‘Voluntary’ Promises in Employment Law; a Study of the Legal Approach in the United Kingdom & the United States of America

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ABSTRACT

In modern employment relations there has been an increased practice by employers to provide their employees with formal statements including company manuals, work rules, policies, and collective agreements. These ostensibly non-contractual documents, which are ‘voluntary’ or ‘unilaterally’ introduced by the employer, may contain, *inter alia*, promises of benefits and entitlements such as an equal opportunity policy, an enhanced disciplinary procedure, and redundancy and bonus schemes. The question in each case is whether these promises can create legal entitlement and are therefore enforceable.

The legal approach in employment law to voluntary promises has not been able to provide a coherent approach that responds appropriately to the employee’s reliance upon the promise and their dignity, on the one hand, and the employer’s business efficiency and the need to protect its business interests, on the other. There is limited research on the legal effect of such promises that operates outside an explicitly contractual framework. Conversely, there is a strong indication that the US legal approach, which shares similar contractual legal framework tools with the UK, has developed a more cohesive approach in relation to such promises. Yet, there is a lack of research in terms of a comparative study on the legal approach to promises, in both UK and US employment law. Thus, the focus of this research is not limited to what constitutes an enforceable promise in English employment law but extends to how English courts can achieve a coherent legal approach to voluntary promises where both parties’ interests and expectations are appropriately balanced.

To achieve this aim, this thesis will examine not only the situation in England but also three representative jurisdictions in the United States, namely Florida, California, and Michigan, which adopt three different approaches to voluntary promises. While the State of California developed a model via the unilateral contract analysis, the State of Michigan adopted the principle of legitimate
expectation model (akin to that recognized in public law in England). Florida, however, remained loyal to the orthodox bilateral contract approach and, in a more similar trend, to the English approach.

The contribution of this thesis is, therefore, not limited to exploring the question of what constitutes an enforceable promise in English employment law or highlighting that the current approaches adopted by English courts have been incoherent, but also explores any possible development that may be open to English courts to adopt and maintain a coherent approach. This possibility will be addressed by examining the adoption of either a unilateral contract approach to voluntary promises or the adoption of public law principles, via the doctrine of legitimate expectation as a further development of the implied duty of trust and confidence, which can be injected into the private law of employment. It will further examine whether the US legal approach has achieved the desired coherence in its legal approach to these voluntary promises, or whether there are theoretical principles in English law, through contract law or public law principles, that could achieve a more coherent approach. It will show how adopting the doctrine of legitimate expectation, as a principle derived from public law, in employment law and thereby recognizing the hierarchy of interests that employees may have, based on proportionality, could resolve the incoherent approach to voluntary promises.
DECLARATION

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

[Signature]

Muayad K.M. Hattab
DEDICATION

TO MY BELOVED

WIFE, PARENTS AND CHILDREN

You are the source of my faith and hope and my inspiration to lead my life meaningfully.

This thesis could not have been complete without your unconditional love and patience, encouragement, and support.

I dedicate this work to

My Wife Mais F. Aqel
My Father Kamal M. Hattab
My Mother Nahidah H. Shanteer
My Daughter Sandy M.K Hattab
My Son Yousef M.K Hattab

&

To those who are fighting for justice, no matter who and where they are.
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The success of this thesis is attributed to the extensive support and assistance from my supervisor Prof Barry Hough and my second supervisor Mr James Hand for their encouragement, guidance, and support throughout this work. I could not express enough my grateful gratitude and sincere appreciation for their invaluable advice and the highly enjoyable challenge and discussion on every part of the thesis. I am also grateful to the speedy, constructive, and thorough responses and comments I was given each time I had a question or needed advice.

I owe my deepest gratitude my wife Mais Aqel who gave me support and understanding through this work. She was always able to push me through the difficult periods of the study and always motivated me. This work would not have been completed without her patience and understanding and full encouragement and support. I am also thankful to my children Sandy and Youse who made me smile at the end of a hard day.

I am also most thankful to my father Mr Kamal Hattab and mother Ms Nahidah Shanteer who kept me going with their unwavering faith and confidence in my abilities, which motivated me enormously. Their unconditional love and endless prayers have been invaluable. I am also thankful to all of my other family members and friends who gave me great support during this work.

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INTRODUCTION TO THE THESIS
In modern employment relationships, there has been an increased tendency by companies and enterprises to provide their employees with formal statements which exist alongside the formal contract of employment. These ostensibly non-contractual documents, which can either be issued at the time of contract or as post-formation statements, can be described by the employer in various ways including: the company manual, the work rules, and employment policies (an example of which might be an equal opportunities policy). Formal undertakings to employees can also be found in collective agreements, but these agreements do not provide the focus of the present research.

The scope of these post-formation documents, which Kahn-Freund described as the ‘unilateral rule-making power of management’ is wide ranging, affecting matters of central concern to employees. The range of matters potentially covered by these documents is no longer limited to terms that could be regarded as falling within an employer's managerial prerogative, i.e. terms that are concerned with the premeditated design of a business' tactical and strategic direction. Rather, they include, inter alia, company rules and regulations regarding grievance and disciplinary procedures, discrimination and harassment, employee benefits,

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commissions and bonuses, redundancy, sick and pregnancy leave, dismissal, appearance and dress code, and so forth. They may also include unilateral rights, advantages, detriments and benefits directed to the individual employee beyond and in addition to their original contract of employment.  

The question with which this research is concerned is whether promises, representations or undertakings in these documents can create legal entitlements and therefore become enforceable. The focus of this dissertation is on instances in which the promises, representations or undertakings are ‘unilaterally’ or ‘voluntarily’ introduced by the employer.

In what follows, promises made unilaterally by the employer will be referred to as ‘voluntary’ promises. This is so because they are not normally ‘bargained-for’ in the sense that the promise in question does not result from an exchange of promises. Moreover, the consideration for the promise is ostensibly either absent or, at the very least, elusive. In many instances little if anything is explicitly requested by the employer in return for the promise being made. In other words, the promise emanates from the employer as an expression of managerial prerogative in the sense that the employer volunteers to make promises, representations or undertakings that have not, in many instances, been negotiated and for which the employee is not always required to furnish consideration beyond the continued conscientious performance of the employee’s existing duties.

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5 See Chapters Two and Three for further discussion.
The question this thesis investigates is whether there are circumstances in which these ‘voluntary’ promises can become legally binding and, if so, when and under what conditions? The thesis will also examine the circumstances in which, at common law, the employer may lawfully revoke these promises without obtaining the agreement of the employee. It will be argued that the jurisprudence of the English courts on each of these issues is incoherent. A study of various state jurisdictions in the United States, (in particular the States of Florida, California and Michigan), will be instructive as to how English laws might in future develop.

Against this background, the questions that English law is therefore facing concern the scope of contractual obligations, on the one hand, and the limitation of the employer's power under its managerial prerogative, on the other. The search for an appropriate balance or solution to these matters rests on analysing whether any of the legal entitlements can be created from unilateral or voluntary promises, their legal effect, and whether and the extent to which an employer can unilaterally, with or without notice, revise and revoke these provisions. The complexity is not limited to the UK only because the US, which shares fundamental common law principles with the UK, has also come face to face with these important questions. However, sharing similar problem-solving tools has not guaranteed the same result. The US, which relies on a state employment law, has varied its approach and its treatment of the question of the entitlement that arises from voluntary promises and the extent and discretion that an employer has to later vary or revoke these promises.

This thesis is therefore a critical analysis of the courts' approach to the rules governing the formation of contracts and their application in examining binding
obligations. The thesis argues that English courts have not been consistent in the legal application of rules regarding entitlements that are created from voluntary promises, and what constitutes a binding obligation in employment relationships. It has failed to give due weight to the argument that an employee who may rely on a formal promise and thereby acquire a legitimate expectation should be protected from undermining his dignity and trust by way of treating the promise as illusory. However, respecting the employees’ dignity and protecting their legitimate expectation may not prevent examining the validity of the employer’s claim that business reasons should frustrate it. It will be argued that modern development of the implied duty of trust and confidence supports, in certain circumstances, the notion that despite contractual formation principles, the employer’s departure from promises which employees legitimately relied on will result in a breach of the implied term. This development is influenced and informed by principles derived from Public law.

In addition, the thesis provides a comparative examination of the US approach in relation to voluntary promises and creating entitlements in employment law. It demonstrates that the US has achieved a coherent approach and improved treatment of the issue of entitlements in employment law by adopting, in some states, the first approach which is based on unilateral contact analysis, whereas in some others, courts have adopted the second approach which is based on legitimate expectation principles.

