has stepped in to protect the wages of employees. Section 48 of the Employment Act makes provision as to when wages of employees are due. In the case of a monthly contract of service, wages are due on the last day of each month, in the case of a fortnightly contract of service, wages are due on the last day of each fortnight. In the case of a weekly contract, wages are due on the last day of each week. When the employee is employed on a task or piece work, wages are due on the completion of such a task or work.

2.2.4 MEDICAL ATTENTION and PAID SICK LEAVE

Before the Employment (Amendment) Act, every employer was obliged to use his best endeavours to provide a sick employee with medical attention and medicines. However, with the amendment of section 43 (1) of the Employment Act, the position presently is that an employer is under no obligation to provide his employees with medical attention and medicines. However, if there is an agreement for medical attention and medicines through a collective agreement or contract of employment or general conditions of service relating to an organization, the employer

19 Act No. 15 of 1997
may provide the employee with medical attention and medicines and where necessary, transport to a medical institution during the illness of the employee.

An employee who through no fault of his, is unable to execute normal duties due to an illness, is entitled, upon production of a medical certificate, to paid sick leave at full pay for the first three months and thereafter at half pay for the next three months. The employer may discharge the employee on the recommendation of a registered medical practitioner or institution if the employee does not recover after six months. In the case of a female employee who has a sick child, she is entitled to leave of absence without loss of pay to enable her to nurse her sick child who has been hospitalised. Leave granted to a female employee under such circumstances is not to be deducted from such employee’s accrued leave.\textsuperscript{20}

\textbf{2.2.5 HOUSING}

Prior to the enactment of the Employment (Amendment) Act, 1997, every employer was under obligation to cause every employee in his service to be adequately housed at all times and at his own expense. Where he was unable to provide adequate housing for employees in his service, he had the duty to pay such employees rent allowance in lieu of such housing. However, with the amendment of section 41 of the Employment Act, the position at present is that the employer has the discretion to provide the employee with housing, a loan or advance towards the purchase or construction of a house. In the case of \textit{Joel Lumbama v Medical Stores Limited}\textsuperscript{21} the appellant an employee was provided with accommodation. The respondent company started experiencing economic problems and decided to give up some of the houses it was renting. The appellant was asked to vacate the house he was occupying in order to allow the company to allocate the house

\textsuperscript{20} Winnie Mwenda, \textit{Employment Law in Zambia- Cases and Materials} (Lusaka: UNZA Press) 43

\textsuperscript{21} SCZ Appeal No. 22 of 1995 (Unreported)
to a senior member of staff. It was held that giving of accommodation was discretionary and therefore the respondent was not compelled to continue to give the appellant accommodation. The respondent company however, showed that they were prepared to pay the appellant housing allowance.

Section 41 was amended with the intention of empowering Zambian workers by enabling them to obtain loans or mortgages to purchase or build their own houses. Before then, there was no incentive for most employees to purchase their own homes since it was mandatory for employees to provide accommodation to employees or pay rent allowance in lieu thereof. Thus the amendment brought some relief to employers who can now invest the resources now being saved into income generating activities.\textsuperscript{22}

\subsection*{2.2.6 PAID LEAVE}

Section 15(1) of the Employment Act makes provision for holidays with full pay after six months continuous service at the rate of two days per month to be taken at such times as agreed by the parties.

The Employment Act provides for maternity leave of twelve weeks with full pay but allows the any employer to give maternity leave to eligible female employees on terms that are more favourable than those provided by the Act.\textsuperscript{23}

The Employment Act specifically makes it an offence for an employer to contravene the provisions of the section above. Section 15(B)(2) of the Act clearly provides that in the absence of any proof to the contrary, the employer will be deemed to have acted in contravention of the

\textsuperscript{22} Mwenda, Employment Law in Zambia 43

\textsuperscript{23} CAP 268 of the Laws of Zambia Section 15(A)
law if he terminates the contract of service or imposes any penalty or disadvantage upon a female employee within six months after delivery. Any person who is found guilty of contravening the provisions of section 15(B)(2) is guilty of an offence.\textsuperscript{24}