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6 French v Barclays Bank [1998] IRLR 646
7 See Chapter Six, in particularly Para 7.10, for full treatment on the test of when an employer may justify a departure from its promises.
8 Malik v Bank of Credit and Commerce International SA [1997] IRLR 462
9 See further Chapter Six below.
Accordingly, to provide a constructive study of the US legal development, the thesis will examine, specifically, three selected states in the US: Florida, California and Michigan. The three states were chosen due to the following:

- Florida was chosen because it is a state which adopts a bilateral contract analysis to voluntary promises in a similar line to that followed in the UK.
- California was chosen because it adopts a unilateral contract approach which could be adopted in the UK.
- Michigan is the state which introduced, for the first time in the US, the new theory of 'legitimate expectation'. It allowed principles akin to those recognized in English public law principles to be injected into the contract of employment where enforcement by legitimate expectation is adopted.

The contribution will not only provide a study of the legal approach of the three US states, namely Michigan, California and Florida, but will also provide an alternative way, commonly used by US academics, to categorise the legal analysis and the courts' approach to the issue of voluntary promises in US employment law. Thus the thesis divides the case law regarding voluntary promises into three categories: bilateral contract (the Florida model), unilateral contract (the California model), and public law (the Michigan model).

Furthermore, this thesis provides an extensive discussion regarding the approach of Michigan, which adopts the public law model. Whilst most literature considers the approach adopted in Michigan as one of either unilateral contract or public
policy exception, only limited research has focused on the similarity between the English public law principle and the elements that the employment law of Michigan is able to provide. This thesis examines the principles akin to those recognized in English public law adopted in Michigan and gives the state its deserved focus and attention.

Finally, the thesis offers an alternative view of the relevance between the employee’s knowledge of the employer’s offer and their acceptance of the offer. It argues that while acceptance of the employer’s unilateral offer in relation to voluntary promises is subsequently implied and waived, an employee's knowledge of that voluntary promise is not relevant to the issue of creating acceptance and consequently entitlement. The thesis highlights the English common law facility of the implied duty of trust and confidence to provide another solid ground in support of this argument, and the thesis demonstrates that the US would also benefit from more legal stability and coherence by allowing the same principle to apply in the US employment relationships, through the idea of good faith which already exists in the US.

Therefore the structure of the thesis and the outlines provided in each chapter will be as follows:

- **Structure and Outline**

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To achieve the above, this thesis will be divided into six chapters. The core chapter deals with the formation of contract, binding promises in the UK, voluntary promises under US law, and finally the influence of public law and the possibility of importing the principle of legitimate expectation into employment law.

To elaborate, the body of the thesis is divided into six chapters as follows:

- **Chapter One**

The chapter provides a first step to build on for the following chapters. It examines how contract law has been viewed in English legal development in the last two centuries, to help understanding of current and future modern law development and also the rules governing creation of binding obligations. Moreover, it will give an indication of the role general contract law is still playing in shaping the contractual employment relationship and, if so, to what degree. Establishing the modern development of employment relationship and its unique nature, the chapter follows the argument by examining the contract theory that is best able to respond to the development of employment law. The chapter will demonstrate that the development of employment law, whether through the roots of private contract law developments or the influence of public law principles, should lead, when appropriate circumstances permit, to a legal recognition of the employee’s reliance on voluntary promises which acquire genuine expectation. This should consequently mean that courts must revisit the contract theory adopted in explaining what constitute binding obligations in employment relation,
and adopt a theory that can best respond to modern development and is capable of addressing the unique nature of employment relations.

**Chapter Two**

The Chapter forms a starting point in the field in which this thesis is developed. It examines the standard requirements for contract formation in employment relations, namely: offer and acceptance, consideration, and the intention to create legal relations. These elements that constitute the orthodox formation rules, the ‘building blocks’, to creating contractually binding terms provide the starting point to the subsequent chapter which considers the issue of voluntary promises.

Accordingly under this analysis, Chapter Two deals with each of the requirements in turn in order to provide a coherent approach and consistent legal principle to the question of creating entitlements. This chapter will argue that the usual standard requirements are not consistent in the line of case law and must, therefore, be reviewed to reflect the modern development of the employment relationship. It will also be argued that the current employment relationship requires the reform of, or at least a flexible approach to, these ‘building blocks’ in order to provide a modern and more accurate representation of the relationship. In addition, it will be argued that voluntary promises fit more appropriately and adequately under unilateral, rather than bilateral, contract analysis.

**Chapter Three**

This chapter will continue to build on the first chapter by focussing on how employment courts regard voluntary promises and when such a promise can be
enforceable. Whilst the focus in Chapter Two was on the rules governing the formation of creating binding obligations, Chapter Three will examine more closely the effect of these requirements in employment relationships, the tests adopted by the court in determining the legal norms of unilateral promises made by the employer, and when an employer can frustrate its obligation created under voluntary promises. Voluntary promises, the chapter demonstrates, have traditionally been enforced when they meet the rules of contract formation discussed in Chapter Two. The chapter explores the development of the implied trust and confidence which allowed indirect enforcement of promises when an employer cannot resile from its promises due to the employee’s reliance creating legitimate expectation.

The chapter will further show the incoherence of the orthodox contract formation test used by courts to determine the legal effect of voluntary promises. Finally, it will argue that the current English approach does not reflect modern employment developments, nor does it provide a coherent approach that balances both parties’ interests appropriately. This opens up the question of whether adopting a US approach through contract law based on a unilateral contract model or by adopting ‘legitimate expectation’ derived from the public law principle, can achieve the desired coherence. Thus the first possibility, i.e. the unilateral contract model, is examined in Chapter Four so as to keep the argument consistent within the same line of contract law discussion following Chapters Two and Three. The second possibility, i.e. legitimate expectation, will be examined in Chapter Six, after examining the US approach in Chapter Five, which explains the extent to which the US approach reflects similarity or possible similarity to that in English law.
Chapter Four

This chapter examines the possibility of the unilateral contract model as an alternative to the traditional English courts, which have considered the employment relationship to be distinctly bilateral without giving sufficient consideration to the unilateral contract approach to promises made outside of the contractual framework. The unilateral model was adopted in California and other US states as a problem solving device to the incoherent approach of the traditional bilateral approach. It is, therefore, vitally important to consider this alternative possibility and whether the English court could develop such a model. The Chapter will consider whether this approach can ultimately solve the issue of voluntary promises, and the degree to which English courts could in fact follow the trend adopted in California and other US states which have adopted the unilateral model. In California, courts, in attempting to provide a coherent approach, allowed an implied unilateral power to revoke contractual term. The chapter will demonstrate that such a possibility is not likely to be open to the English court or at least only in a limited way. This opens the question of whether either the public law principle or the approach adopted in Michigan provides a coherent approach. This is examined in chapters Five and Six.

Chapter Five

This chapter considers the US legal approach to voluntary promises and whether it has achieved a more coherent approach that could be adopted in the UK. This chapter will compare and contrast three State models that reflect on the three
different approaches that have been applied in the US. Whilst Florida resembles the UK bilateral approach, California provides the model for a unilateral approach which, this thesis argues, the UK could adopt on the basis that it provides a better explanation to voluntary promises than the bilateral model. On the contrary, Michigan has departed from the orthodox contract law model and turns to the principle of legitimate expectation model, akin to those recognised in public law in England, in order to respond to the inconsistencies that the bilateral approach to voluntary promises currently provides. The chapter will consider whether this principle can provide a more sophisticated legal principle that could maintain the right balance between the expectations of both parties, or whether the principle in English public law can provide a better solving device if incorporated into employment law. This model and its possible application in the UK is considered further in Chapter Six.

- Chapter Six

This chapter continues the argument that the boundary between enforceable and unenforceable promises in the UK is incoherent and vague. Whilst the first part of the thesis, i.e. Chapters Two, Three and Four focus on the contract law approach and its possibility to provide a coherent approach in line with the traditional contract law principle (i.e. the unilateral contract approach as a solution), Chapter Six considers the possibility of achieving a coherent approach in light of public law principles, in particular the principle of ‘legitimate expectation’, the formation of which Chapters One, Three and Five provided the basis for. The Chapter considers whether the doctrine of legitimate expectation can be imported into the
private law of employment law. While Chapter Five demonstrated how the US courts in Michigan have sought and adopted the principle of ‘legitimate expectation’, outside and beyond the private law of traditional contract, in its attempt to provide a coherent approach to the issue of voluntary promises, the aim of Chapter Six is to argue that there is evidence of the courts’ readiness and willingness to give legal effect to the legitimate expectations of the parties in English employment law. Furthermore, this chapter will be able to show that the courts have already adopted a public law principle into employment contract law to protect the parties’ legitimate expectation, albeit on a small scale, through the development of the implied duty of trust and confidence, and this needs to be acknowledged. It will be shown that the incorporation of the public law principle of legitimate expectation and its further development through the implied duty of trust and confidence can provide a coherent and sophisticated approach. The enforcement of promises under the principle of ‘legitimate expectation’ can ensure protection for the employee who has relied upon such promises for security and additional benefits whilst, at the same time, giving sufficient weight to the argument that legitimate business reasons can override an employee's reliance when the employer can justify its decision to depart from its promises.

• Chapter Seven

It draws together the research, provides a summary of the arguments, and answers the research question stated in the introduction and subsequent chapters. It offers recommendations of possible solutions to the issue of voluntary promises and provides concluding remarks.
CHAPTER ONE

THE DEVELOPMENT OF CONTRACT, RELATIONS, AND THEORY IN EMPLOYMENT LAW
1.1 Introduction

Traditionally, freedom of contract was the dominant theory supporting the doctrine of consideration;¹¹ contract law was, therefore, limited to providing the required test that a bargain had been concluded.¹² The parties were free to bargain the substantive terms of the contract and the law was merely used to consider the legal enforceability of the parties’ bargain.¹³ However, over the last century, contract law has been the subject of many legislative and judicial interventions that have undermined the classical contract-bargaining theory;¹⁴ most notable is the development of the implied duty of trust and confidence in employment relation.¹⁵ This issue is discussed later in this chapter.

There are two aims of this chapter. In the first part, the chapter argues that the courts ought to consider the unique status/type of contract and the identity of the parties rather than the ideal of a unified law of contract characterised by rules of general application. The employment relationship, it is argued, should be considered with a distinctive vision that is capable of reflecting its uniqueness. The development of employment law, whether through private contract law developments or the influence of public law principles,¹⁶ should lead, when appropriate circumstances permit, to a legal recognition of an employee’s reliance on voluntary promises which acquire genuine expectation. To be able to do so,

¹² See Further Part 2.2 and 2.3 below
¹⁴ For example, sales of good contracts are now subject to the Unfair Contract Terms Act 1977 and Sale of Goods Act 1979.
¹⁵ See Para 2.3 below on theoretical analysis and the developed approach to contract theory.
¹⁶ See also Chapter Four and Five below.
courts must revisit the contract theory adopted in explaining what constitutes binding obligations in relation to employment. The second aim of this chapter, it is accordingly argued that contemporary contract theory which governs the rules of contract formation must be reviewed to meet modern developments in employment relationships and its unique nature. Having established, in the first part of the chapter, that an employment relationship is unique, the argument advanced is that the orthodox theory of contract is unable to reflect upon this unique nature of employment relationships and that, as a consequence, it neither responds appropriately to the parties’ and genuine and legitimate expectations nor recognises their reasonable reliance.

The above issues are central to the main question of the thesis regarding the enforcement of voluntary promises. Accordingly, an examination of how contract law has been treated in employment relationships and how promises have been explored in English legal developments in the last two centuries provides on an understanding of modern law development on the rules governing creation of binding obligation. Moreover, it gives an indication of the role that general contract law rules play in shaping contractual employment relationships and the extent of that role.

1.2 The Importance of Contract Law

The importance of the law of contract in the development of employment relationships, and as a consequence the creation of binding obligations, is not straightforward. It is an issue which has been debated amongst academics and
According to Wedderburn and Davies, the law of contract is essential and remains important to providing appropriate equipment which can solve individual employment disputes. Their view is that ‘legal processing of individual employment disputes in the English system rests naturally upon the enforcement of the individual contract of employment’. Thus, for Wedderburn and Davies the issue of voluntary promises is subject to general rules of the English law of contract. Any development of the court’s approach as to which promises are enforceable and how to achieve an appropriate balance between parties’ interest is subject to contract law development.

Kahn-Freund described the importance of contract law in terms of it a legal framework for the rights and obligations of parties in industrial relations. However, he was concerned with the domination the orthodox rules of contract of employment grant employers without taking into account employee’s contribution to the industrial relation. Freedland, finds that the importance of the law of contract rests upon its facility to combine an apparatus for the regulation of an individual employment relationship with the necessary legal theory that can make many other parts of labour law system workable and explicable.

In contrast, and thereby highlighting the existent debate amongst academics, Fox opposes the contract law of employment as, in his opinion it can only establish

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inequality where employers keep maintaining a higher bargaining power.21 The contract of employment, in his view, is based on the principle of the freedom of contract, but gives employers managerial prerogatives which are above and beyond those freely contracted. This view may be justified if bargaining theory, as is explored in next part of this chapter, remains as a dominant theory in employment relation.22 However, a modern trend to adopt reliance theory in employment relation provides and insures an appropriate protection to the parties’ interests and expectations, as the forthcoming reveals.23

Adopting a similar view to Fox, Donaldson suggests that contract law must be abandoned in order for the statute to take over the regulation of employment relationship24. Similarly, Hepple took the view that only ‘statutory provision’ can solve these difficulties as it ‘would leave the way clear for the common law to free itself from the stultifying effects of the requirement of additional proof of an intention to create legal relations.’25 In contrast, Ewing states that ‘It was the failure of the common law which was partly responsible for the introduction of the statutory jurisdiction in the first place’.26 He argued that now ‘it is the failure of the statutory jurisdiction to meet expectations which is leading people to fall back on the possibility of greater common law protection’.27 Such a development was also acknowledged by McColgan who argued that modern developments in

21 A Fox, Beyond Contract: Work, Power and Trust Relations, (London, Faber and Faber, 1974).
22 See Para 2.3 below.
23 See further discussion and analysis in Chapter Six.
25 Bob Hepple ‘Intention to Create Legal Relation’ [1970] CLJ 122, 137. This view by Hepple was in an analysis concerning collective agreements.
26 K D Ewing and A Grubb ‘The Emergence of a New Labour Injunction?’ [1987] ILJ 145
27 Ibid, 145
common law have recently shown that ‘employees have potentially more to gain from contractual claims’. 28

These arguments between academic and lawyers bring the initial question of whether the general orthodox rules of the law of contract are equipped and appropriate to regulate modern day employment relationships. If the answer to the question is yes, then the approach of Freedland, and to some extent that Wedderburn and Davies, must be read in conjunction with the view that the law of contract consists within set rules which are deemed capable of further development so as to accommodate the modern needs of the parties in an ongoing relationship. 29 The underlying difficulty of the orthodox contract law approach, as discussed below, rests upon its failure to take into account the unique nature of the parties’ relationship by insisting on formality or strict rules of formation which ignore the fact that the social reality of an employment relationship is ‘that a person's employment is usually one of the most important things in his or her life’ 30 which must give rise to expectations from both parties that is surely unique or different to those of commercial transaction or other types of contract in general. 31

However, if the answer to the question is in the negative, then it is suggests that a call for separate, or at least a much more developed, sets of rules that are sufficient and capable to reflect on the modern expectation of the parties to the

30 Johnson v Unisys Ltd [2001] IRLR 279, [35-36]
31 For example, the duty of trust and confidence, as will be examined below, is unique in its operation and scope in employment law. See further below
employment relationship is needed.\textsuperscript{32} This, as discussed in the second part of this chapter, may only be construed by giving greater recognition to the parties’ legitimate expectation on a promise. This supports the argument that reliance theory of contract, rather than bargain theory, is capable to propose a better explanation to enforcement and binding obligation in employment relationship as explored further below.

### 1.3 Historical Outline

In order to understand how courts have developed their view of employment contracts, a brief discussion on the development of employment relationships is required. These examinations will not only assist in the understanding of the rules governing contract formation, but will also provide an overview of the legal approach to voluntary promise and why a legal coherence to the question of its enforcement is necessary.