This provision was clearly intended for the protection of female employees from victimization by employers on grounds related to their pregnancies. This provision enables female employees to perform their biological functions without fear of losing their jobs as long as they conform to the requirements of the law.\textsuperscript{25}

\subsection*{2.2.7 REPATRIATION}

Section 13 of the Employment Act places an obligation on the employer to pay the expense of repatriation under the following circumstances namely, whenever an employee has been brought from a place within Zambia, to a place of employment, by the employer, and on the expiry of the period of service as specified in the contract of service. Further, on termination of the contract of service due to the inability, refusal or neglect of the employer to comply with all or any provisions of the contract and on the termination of the contract of service by reason of the inability of the employee to comply with the provisions of the contract by reason of illness or accident not occasioned through his own fault.

Section 14(1) of the Employment Act provides that the employer shall, whenever possible, provide transport or pay for public transport for the employee to be repatriated. This section was worded in this manner in recognition of the fact that while it might be possible for some employers due to lack of resources, to provide transport to repatriate their employees, they could do so through the use of public transport.

\textsuperscript{24} CAP 268 of the Laws of Zambia Section 15(B)(3)
\textsuperscript{25} Mwenda, Employment Law in Zambia 46
2.2.8 BREACH OF IMPLIED TERMS

Employees are likely to use the breach of an implied term to claim damages or as a means of justifying a constructive dismissal. A constructive dismissal occurs when the employer through his behavior makes the working environment so uncomfortable that it is impossible for the employee to continue working. The employee is left with no alternative but to tender his resignation. In such a situation, the resignation is obviously brought about by the employer’s behavior.

In the words of Lord Denning in the case of Western Excavating Ltd v Sharpe:26

If the employer is guilty of conduct which is a significant breach going on the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, may give notice and say that he is leaving at the end of the notice. The conduct must however, be sufficiently serious to entitle him to leave at once.

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2.2.9 CONCLUSION

Implied terms have a very important role to play in contracts of employment, as we already know, it is impossible for this kind of contract to consist of all terms and conditions that ought to be found in it. Therefore, it fills in the gaps inevitably left by expressly agreed terms. Apart from that and most importantly for the purposes of this paper, these implied terms come to the aid of the employee greatly by curbing the power that the employer may seem to possess. This is done by implying terms under statute and where statute is silent reference may be made to the implied terms under common law some of which have been discussed above.

When there is a breach in these implied terms damages can be awarded to the employee or the employee can justify his claim to have been constructively dismissed.
CHAPTER THREE

3.0 IMPLYING TERMS INTO AN EMPLOYMENT CONTRACT THROUGH COLLECTIVE AGREEMENTS

3.1 INTRODUCTION

Another source of implied terms can be derived from Collective Agreements. These collective agreements are a result of negotiations between the employee and the employer through the help of trade unions.

This paper will look mainly at how these collective agreements are incorporated into the employee’s individual contract of employment and the effect that they have on the employment contract.

It will also look at how collective agreements attempts to curtail the high bargaining power that is seemingly inherent in an employer.

3.2 COLLECTIVE AGREEMENTS

A collective agreement is defined in the Industrial and Labour Relations Act\(^1\) as

"An agreement negotiated by an appropriate bargaining unit in which the terms and condition of or affecting the employment and remuneration of employees are laid down"

Collective agreements were traditionally the major source of terms and conditions of employment for the majority of workers. In entering a contract of employment, the bargaining

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\(^1\) CAP 269 Laws of Zambia Section 3 (1)
power of the potential employee is much less than that of the employer. The worker needs the job more than the employee needs the particular individual. Collective agreements redress this balance by harnessing the collective power of all the employees. The employer may be able to resist the demands of one individual but will have to pay attention to an agreement that has been made collectively by the workforce.²

3.3 ADVANTAGES OF COLLECTIVE AGREEMENTS TO EMPLOYEES

Employees benefit significantly through collective agreements.

Collective agreements promote the value of employees to the employer.

1. Employees secure regular work hours and provide protections against unjust dismissals, layoffs and disciplinary actions.