Modern employment law emerges from two main sources: common law and statutes. Prior to the introduction of statutory regulations,\textsuperscript{33} common law was the main source that governed employment relationships where obligations and rights were created under the classical doctrine of the law of contract. The effect of common law, as discussed in Chapter Two, continued to play a core role in contract law development in employment and the governing rules of creating


\textsuperscript{33} In particular the Contract of Employment Act 1972 and the Employment Protection (Consolidation) Act 1978 which governed the employment relationship.
contractual obligation. Thus, the question of voluntary promises in employment relation is generally governed by the general rules of common law of contract.\textsuperscript{34}

Towards the mid-20\textsuperscript{th} century, the UK witnessed an increase in the influence of trade unions; there were a growing number of strikes and changes in the political, social and governmental attitude towards industrial relations.\textsuperscript{35} In 1965, against these far-reaching changes, the well-known Donovan Royal Commission was commissioned\textsuperscript{36} to look into the question of industrial relations in the UK.\textsuperscript{37}

The report was commissioned in an era that Kahn-Freud described as the age of ‘\textit{collective laissez faire},’ in which debates were focused on the role of free and voluntary agreement as the right way forward to reduce disputes and improve employment relationships and workers’ rights and conditions.\textsuperscript{38}

The Donovan Report encouraged employers to produce unilateral, formal statements in the form of manuals or handbooks as the best means of solving disputes and promoting settlements outside tribunals.\textsuperscript{39} It is interesting to note that over 40 years after this report, the Gibbons Report, published in 2007, reiterated the point that the best way forward in achieving economic and social justice in employment relations was to encourage such voluntary documents in the workplace; the Report considers that such documents would reduce the growing

\textsuperscript{34} See Chapter Two and Three for detailed discussion
\textsuperscript{37} Donovan Commission, Para [23]-[45], [520]-[544].
\textsuperscript{39} Donovan Commission, Para [530]-[535]
number of employment cases that were brought before tribunals, which is something governments always aim to achieve.

It must be recognised, however, that without some sort of legal or normative status to voluntary promises, there would be no clear incentive for both parties to respect its provisions or statements.\textsuperscript{40} However, the current legal approach to promises made outside a contractual framework is still falling short and remains uncertain. As the following chapter will reveal, UK employment law continues to be incoherent concerning the legal approach to enforcement of voluntary promises notwithstanding its importance as described in the Donovan Commission Report.

1.4 The Contract Identity and Development of Employment contract

Historically, contract law principles govern all types of contract, including employment contracts, where there is a tendency to provide a general principle of contract law that is applicable to all types of contract without paying much attention to the contracting parties, the inequality of their barging power or what they are contracting for. However, due to the economic and social changes stated above, contracts are now divided into different categories and various branches where some appropriate account to the specific type of contract and its contracting parties is increasingly recognised. This is not to suggest that separation of these different branches of contract law is anywhere near settled. Rather, general
common law principles, which tie contracts together, remain dominant.\textsuperscript{41} However, the common law doctrines holding contracts together are in decline. Most notable is the contract of employment that recognises that employment relations are different from commercial and,\textsuperscript{42} accordingly, should be governed by specific contractual rules distinctive from other types of contract.\textsuperscript{43}

There is more than one reason why it makes sense to treat the parties to an employment contract with specific contractual rules. First, employees are in a much weaker position to bargain than commercial organisations.\textsuperscript{44} Second, the employee is usually the vulnerable party.\textsuperscript{45} Third, employment relationship is regarded as a long-term relational contract and affects the social welfare of the individual.\textsuperscript{46} Fourth, adequate regulation will reduce disputes and hence the high number of applications to the court.\textsuperscript{47} Fifth, there is an economic and social need to provide adequate and fair regulation, not only for the individual interests of workers but also for the public interest at large.\textsuperscript{48} Thus, it has been suggested that employment contract law should be separated and freed from the general law of contract,\textsuperscript{49} or at least not governed by the orthodox contract law rules in order to

\textsuperscript{41} See Pitt, Gwyneth, ‘Crisis or stasis in the contract of employment?’ [2013] Contemporary Issues in Law 193.

\textsuperscript{42} Johnson v Unisys Ltd [2001] IRLR 279; Autoclenz Ltd v Belcher [2011] IRLR 820

\textsuperscript{43} Malik v BCCI [1998] AC 20. See further below on trust and confidence.

\textsuperscript{44} Johnson v Unisys Ltd [2001] IRLR 279; Autoclenz Ltd v Belcher [2011] IRLR 820

\textsuperscript{45} Malik v BCCI [1998] AC 20, 37.

\textsuperscript{46} Ibid


\textsuperscript{48} For example, a public interest in the employment relationship is apparent in its need to reduce employment disputes or dismissal which would increase unemployment rate and accordingly increase the burden on the taxpayer to pay social welfare and governmental benefits. Again, employees with low income wages would force the taxpayer to substitute though the same burden of paying welfare and social benefits to the employee.

\textsuperscript{49} See Hugh Collins, ‘Market Power, Bureaucratic Power and the Contract of Employment’ [1986] ILR 1, in which he argued that the common law of contract of
comply with the long-term relationship inherent in employment and its modern
development.\textsuperscript{50}

Despite the unique nature of employment relationships, as stated above, it is
noticeable that most major contract textbooks have considered contracts under the
classical general principles of contract law, without giving any emphasis or
division to the subject matter of the contract, or to particular transaction types.\textsuperscript{51} In
theory, contractual concepts/rules that bind all types of contracts together (e.g.
‘offer’ and ‘acceptance’; ‘consideration’; and ‘legal intention’) may justify this
attempt to hold all types of contracts under one umbrella. However, in practice,
specialists in one given type of contract have focused on the details and rules that
govern that particular type of contract,\textsuperscript{52} and on its development, to meet the
specific needs of its particular parties.\textsuperscript{53} The reason for this separation is due to the
change of ideology in the role and characters of modern contract law.

This indicates that the strict orthodoxy rules of contract formation, as the
forthcoming chapter will further reveal, has not been able to respond appropriately
to the development of the employment relationship, in particular voluntary
promise, nor provided an adequate explanation to modern views that insist on
finding a fair balance between protecting business efficiency and respecting


employees’ dignity. Modern development suggests a shift away from the orthodox view of contract formation and encourages the call for a refined version of contract governing voluntary promises. This will be examined further in Chapter Three and Four.

To elaborate, there is a move away from the ideal that the purpose of contract law is, primarily, to ensure contractual enforceability and remedies. Instead, the purpose of contract law is taken as being to protect the weaker party by taking the identity of the parties in a contract into account. Shatwell argued that ‘Freedom of contract was appropriate to the arm’s-length dealings between businesses of similar bargaining power which were the stock-in-trade of nineteenth-century contract law.’ However, in recent developments ‘a more complex pattern has emerged with the shift away from that paradigm whereby the extent of intervention is made to depend on the identity of the parties to a contract.’ The trend of this shift will be more apparent in Chapter Six, which considers the derived principles of public law in employment relation.

Rakoff argues that the choice of rule may legitimately vary in different types of transaction and he gave an example of how the sale of a mass-produced item is different in that sense to a contract for the construction of a tower block. In the former, the completion of the contract is easier and much more straightforward.

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57 Ibid.
than the latter one. Furthermore, the repudiation of the latter one will be far more detrimental to the builder than to the seller of goods since the goods can be easily returned whereas the builders cannot ‘undo’ the building or the construction work they have already done.\textsuperscript{58} This argument is a valid example of how orthodox rules of contract law cannot apply to all types of contractual relationship; in particular, they are unable to deliver adequate and appropriate rules governing the enforcement of voluntary promises in employment law. A refined version of contract law is ultimately essential to respond to the modern development of employment relations.\textsuperscript{59}

The Supreme Court in \textit{Autoclenz Ltd v Belcher}\textsuperscript{60} that employment contracts cannot be treated the same as commercial contracts and recognised the inequality of bargaining power between the parties of employment law. Lord Clark\textsuperscript{61} noted that legal rules and principles that apply to ordinary contracts and, in particular, to commercial contracts, may not be appropriate in the context of employment contracts.\textsuperscript{62} He agreed with the view, adopted in this case by the Court of Appeal that the difference between employment relations and the ordinary commercial dispute is that contractual agreements relating to work or services are ‘often very different from those in which commercial contracts between parties of equal bargaining power are agreed.’\textsuperscript{63} Bogg argued, in his commentary on the case,\textsuperscript{64} that the case demonstrates ‘high judicial recognition of the need for contractual

\textsuperscript{59} See further chapters Three and Four.
\textsuperscript{60} [2011] IRLR 820.
\textsuperscript{61} \textit{Autoclenz Ltd v Belcher} [2011] IRLR 820.
\textsuperscript{62} Ibid, [21].
\textsuperscript{63} Ibid,[34], quoting Aikens LJ reasoning in \textit{Autoclenz Ltd v Belcher and others}, [2009] EWCA Civ 1046, CA,[92].
\textsuperscript{64} Alan L. Bogg ‘Sham Self-Employment in the Supreme Court’ [2012] ILJ 328
protection of vulnerable parties in the employment sphere’.\textsuperscript{65} This means that common law of employment contract ‘is now something other than ‘commercialist or mercantilist, essentially committed to the values and techniques of private law in a narrow sense’.\textsuperscript{66}

Furthermore, restraining any abuse of power in employment law, which generally incorporated from public law principles, is another indication of the unique nature of employment relation. The case of \textit{Clark v Nomura} is a telling example of public law principles’ incorporation in private laws of employment.\textsuperscript{67} In \textit{Clark} a unilateral promise by the employer to provide for a ‘discretionary bonus scheme which is not guaranteed in any way and is dependent upon individual performance’,\textsuperscript{68} was held to impose an obligation on the employer that cannot be undermined. Burton J held that those last words of the clause imposed a ‘contractual straitjacket’\textsuperscript{69} for the exercise of the employer’s discretion i.e. an obligation to pay a bonus by reference to the claimant’s ‘individual ... contractual performance as a senior trader, with all its responsibilities.’\textsuperscript{70} On the facts of the case, the employer’s decision to award nil bonuses to an employee who had earned substantial profits for the company was irrational and did not comply with the terms of the employer’s discretion. The court’s reasoning was clearly

\textsuperscript{65} Ibid, 344.  
\textsuperscript{67} [2000] IRLR 766, approved by the Court of Appeal In \textit{Horkulak v Cantor Fitzgerald International} ([2004] IRLR 942 CA) in which it was held that the employers must exercise the discretion of payment of a bonus stated in the employment contract genuinely and rationally. See further Chapter Six below.  
\textsuperscript{68} Ibid  
\textsuperscript{69} Ibid  
\textsuperscript{70} Ibid, [36]
influenced by public law principles, (i.e. the *Wednesbury* rationality test).\(^71\)

Moreover, the case provides a clear example of the trend in employment law to implied limitations on the employer’s exercise of discretionary power and yet allowed further recognition of the employees’ reliance on their genuine expectation. Such development has been increasingly broadened by the development of the implied duty of trust and confidence, which itself has been shaped by public law influences, as will be explored further in Chapter Six.

### 1.5 The Emergence of the Duty of Trust and Confidence

Modern contract law of employment has increasingly taken into account the unique nature of the parties’ relationship and, because intervention is usually by way of imposition of terms into a particular contract type, modern developments in employment law has witnessed an increased intervention of this type.\(^72\) One feature that distinguishes a contract of employment from other contracts is that the contract of employment contains implied terms that are characterised as personal relationship or relational duties, as well as duties to enhance partnership. For

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71 The public law principle of *Wednesbury* test is examined in Chapter Six. The test was initially developed following the court decision in *Associated Provincial Picture Houses v Wednesbury Corporation* ([1948] 1 KB 223) to response to exceptional cases where courts are caught in circumstance of a public body which was within its jurisdiction rights but had nevertheless came to a decision or made a conclusion that are incapable of being justified.

72 E.g. duty of obedience and co-operation (*Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen* (No 2) [1972] 2 QB 455); duty of care (*Johnstone v Bloomsbury Health Authority* [1991] ICR 269), Duty to treat employee with respect (*O'Brien v Transco plc (formerly BG plc)* [2002] ICR 721), and duty of good faith (*Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1986] ICR 297, CA).
example, the duty of trust and confidence has become recognised as an important (arguably, fundamental) implied term in the contract of employment.\footnote{Malik v BCCI [1998] AC 20. For further details on the role of implied term of trust and confidence, see Douglas Brodie, ‘The Heart of the Matter: Mutual Trust and Confidence’ [1996] ILJ 121; Douglas Brodie ‘Mutual Trust and the Values of the Employment Contract’, [2001] ILJ 84, 94} 

This implied duty operates uniquely in employment contracts where parties must not act in any way that undermines their mutual trust and respect.\footnote{Malik v BCCI [1998] AC 20} It further operates so as to stop employers from behaving ‘in a way which is not in accordance with good industrial relations practice.’\footnote{British Aircraft Corporation v Austin [1978] IRLR 332.}

Accordingly, the implied duty of trust and confidence, as Brodie noted, recognises the personal element of employment contract.\footnote{Douglas Brodie ‘Mutual Trust and the Values of the Employment Contract’, [2001] ILJ 84, 95.} In the leading case of Malik v BCCI,\footnote{[1998] AC 20.} the House of Lords was prepared to accept that ‘[a]n employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable.’\footnote{Ibid, 37, ( per Lord Nicholls).}

Thus, a manager who made a remark about his personal secretary that she was an ‘intolerable bitch on a Monday morning’ was held to breach of the implied term of trust and confidence;\footnote{Isle of White Tourist Board v Coombes [1976] IRLR.} a supervisor’s remark to an employee that ‘Well, you can’t do the bloody job anyway’ was held to destroy the continuing bond of confidence between the parties and amounted to a constructive dismissal;\footnote{Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84.} and a remark to an
employee that ‘If you cannot do the job I pay you to do, then I will get someone who can’ was also held to be in breach of the employment contract.\(^{81}\)

While the above examples illustrate the development of trust and confidence in employment law, it cannot be said that the duty exists in other types of contract. The scope of the implied duty and its possible development in employment law provides yet more evidence of the unique nature of the employment contract. This was observed by Lord Hoffmann’s assertion in *Johnson v Unisys Ltd* in the following terms:\(^{82}\)

> At common law the contract of employment was regarded by the courts as a contract like any other… But over the last 30 years or so the nature of the contract of employment has been transformed. …The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far-reaching is the implied term of trust and confidence. But there have been others

The duty of trust and confidence has been viewed to cover numerous situations, as shown above, in order to prevent employers mistreating employees by ‘harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.’\(^{83}\) Its role has nonetheless been viewed, as noted by Lord Steyn, to prevent the employer’s exploitation of his workers:

> [T]he implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.\(^{84}\)

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\(^{82}\)[2001] IRLR 279, [35-36]

\(^{83}\) *Malik v BCCI* [1998] AC 20, 38, (per Lord Nicholls)

\(^{84}\) bid, 65, (per Lord Steyn).
Apart from the wide range of situations, as noted above, in which the duty of trust and confidence has been applied and held to be falling within its scope, the importance of the duty also lies, as Hepple suggests, on its ability to converge public law doctrines and those of employment law. As will be examined further in Chapter Six below, it may be plausible to suggest that the implied term of mutual trust and confidence is capable of developing in such a way that is consistent with the promotion of such values. Moreover, the emergence and development of the implied term of trust and confidence is another example of the conflicting approaches adopted by the court in which the personal element in employment is reflected in the content of the employment contract on the one hand, and a court injection of public law principle to restrain abuse of power into the private law of employment on the other.

A clear example of this development is found in the case of French v Barclays Bank, which will be considered in more detail in chapters Three and Six. In this case, the court concluded that trust and confidence can enforce a voluntary promise that does not have a contractual right, under the orthodox rules of contract law, to demand the performance of the promise. The legal basis for this finding was that in certain circumstances an employer’s departure from its promises, though not a contractual term itself, will be a breach of the implied term of mutual trust and confidence. This is a significant trend regarding the question at the heart of the thesis about a coherent approach to voluntary promises. This is

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87 Clark v Nomura [2000] IRLR 766
89 French v Barclays Bank [1998] IRLR 646.
because the court in the case of *French*, while acknowledging that an employer’s promise relied upon by an employee can acquire *legitimate expectation* protected by the duty of trust and confidence, in a similar trend to public law, it did not consider the question on when an employer’s breach of its promises can be justified. This will be fully examined in Chapter Six.

Furthermore, the employer’s discretionary power under the contract of employment subject to the implied obligation that such discretion must not be applied in any way to undermine the trust and confidence between the parties.\(^90\) Brodie argued that the implied duty of trust that restricts the employer’s discretionary powers is particularly important to guard against abuse of power given the imbalance of power that is almost inevitable in the employment relationship.\(^91\) The line of cases which demonstrate a restraint on the employer’s abuse of power and discretion are steadily growing.\(^92\) Such cases gain strength from the implied duty of trust and confidence which provide adequate tools to the court in its finding, but such strength is also gained from the fact that they are consistent with public law inheritance into the private law of employment.\(^93\) In practice, the courts are ‘exercising a judicial supervisory jurisdiction in some

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\(^90\) For example, *United Bank v Akhtar* [1989] IRLR 507; and *Imperial Group Pension Trust v Imperial Tobacco* [1991] ICR 524. Also, it was held that terms conferring discretion must at common law be exercised rationally. See for example *Horkulak v Cantor Fitzgerald* [2005] ICR 402 *Keen v Commerzbank AG* [2006] EWCA Civ 1536; Followed by *Humphreys v Norilsk Nickel International (UK)* [2010] EWHC 1867.


contract cases, thus controlling exercises of power that might interfere with the interests of weaker individuals.\textsuperscript{94}

A further development of implied duty, as Hepple suggests, is observed with reference to the ECHR; that 'since the court must act compatibly with convention rights, the duty of trust and confidence also embodies a duty to respect the convention rights of an employee.'\textsuperscript{95} This trend, if legally developed in employment law, may possibly be extended to mean that once the employer makes a unilateral promise in a formal statement that creates benefit and/or rights to the employee, then the employer has created a legitimate expectation to the employee that he will be bound by what Hepple referred to as the convention rights of an employee so that the implied duty will not be undermined. An examination of such possibility will also be analysed further in Chapter Six.