2. Employees can obtain flexible work arrangements where none existed previously. They gain better pay, scheduled pay increases, and paid sick leave. Career paths and standardized advancement procedures create a prospect for employment longevity.

3. The expectation of employment longevity can significantly impact the employee's life outside of work, including encouragement to take out loans, buy homes, have children and make other life decisions.

4. Collective agreements allow for employee representation in worker's compensation appeals and other employee interests.³

² Gwyneth Pitt, Employment Law (London: Sweet and Maxwell, 2007) 125
3.4 INCORPORATION OF COLECTIVE TERMS IN A CONTRACT OF EMPLOYMENT.

The contract of employment is not a simple personal contract between two individuals but may also be a contract between an individual and a corporate entity which has its own legal existence independent of its managers who are, at any point in time, its current controllers. An individual employee cannot, by any criteria, be regarded as having equal bargaining power to that of the employing organization. Furthermore, for the vast majority of employees, the variable terms of the contract of employment, as mentioned in a previous chapter, are not arrived at by individual agreement between the employee and his or her employer. In practice they are incorporated into the contract from either a collective agreement, negotiated and agreed between representatives of management and union, or unilateral management policies, both of which are intended to be applied to all employees who come within the designated group.

The legal position of collective agreements in the United Kingdom was clearly set out in 1969. According to Salamon, "The fact that the agreements *prima facie* deal with commercial relationships is outweighed by the other considerations, by the wording of the agreements, by the nature of the agreements and by the climate of opinion. Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability are not contracts in the legal sense and are not enforceable by law, they remain in the realm of undertakings binding in honour"\(^4\).

This view is also supported by Professor Kelvin Freund, a lecturer at the University of Nigeria who is of the opinion that collective agreements should not be binding on the parties because at the time of negotiation, the parties did not have the intention to create legal relations. Therefore, collective

agreements should only be binding in honour. He also argues that there is no privity of contract between the employer and the trade union, as the trade union is not a party to the contract between the employer and the workers, and the workers are not privy to the agreement between the employers and the trade union.\(^5\)

This position is further reflected in the development of the English Industrial Relations Act (1971-4), when the collective agreements were presumed to be legally enforceable between the signatories, employers acquiesced to union demands for the inclusion of a clause stating ‘this is not a legally enforceable agreement’. The subsequent Trade Union and Labour Relations Act (1974) reiterated the principle that a collective agreement cannot be legally enforced between the parties unless it is in writing and contains an express provision that the parties intend it to be legally enforceable. It is only therefore through the express or implied incorporation of the collective agreement into the individual contract of employment that there is any general legal basis for enforcing the terms of a collective agreement.\(^6\)

However, the issue of whether collective agreements should be legally enforceable was raised again in the early 1990’s, particularly, whether the law should be amended to ‘encourage’ employers and unions to agree to legal enforceability. It has been argued that legal enforcement of collective agreements would put pressure on union officials to ensure that members complied with the terms of the agreement.\(^7\)

Indeed, Zambia supports this position and encourages that a collective agreement should contain a

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\(^6\) Micheal Salomon. Industrial Relations. 328

\(^7\) Micheal Salomon. Industrial Relations. 328
provision that the agreement is binding on both parties. In the very recent collective agreement between The Government of the Republic of Zambia and Civil Servants and Allied Workers Union of Zambia (CSAWUZ)⁸, there is a declaration stating, “The Parties hereby declare that they shall honour and uphold the contents of this agreement and further commit themselves to the promotion of Industrial peace”.

3.5 THEORIES OF INCORPORATION OF COLLECTIVE AGREEMENTS INTO CONTRACTS OF EMPLOYMENT.

As indicated above, the general position is that the products of collective bargaining between an employer and a trade union are not legally binding between those parties, those products will be binding between the employer and individual employees if there is an express statement in the contract of employment to that effect. If there is no express statement in the contract it may be possible to argue that they are incorporated through implication, in effect through custom and practice.⁹

This brings us to the three main theories regarding incorporation of collective terms into individual contracts of employment.