1.6 Development of Employment Contract

It was noted that the classical view of freedom of contract has been undermined in the employment relationship. Thus, the classical contract model, which in employment law was represented by the ideology of \textit{laissez-faire} throughout most of the early part of the twentieth century, has been affected by substantive terms imposed by Parliamentary legislation\textsuperscript{96} or the courts’ inference with common law terms.\textsuperscript{97} Such development has also placed restrictions on the freedom of the parties to negotiate terms of employment that are deemed unfair or unreasonable

\textsuperscript{95}Ibid 22-23.
\textsuperscript{96}Such as the laws of unfair dismissal. See Para 2.2.2 above.
\textsuperscript{97}Such as the development of the implied duty of trust and confidence. See Para 2.2.3.
under employment law.\textsuperscript{98} It has also imposed into the parties’ contract rights and responsibilities, even if the parties did not include them expressly in their agreement.\textsuperscript{99}

Accordingly, a distinction must be drawn between certain types of contract. The classical view of general contract law, which cannot view the distinctive and unique nature of the employment relationship, is ill-equipped to respond to the specific needs of such relations. Thus, in order to meet the increasingly complex demands by the parties to a particular transaction, contract law must itself become more sophisticated where clear distinction is made between different types of contract. This matter is important to the issue of voluntary promise since finding a coherent approach, as will be explored in the forthcoming chapter, depends on a flexible approach that is not restricted by the classic contract law rules which cannot respond to modern development, as noted in the duty of trust and confidence above, and the uniqueness of the employment relationship.

Allowing clear distinction will create and develop separate paths where each type of contract can, in its own road, create adequate contract law rules that are fit for the role they are aimed to achieve and that fulfil the particular needs of their parties. Where, for example, the doctrine of freedom of contract will be far better in certain commercial transactions, it may not deliver the same result in other types such as employment contracts since for weak or vulnerable parties, freedom


\textsuperscript{99} E.g. duty to co-operate and the implied duty of trust and confidence. See Chapters Two and Three.
of contract means less autonomy to contracting parties, not more.\textsuperscript{100} The recent development of trust and confidence, as noted above, supports such a trend.\textsuperscript{101} The emergence of implied duty has confirmed that employment contracts cannot be treated the same as commercial contracts and recognised the inequality of bargaining power between the parties in employment law.\textsuperscript{102} Furthermore, the unique nature of employment law is manifested in the role and development of the implied obligation of trust and confidence, which acknowledges the need to protect the legitimate reliance of the parties upon voluntary promise. Additionally, the argument that parties’ reliance and their expectations must be are protected in employment law due to the unique nature of employment relationship is much dependent and influenced by the development, or possible development, of the contract theory which explains the enforcement of promises in employment law. This is considered next.

\section*{1.7 Contract Theories}

The starting point for any attempt to consider the enforceability of voluntary promises must surely be conceived by examining the legal theory of contract in order to find what commitments in employment relationship the law ought to enforce. The main theories or principles of contractual obligation that are most relevant to promises in the employment relationship are: the will theory, the bargain theory, the reliance theory, the fairness theory, and the efficiency theory.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{100} This has been, to some extent, recognised by the recent finding of the Supreme Court in \textit{Autoclenz Ltd v Belcher} [2011] IRLR 820.
\item\textsuperscript{101} E.g. \textit{Malik v BCCI} [1998] AC 20; \textit{French v Barclays Bank} [1998] IRLR 646
\item\textsuperscript{102} \textit{Clark v Nomura} [2000] IRLR 766
\end{enumerate}
\end{footnotesize}
Each theory will be discussed in relation to the principle of contract law in general and to employment law in particular to analyse which can explain voluntary promises in a more coherent and plausible manner.

The object of this analysis is to identify the main problems that theories have acknowledged in relation to identifying contractual obligation in employment relations and which theory can best solve the problems that gave rise to its need. The need for this analysis is to help understand the theory behind contract law and its role in providing a framework ‘that recognises the enforceability of promises on the basis of various elements, and directs inquiry toward determining those elements while fashioning principles that reflect them in an appropriate way.’

For this reason, each type of theory shall be separately considered. However, the discussion on each theory and the criticisms presented here are, therefore, neither comprehensive nor particularly novel.

1.7.1 Will Theories

Will theories maintain that a promise is enforceable because the promisor has ‘willed’ or freely chosen to be bound by a commitment made. According to the classical view, the contract that is formed by exchange of promises ‘gives expression to and protects the will of the parties, for the will is something inherently worthy of respect.’ Thus, the enforcement justification is acquired by

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the promisor’s free undertaking to be bound since he intended to be subjected to a legal sanction when commitments were offered.  

Will theory explains the force of promises, and hence of contract, ‘upon the notion that contractual duties are binding because they are freely assumed by those who are required to discharge them.’ Consequently, the meeting of minds at the time of agreement is the essential inquiry where the ‘subjective’ intention morally justifies the enforcement of the promise.

This position, as far as voluntary promises in employment relations are concerned, leads quite naturally to an enquiry as to the employer’s actual state of mind, i.e. his subjective intention, at the time when a formal commitment to confer benefit to its employees was offered. However, the will theory in practice poses difficulties since intention is not normally assessed by the will but by courts’ recognition. Accordingly, the will theory can be criticised for the fact that it is not the actual ‘subjective intentions of promisors which are usually (if ever) given effect to, but rather the objectively manifested indication of such intentions, the words or behaviour of the promisor as manifested to the reasonable promisee or to the reasonable third party observer.’

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108 See below discussion on the Court of Appeal decision in Malone and others v British Airways [2010] EWCA Civ 1225, at Chapter Three.

The theory cannot escape defeat if the obligation was not created due to the actual will of the promisor. Imposing a legal obligation by the courts’ objective inquiry into the presumed promisor’s intent expressively undermines the act of will as the source of legal or moral authority of the promise. Accordingly, employment courts, as will be viewed in Chapter Two, have generally abandoned the will theory as the searching tool to establish the enforcement of voluntary promises.

The element of valuable consideration, as will be explained below, has been subject to much development where its importance in employment law to explained enforceability has been limited. Thus, the test generally in employment relations is the objective intention of the parties, which can be viewed as the source of the authority of the promise. However, as will be examined in the forthcoming chapter, the objective test, which has been regarded as the bulwark principle of the law of contract, was disregarded in favour of a more subjective approach in the recent Court of Appeal in Malone and others v British Airways plc. This indicates that the English jurisprudence to what creates an enforceable promise under the rules of contract law of employment is incoherent. This will be considered in Chapters Two and Three.

1.7.2 Reliance Theory

The theory of reliance provides that a promise is binding where a promise is offered expressly by words or implicitly by some act, and the promisee relied on

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111 Grant v South-West Trains Ltd [1998] IRLR 188; Attrill and Ors v Dresdner Kleinwort Ltd and Anor (Dresdner Kleinwort Limited and Anor v Attrill and Ors, [2013] EWCA Civ 394
112 See further Chapter Two, Para 2.5
113 [2011] IRLR 32
Chapter One: The Development of Employment Contract, Relation, and Theory in Employment

...it. The emphasis is, therefore, on the promisee to explain contractual liability rather than the promisor, as seen above in the will theory.

Traditionally, as noted above, for a commitment to be enforceable it must have been bargained for. The reliance theory expands enforcement beyond the requirement of a bargain by identifying an additional factor or factors which justify enforcement. Thus, in *Gill v Cape Contracts Ltd*, the employer’s argument that its promise had merely offered the employees a reasonable expectation that it would employ them was rejected by the court. It was held that the employer’s clear commitment, which was relied upon by the employees, will be protected. This is a clear indication that emphasis on the promisee’s reliance is recognised in employment to explain contractual liability.

Furthermore, the Court of Appeal in *Albion Automotive Ltd v Walker* regarded it relevant to the establishment of a binding obligation that the policy was drawn to the attention of the employees by the employer; this can be viewed as increasing the employees’ reasonable expectation that the enhanced redundancy payments would be made.