1. Automatic Incorporation

The first theory is known as the concept of automatic incorporation. Under this concept, it is assumed that collective terms are incorporated automatically into individual contracts of employees in the enterprise or industry in which the collective agreement is in effect as soon as the


agreement becomes legally binding. If the facts indicate that both the employer and employee intended that the agreement should be part of the contract then the way will be clear for holding that it has been impliedly incorporated. The clearest evidence of such an intention will usually be that the parties have consistently acted as if the agreement were part of the contract. In _Henry v London General Transport Services Ltd_\(^{10}\) it was accepted that a collective agreement could be impliedly incorporated on the basis of custom and practice. The claimants, who argued that they were not bound by a collective agreement, conceded that it was custom and practice in the trade for all relevant employees to be bound by collective agreements made between their Union and the employer but only if the agreement had been approved by a majority in a ballot first.

2. Non Automatic Incorporation

In this second theory, there is no automatic incorporation of collective terms but that parties to the contracts of employment must consciously incorporate the said terms in their contracts of employment. We see this in the case of _Gascol Conversions Ltd v Mercer_.\(^ {11}\) This is an illustration of how a contract of service may be affected by a collective agreement automatically. The plaintiff was engaged to work 54 hours a week. A year after the engagement of the plaintiff, a national collective agreement was reached providing for a basic 40 hour week with overtime when necessary. It was held that the national collective agreement which he had signed superseded the terms of the contract of employment because its terms superseded the terms of the latter by incorporation.

\(^{10}\) [2002] I.R.L.R. 472

\(^{11}\) [1974] I.C.R. 420
3. Incorporation by Agency

The third theory is the principle of agency which relies on the law and principles of agency. According to this, the principal is basically liable for the actions of his agent, especially if the act of the agent is within the scope of his authority. Therefore, whatever the trade union/bargaining unit for the employer does as an agent of the worker/employer is binding on the worker/employer.

In the case of Burton Group v Smith\(^{12}\) Mr. Smith had applied for voluntary redundancy under a scheme negotiated between his employer and his trade union. Although the date for redundancy had been agreed between Burton and the union, Mr. Smith died before notice had been served on him. In order to be eligible for the redundancy payment his estate needs to show that the union had been acting as his agent and thus notice had in effect been given to Mr. Smith before his death. It was held that although a union may act as agent for its individual members, to do so it would require a specific agency agreement. An agency agreement does not stem from the mere fact that the individual is a member of the union.

In Zambia, the legal status of collective agreements is set in the Industrial and Labour Relations Act. The Act states that the minister may, after considering the collective agreement lodged together with the comments of the commissioner direct the commissioner to register the collective agreement.\(^{13}\)

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\(^{12}\) [1997] I.R.L.R. 351
\(^{13}\) CAP 269 Laws of Zambia Section 71(1)(b)
Before its repeal, The Industrial Relations Act made provision for the legal enforceability of a collective agreement by providing that a duly gazetted collective agreement was binding on the parties for the period during which it was in existence.\textsuperscript{14}

The 1997 Act did away with the need to gazette collective agreements negotiated and concluded by joint councils. However, every collective agreement that has been approved by the Minister is binding on the parties\textsuperscript{15}. In the case of *Kamayoyo v Contract Haulage*\textsuperscript{16} the Supreme Court held that a collective agreement is a legally binding contract between the parties and that anything done outside these contractual agreements are of no legal effect.

In the case of *Pamodzi Hotel v Godwin Mbewe*\textsuperscript{17} a collective agreement was incorporated into the terms of employment that bound both parties. The agreement provided a penalty of dismissal after warning for a first breach for offences related to drunkenness and summary dismissal without any need for a previous warning for drunkenness. On allegation that the respondent was drunk on duty, he was dismissed. He sought a declaration in the High Court that the dismissal was null and void. Evidence was adduced at the trial that he was found to be drunk by security guards and was seen by the hotel manager, who from the smell of his breath and appearance found that he was not his usual self and concluded that he was drunk. The court found that under the collective agreement, dismissal could only occur after a final written warning for a previous breach and as no warning had been given, summary dismissal was unlawful.

The appellant appealed to the Supreme Court. The Supreme Court held, *inter alia*, that, where there is a collective agreement which has been properly published in the Gazzette and which

\textsuperscript{14} Winnie Mwenda. *Employment Law in Zambia* (Lusaka: UNZA Press. 2011) 215
\textsuperscript{15} CAP 269 Laws of Zambia Section 71 (3) (c)
\textsuperscript{16} [1982] ZR 13 (SC)
\textsuperscript{17} [1987] ZR 56 (SC)
contains a disciplinary code providing for certain procedure to be followed before dismissal, there is statutory support for such procedure and a breach thereof might as well result in a declaration that a dismissal was null and void.

It should be noted that one of the effects of incorporation of collective agreements in a contract of employment is that once the terms of the collective agreements have been incorporated into the individual contract of employment, they can only be removed by the agreement of the parties, not by a unilateral declaration by the employer. This was the holding in the case of Robertson v British Gas \(^\text{18}\) where Mr. Robertson’s letter of appointment stated that “Incentive bonus scheme conditions will apply...” He later received a statement which confirmed that incentive bonuses were to be calculated in accordance with the rules of the scheme currently in force. Sometime later, British Gas terminated the collective agreement between themselves and the trade union. Withdrawal from the collective agreement by British Gas meant the loss of considerable bonus payments to Mr. Robertson and he successfully sued British Gas for the loss of earnings.

### 3.6 CRITERIA USED BY COURTS IN DETERMINING WHETHER A COLLECTIVE AGREEMENT IS BINDING

In recent UK law, whether the terms of a collective agreement are binding as between a particular employer and a particular employee depends on the individual’s contract of employment and on whether the term in question is "apt for incorporation" into individual contracts.

When considering whether collectively agreed terms are incorporated into individual employment contracts, the Court will take account of:

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\(^{18}\) [1983] I.C.R. 351
1. The intentions of the parties to the collective agreement

2. Whether the terms of the collective agreement are apt for incorporation. Generally, it will be difficult to convince the tribunal that the terms of a collective agreement are incorporated where they relate to overarching issues about the management of all employees. However, collectively agreed terms relating to individual rights - such as hours of work or periods of notice - are likely to be apt for incorporation.¹⁹

In the recent case of *Malone and Others v British Airways Plc*²⁰ the High Court held that it was not apt for provisions relating to crewing levels contained within a collective agreement to be incorporated into individual contracts of employment.

The Claimants in this case were three members of British Airways cabin crew who brought test claims on behalf of several thousand employees. The Claimants’ contracts of employment included a clause stating that their employment would be governed by the terms of collective agreements and that these agreements were deemed incorporated in to their contracts of employment. Relying on this term, the Claimants claimed that a collective agreement between BA and the Unite union providing for minimum staffing levels was incorporated in to their contracts of employment.

As part of cost cutting measures, BA reduced the minimum staffing numbers below those set out in the relevant collective agreement. The Claimants claimed that, as the minimum staffing levels were incorporated in to their contract of employment, BA was in breach of those contracts. They therefore sought a declaration of their rights and an injunction to compel BA to reverse the cuts.

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The High Court found that:

1. The new crewing levels exceeded Federal Aviation Authority minimum levels which were the legally enforceable crewing levels;

2. The collective agreement did not expressly provide for the relevant section of the collective agreement to be legally binding (whereas it did in other sections);

3. The contracts of employment did not expressly incorporate the relevant parts of the collective agreement;

4. As drafted, the minimum crewing levels could not have been sensibly set out in a contract of employment and as such they were not “apt” for incorporation.

Ultimately, the Court found that there had been no intention to give crewing level agreements legal enforceability by individual crew members.

The Court said that if it was wrong to make the decision it had, a variation clause included in contracts issued after 1994 gave BA the express right to make reasonable changes to terms and conditions and, as the changes were reasonable, BA were in any event entitled to vary the contracts.

The Court went on to say that, even if they had found that the collective agreement was incorporated in to the Claimants’ contracts, an injunction compelling BA to reverse the changes would not have been an appropriate remedy.
In yet another the recent case of *Worrall v Wilmott Dixon Partnerships Limited* 21, the Employment Appeal Tribunal (EAT) held that terms in collective agreements will not be incorporated into an employee’s contract of employment unless they are agreed or specifically brought to the employee’s attention. It is insufficient for the terms to simply be contained in documents which are available to the employee.