This trend toward reliance, as will be explored more in the forthcoming chapter, is reflected in the development of trust and confidence, as discussed above, where...
the implied obligation creates expectations that promises relied upon are protected so as not to undermine trust and confidence. The employer’s attempt to depart from its promises was, therefore, held to be a breach of trust and confidence.\textsuperscript{119}

Thus, the theory that appeals powerfully to modern legal contract is increasingly adopted in the employment relationship since it seems to be entirely objective and social.\textsuperscript{120} The court’s recognition of the unequal power in the employment relationship has played on the increased tendency to adopt reliance theory, which gives more force on the promisee than the promisor.\textsuperscript{121} Further, as will be seen in chapters Three and Six, the theory reflects the modern development in employment law under the unilateral contract approach and legitimate expectation, and provides a better explanation to the enforcement of voluntary promise. This is because liability and enforcement are not assessed by the courts’ strict examination of the intention of the promisor but by whether the formal promises made, explicitly by words or implicitly by behaviour, are capable of creating reasonable reliance that the employer is bound.\textsuperscript{122} Again, reasonable reliance which creates legitimate expectation must appropriately balance the parties’ interests. The employee’s legitimate expectation is accordingly weighed against any overriding legitimate business interests of the employer which can justify the employer’s decision to depart from its promises. This will be examined in Chapter Six.

\textsuperscript{119} See \textit{French v Barclays Bank} [1998] IRLR 646. see further chapters Three and Five below
\textsuperscript{120} Morris R. Cohen, and Felix S. Cohen, \textit{‘Readings in Jurisprudence and Legal Philosophy’} (V1, Beard Books, Washington DC, USA) 191
\textsuperscript{121} See e.g. \textit{Clark v Nomura} [2000] IRLR 766 and the discussion in Chapter Three below.
\textsuperscript{122} See further discussion \textit{French v Barclays Bank} [1998] IRLR 646, at Para 4.1.
Accordingly, when considering breach under the doctrine of reliance ‘the whole question of contract is integrated in the larger realm of obligations, and this tends to put our issues in the right perspective and to correct the misleading artificial distinctions between breach of contract and other civil wrongs or tort.’\textsuperscript{123} Hence, injury to the employee is resulting from a direct breach of the contractual obligation,\textsuperscript{124} or due to the employer’s unjustified departure from legitimate expectation acquired upon its promise to the employee that undermined the implied term of trust and confidence.\textsuperscript{125}

However, as Morris R. Cohen observed, not all contractual obligations are ‘coextensive with injurious reliance because (1) there are instances of both injury and reliance for which there is no contractual obligation, and (2) there are cases of such obligation where there is no reliance or injury.’\textsuperscript{126} Admittedly, he noted, ‘not all cases of injury resulting from reliance on the word or act of another are actionable, and the theory before us offers no clue as to what distinguishes those which are.’\textsuperscript{127} This means that the theory is dependent upon evaluative standards that are unrelated to reliance itself so as to examine whether the reliance was justifiable or reasonable in any event.\textsuperscript{128} This is essential to the question, examined in Chapter Six, about the advantage of the legitimate expectation approach which allows for important business interests or aims (however defined)

\footnotesize{\textsuperscript{123} Morris R. Cohen, and Felix S. Cohen, ‘Readings in Jurisprudence and Legal Philosophy’ (V1, Beard Books, Washington DC, USA) 191, 192.  
\textsuperscript{124} Attrill and Ors v Dresdner Kleinwort Ltd and Anor (Dresdner Kleinwort Limited and Anor v Attrill and Ors) [2013] EWCA Civ 394. See further discussion in Chapter Three.  
\textsuperscript{125} French v Barclays Bank [1998] IRLR 646  
to override promises so that a fair balance between the employer’s interests and those of the employee must be observed.

1.7.3 Efficiency Theory

The Efficiency Theory is based on the cost-benefit model where ‘the term efficiency will refer to the relationship between the aggregate benefits of a situation and the aggregate costs of the situation.’\textsuperscript{129} The metric for asserting cost and benefits, according to S.A Smith, under this theory commonly refers to the satisfaction of individual preference which is typically called ‘welfare’.\textsuperscript{130} This makes the notion of welfare in the context of this theory comprehensive. Hence, it ‘incorporates in a positive way everything that an individual might value - goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfilment, sympathetic feelings for others, and so forth.’\textsuperscript{131}

The theory which is often described as the ‘economic’ theory of contract law is based on the exchange assumption that promises in exchange will make each party better off and, hence, efficient.\textsuperscript{132} However, ‘economic analysis is not a competing theory of contractual obligation, but only one of many yardsticks for assessing competing legal theories.’\textsuperscript{133}

\textsuperscript{132} S Smith S, \textit{Contract Theory} (Oxford : Oxford University, 2004) at 219
In employment law, efficiency on the unilateral promise of the employer can be explained in the practical benefit the employer gains in keeping the workforce more productive and the benefit the employee receives. But this leaves the question of explaining contract formation and enforcement to the analysis of law and not the economic theory, since enforceable exchanges of legal entitlements without much more cannot explain why or when some promises are enforceable while others are not.\(^{134}\) This means that the theory is only economic methodology or approach that cannot provide on its own metric a distinction between enforceable and unenforceable commitments.\(^{135}\)

### 1.7.4 Substantive fairness theory

The theory of fairness assumes ‘that a standard of value can be found by which the substance of any agreement can be objectively evaluated.’\(^{136}\) The theory therefore focuses on the substance of a transaction to evaluate if it corresponds with ‘fair’ standard. In employment law, fairness has been associated with limitation of the employer’s abuse of power. In other words, the theory tends to adopt a process of looking for either ‘information asymmetries’\(^{137}\) or what is known as ‘unequal bargaining power’.\(^{138}\) Thus, in employment law the idea of substantive fairness may relate not only to procedural fairness but the particular

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\(^{135}\) S Smith, *Contract Theory* (Oxford: Oxford University. 2004), 109


substance of the fairness of a dismissal.\textsuperscript{139} It was noted earlier that public law principles have been injected into employment law when concerning cases of abuse of power.\textsuperscript{140}

RestRAINT on the abuse of power is another important feature of employment relations, as Chapter Six further reveals, which was influenced and derived from public law principles. In his remarkable article, ‘Public law and employment law: abuse of power’, John Laws\textsuperscript{141} stated that employment relationships are distinguished from standard commercial relations in that parties to employment contracts do not have equal negotiating power ‘like two businessmen of equal power deciding what deal to strike.’\textsuperscript{142} Such contracts can also not be treated in the same manner as consumers’ contracts or contracts of sale where a party may choose to take it or leave it.\textsuperscript{143}

Employment relationships have been uniquely influenced by public law principles that share their aim of restraining abuse of power. Thus, fairness theory appears to invite ideas similar to Public law, based on reasonableness and fairness, to protect employees against abuse of power.

However, the theory is criticised for focusing on either extreme fraction of commitments or a qualitative issue by making either a quantitative or a procedural

\begin{footnotesize}
\begin{enumerate}
\item Barry Hough and Ann Spowart-Taylor. ‘The doctrine of consideration: dead or alive in English employment contracts?’ [2001] Journal of Contract Law 193, text to n 67 and 68.
\item See above Para 2.2.3
\item Ibid, 456.
\item See further K.W. Wedderburn, ‘Labour Law 2008: 40 Years On’ ILJ 397.
\end{enumerate}
\end{footnotesize}
This means that the substantive fairness approach is unable to offer meaningful standards of enforceability or provide predictable results. ‘Both the extreme indeterminacy and the focus on aberrant cases inherent in a principle of substantive fairness prevent it from providing the overarching account of contractual obligation that contract theory requires.’

1.7.5 Bargain Theory

Bargain theory does not focus on the contracting parties but on the manner in which they reached the agreement. The theory, which ‘sees the promise as being bought by the promise,’ is the traditional approach adopted by English courts to explain the enforceability of promises in employment relations. The machinery tool to distinguish between enforceable and unenforceable agreement under this theory is the doctrine of consideration, which will be examined further in the following chapter. The emphasis on the principle of consideration under this theory means that a unilateral or voluntary offer by an employer, despite its clear and unambiguous commitment, cannot be enforced without furnishing a good consideration for which parties must exchange.