The Claimant in this case was employed by Birmingham City Council and, in 1993, the Council and its trade unions entered into a Collective Agreement relating to redundancy. Clause 3.2 of this Agreement, which was contained in the Council’s staff handbook, provided that, where employees were made voluntarily redundant, the Council would increase any redundancy payment by crediting the employee with at least 5 years’ additional service.

The Claimant’s employment transferred under Transfer of Undertakings (Protection of Employment) (TUPE) in 2001. There were then subsequent TUPE transfers in 2006 and 2008, following which the Claimant applied for voluntary redundancy. He was however advised by his new employer that, since the introduction of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, which abolished the power to award a credited period, they no longer had any discretion to award additional years service in a voluntary redundancy situation.

The Claimant brought a claim for breach of contract, alleging a breach of clause 3.2 of the Birmingham Council Collective Agreement.

Before determining whether there had been a breach of contract, the Employment Tribunal first

21 [2010] E.A.T 521
had to consider whether clause 3.2 had been incorporated into the Claimant’s contract of employment. At first instance, the Tribunal held that it had been by reference to the clause contained in the staff handbook and a letter provided to all employees at the time of the 2001 TUPE transfer.

On appeal, the Employment Appeals Tribunal (EAT) held that clause 3.2 of the Collective Agreement had not been incorporated into the Claimant’s contract of employment. Specifically, the EAT held that it was not sufficient for the clause to be referred to in the staff handbook as the fact that the Claimant had access to the handbook did not show that he had notice of its terms or that he had agreed to them. The EAT also considered the reference contained in the 2001 TUPE letter. It observed that this letter listed over 100 different pay agreements without providing any details of their contents and held that it was impossible to show that the Claimant had specifically known about the existence of clause 3.2 or had agreed to it.
CONCLUSION

Collective Agreements are a result of collective bargaining that takes place between the employer and a trade union representing the employee. There have been arguments that these agreements are not binding in the legal sense and are merely binding in honour. However, others have argued in the contrary, claiming that these collective agreements should be legally enforceable in an attempt to ensure that the employer who is at a higher bargaining power than his employees adheres to the term of the agreement.

In Zambia, in order for the collective agreement to be binding on both parties, the agreement should declare that the terms will indeed be binding. Once the agreement is enforceable, neither party cannot breach any term in the agreement nor can they vary the terms of the agreement unilaterally. This restriction ensures that the employer’s high bargaining power over that of the employee is curtailed.

The courts play an important role in considering whether the terms in an agreement were meant to be enforceable. The Court will firstly consider the intention of the parties’ of the agreement and secondly they consider whether the terms are ‘apt for incorporation’.
CHAPTER FOUR

4.1 CONCLUSION

It has been observed in this paper that the employment contract cannot contain all the terms and conditions that it ought to have. This is impossible. Our domestic laws such as the Employment Act and the Industrial and Labour Relations Act and other international laws that Zambia has ratified or domesticated have intervened to ensure that the terms are not expressly stated in the employees contract by the employer may be implied into the contract by law. This is all in an attempt to limit the powers of the employer who is usually at higher bargaining power because the employee is the one of the two who needs the job more than the employer may need him or her.

The rationale of this study was to analyse the extent to which these implied terms protect the rights of the employee and help equalise the powers of the employee and that of the employer, ensuring that the employee is not taken advantage of.

Notice that under Common Law, the employer has many duties and obligations towards the employee that he has to perform and a breach of these duties could lead to the employee being awarded damages or any other remedy that may be available to him. These duties need not be put into the contract of employment but are implied and binding to both parties.

The same goes for obligations that are found *inter alia* in the Employment Act. Some of the provisions in the Act are there to ensure that the rights of the employee are adhered to and also to ensure that the employer does not take advantage of the employee because of the high bargaining power they possess.
One of the objectives of this paper was to see whether the unequal bargaining power of the employer will ever be curtailed. Unfortunately, despite the intervention of statutory law, the position of the employer is still, relatively speaking, more powerful. It is also possible that the employer's relative strength or power may be because work in their industries is so desirable that it is easy to find replacements for recalcitrant workforce. Further, the employer's power may be a result of high levels of unemployment.
4.2 RECOMMENDATIONS

1. A contract of employment being an agreement will not embody all terms and conditions related to that contract. Some terms will be implied from common law, other terms will be found in statutes and others can be implied through collective agreements. Unless an employee is aware of their rights then the employee cannot defend his rights and hence his rights are not secure. In the earlier Industrial and Labour Relations Acts (1970 and 1990), there was a provision for unions to ensure that their leaders underwent education and training programmes. The rationale was that once the leaders were knowledgeable about the world of work, they would share this knowledge with the general following. Unfortunately, this provision was removed by the amendment of the 1993 Act.

The Ministry of Information and Labour should therefore conduct workshops to bring to the attention of the workers that the terms of the contract may be found in other forms other that the employment contract.

2. Apart from the Ministry of Information and Labour trying to disseminate information to workers, the employers themselves need to take part in this exercise. When considering the duties of the employer to bring relevant terms to the attention of the employee, employers should provide as much information as possible to the employees, regardless of their role and seniority. If employers can offer external advice to their employees, they would be less likely to incur the implied duty itself (in this case, the duty of mutual trust and confidence). Of course, this has to be balanced against the cost and practicalities of making such advice available.
3. According to the Ministry of Labour\textsuperscript{1}, it is difficult to protect the employee if he/she does not report instances when their employer is not complying with the implied terms found in the employment. According to them, the only way they may be aware of an abuse by an employer is either if they receive an anonymous tip from a concerned person and an inspection is carried out on the employers premises or if the employee themselves come forward and report the abuse or non compliance of the employer.

Many workers are not aware of their rights and need to be sensitized especially domestic workers. It is the right of an employee to be treated in accordance with the provisions of the labour laws. This sensitization can be done through the media or by labour officers going door to door giving information on the rights of an employee and the hidden terms that are implied into their contracts even though they have had no express knowledge of them. This is to ensure that where inspections cannot be made, then the employees are willing and not afraid to report the actions of an employer abusing his power.

4. The Ministry of Labour should also intensify their inspections and conduct them on a regular basis. More funding must be put aside for this activity. This will keep other employers alert and adhering to the required standards. Also the minimum standards to be adhered to should be raised in an effort to guarantee a better working environment for the employee.

5. The Ministry of Labour should also come up with stiffer penalties for employers who do not comply with the set standards as a way of ensuring that they fulfill their obligations as employers to their employees.

\textsuperscript{1} Miss Kasanda Mundale (Acting Labour Commissioner, Ministry of Information and Labour, Lusaka) interview by Wanga Sumaili, March 16, 2012.
6. In respect to collective agreements although the agreements are meant to last for periods of two to three years, the agreements are allowed to run beyond the stipulated period. This is because the new agreements are never agreed to in time by the bargaining units. What needs to be done to remedy this is to have the department of labour officers to implement the provision in the Industrial and Labour and Relations Act which imposes penal sanctions for failure to conclude a collective agreement in time. If this is imposed, the employer is forced to bring in new conditions which would be more beneficial to the employee.

7. The vast majority of collective agreements are formalized in written documents. Nevertheless, many arrangements (agreements) in respect of operational situations at the departmental or workgroup level may lack formal written codification and rely on 'verbal understandings'. It would be extremely difficult to make these subject to determination through legal interpretation; they would tend to remain outside the scope of law resulting in a two-tier system of collective agreements. To remedy this, it is recommended that all operational situations, including those at departmental and workgroup level, be reduced to writing.

8. In Zambia, collective agreements have fixed term periods of two to three years. As a result, they may not be amenable to change with situations or circumstances. Therefore, a legal requirement to maintain the existing term could inhibit the trade unions ability to renegotiate or require the courts to determine whether the situation had changed sufficiently to make the existing term inapplicable. It is recommended therefore that some flexibility be written into these collective agreements to enable the parties to
redefine or renegotiate the terms within the period of the agreement in reaction to the changed circumstances.
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