This was indicated by the House of Lords in Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd which held that ‘[a]n act or forbearance of one party, or the

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145 Edward Allan Farnsworth, Contracts (5th edn, Wolters Kluwer Law and Business, USA, 1982).
148 Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915] AC 847 at 855.
149 Ibid.
promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.'\textsuperscript{150} Accordingly, the adoption of bargaining theory in employment makes the focus on whether a promise is binding dependent on the doctrine of consideration; each party’s promise must be induced by the other.\textsuperscript{151} However, reliance theory, as we noted above, does not give consideration such greater attention, but rather focus on what have been promised.\textsuperscript{152}

The problem with orthodox bargain theory, as Hough and Spowart-Taylor noted, is that ‘it may cast down seriously meant promises which were intended to bind.’\textsuperscript{153} They noted that in employment law there appears to be an adoption of weaker interpretations of consideration which cast a serious doubt on the orthodox doctrine to provide a problem-solving device that is used by the courts to identify binding promises in modification cases.\textsuperscript{154}

Moreover, a strict interpretation of the orthodox doctrine of consideration would make many voluntary promises, which may constitute benefits such as pay increases or bonuses as noted in the case of Clark above, unenforceable.\textsuperscript{155} As will be discussed in the next chapter, recent developments in both general contract and employment law, following the decision of Williams v Roffey Bros. Ltd,\textsuperscript{156} in which contracted performance was recognised as supplying consideration for a

\textsuperscript{150} [1915] AC 847 at 855.
\textsuperscript{151} Ibid.
\textsuperscript{152} See further Chapter Two for more analysis on contract formation.
\textsuperscript{154} Ibid
\textsuperscript{155} See Clark v Nomura [2000] IRLR 766. See Chapter Two below for further discussion on the doctrine of consideration, Para 3.3
\textsuperscript{156} [1991] 1 QB 1.
fresh promise, employment courts became more willing to depart from the application of the orthodox doctrine in favour of the reliance model or at least broadened the concept of consideration.\textsuperscript{157}

Since bargain theory is largely associated with the doctrine of consideration, it is essential to consider the significance of the doctrine’s role in contract formation and how important consideration is viewed by judges an academic. This is considered next.

\textbf{1.8 Conclusion}

It has been noted that the classical theory of exchange is no longer able to provide an adequate explanation to enforceability in employment law.\textsuperscript{158} Indeed, as Chloros noted, ‘we have moved a long way from the idea of contract-bargain’\textsuperscript{159} theory where strict orthodox rules of contract formation have been adopted.\textsuperscript{160} In employment relation, English courts, as will be examined further in the next chapter, have shown a readiness to adopt a more sensible and rational approach to respond to the commercial and social transformation of the modern era.\textsuperscript{161} This was supported by the trend towards reliance rather than bargain theory.\textsuperscript{162}

\textsuperscript{157} See Attrill and Ors v Dresdner Kleinwort Ltd and Anor (Dresdner Kleinwort Limited and Anor v Attrill and Ors, [2013] EWCA Civ 394, and the discussion on consideration in Chapter Two, Para 3.3
\textsuperscript{158} See Para 2.1-2.2, above.
\textsuperscript{159} AG Chloros, ‘The Doctrine of Consideration and the Reform of the Law, A Comparative Analysis’ [1968] Int'l and Comp LQ 137, 139.
\textsuperscript{160} See Chapter Two below.
\textsuperscript{161} E.g French v Barclays Bank [1998] IRLR 646; Attrill and Ors v Dresdner Kleinwort Ltd and Anor (Dresdner Kleinwort Limited and Anor v Attrill and Ors, [2013] EWCA Civ 394
\textsuperscript{162} See above Para 2.3.5
It was further observed that lines of cases and development, such as implied trust and confidence, have shown a rapid decline in the classical contract-bargain theory and an increased tendency by courts and tribunals to adopt and acknowledge the importance of the parties’ reliance on voluntary promises.  

As will be examined in the next chapter, while bargaining theory provides the traditional explanation of the enforceability of contractual terms and promises in agreements, courts have not been coherent in the extent to which they are prepared to restrict themselves to this orthodox bargain theory in order to identify binding promises in employment cases. The heavy reliance on orthodox theory, given that consideration is justified on the basis of bargain theory, may render intended promises unenforceable or otherwise lead the courts to invent consideration, rather than breaking free from its burden, to justify a finding of enforcement.

Furthermore, the classical theory of contract appears to be unsatisfactory in explaining the enforcement of promises in employment. At the same time, the decline of bargain theory in the contract of employment will be accelerated. Thus, the rules governing the formation of the contract of employment, as the next chapter will examine, must be viewed in relation to its unique nature where classical contract theory is an inadequate explanation of the law of the contract of employment. The development of the implied obligation of trust and confidence,

163 See discussion of these developments in Chapter Two. See above, Para 2.2.3 on the duty of trust and confidence as an examples of such developments.
164 See Chapter Two below for further analysis.
165 See Shadwell v Shadwell (1860) 9 CB (NS) 159; Ward v Byham [1956] 1 WLR 496, Edmonds v Lawson [2000] IRLR 319 CA; Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2012] IRLR 553. See Chapter Two for further discussion on the contract formation and related cases.
as noted above, presents a valid acknowledgement of the unique nature of employment law where further recognition of the need to protect the legitimate reliance of the parties upon voluntary promise must be accepted. Accordingly, employment relationships must be freed from the restrictive classical doctrines of the common law of contract. It must therefore be suggested that employment relationships should be governed by developed or separate sets of formation rules in explaining the enforceability of binding obligations. These suggestions will be examined in the next chapter.
CHAPTER TWO

THE FORMATION OF BINDING OBLIGATION UNDER COMMON LAW OF CONTRACT
2.1 Introduction

The central issue of when - and whether or not - a promise becomes binding is tied in with the common law rules on contract formation. For a promise to become binding and confer a legally binding contract, it must meet the legal requirements of contract formation, regardless of whether or not such a promise was made in order to create a unilateral or bilateral contract. Accordingly, not every promise in English law automatically binds the promissor or creates a legal obligation; a party may not have intended their promise to have or to have created any legal effect, and hence a distinction must be drawn between binding and non-binding promises.167 The law behind the formation of the contract of employment is based upon the orthodox law of contract principles of offer and acceptance, intention and consideration.168

The employment contract, as noted in Chapter Two above, relies entirely upon the general principles of the common law of contract, to satisfy the test of contract formation and enforcement. Offer and acceptance between employer and employee are essential, to create a binding obligation and agreement, but this alone is insufficient. Under common law there are two additional requirements that must be met for such an agreement to be legally valid. Firstly,

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167 Brodie acknowledge some of these difficulties in employment law in his most recent article; see Douglas Brodie, ‘Common Law Remedies and Relational Contracting: McNeil v Aberdeen CC (No 2) [2013] CSIH 102’ [2014] ILJ 170

168 Western Excavating (ECC) Ltd. v. Sharp [1978] QB 761. But see our discussion on the unique nature of employment relationship above, Para 2.2-2.2.4. See further Alan L. Bogg ‘Sham Self-Employment in the Supreme Court’ [2012] ILJ 328
consideration must be given by both the employer and the employee; and secondly, both parties must intend to create legal relations.

The initial formation of an employment relationship and its existence is generally straightforward and without complications. In other words, leaving aside the question of whether or not there is a 'contract of service' or a 'contract for services', which is not a particular focus of this research, the difficulties in the employment relationship, as Freedland noted, is not greatly related to the issue of whether a contract for the existence of the actual employment relationship has been formed.\(^{169}\) This can, in general, be easily recognised in the employer's offer of a job, and the employee's acceptance, which thereafter creates a legal relationship; consideration is found in the exchange of service(s) for remuneration.\(^{170}\)

English law - as opposed to the law in most US states\(^{171}\) - treats the formation as one of a bilateral contract rather than a unilateral one.\(^{172}\) This bilateral approach in employment law led English courts - as will be examined in the forthcoming chapters - to treat the question of whether a voluntary promise is binding, as a question of incorporation into the original employment, rather than creating extraneous contracts. This importance of a unilateral contract approach is, however, not only found in the formation rules governing the creation of


\(^{170}\) The employment relationship was considered as distinctively bilateral as earlier as in *Kearney v. Whitehaven Colliery Co* [1893], 1 QBD 700

\(^{171}\) Such as the states of California and Arizona. See further Chapter Five below.

\(^{172}\) *Kearney v. Whitehaven Colliery Co* [1893], 1 QBD 700
contractual rights which respond more appropriately to promises that have been unilaterally introduced by the employer, but also in its flexibility to create a separate contract, rather than becoming incorporated into the original contract of employment. This will be considered further in Chapter Four.

Furthermore, the current legal position or effect on the unilateral or voluntary promise introduced by employers outside the contractual framework is not easily concluded. Difficulties also arise from the appropriateness and competence of the rules governing the creation of contractual obligations in employment relations, which is the central argument discussed in this Chapter. As noted in the previous chapter, the contract theory which depends upon the orthodox rules of exchange has not been able to provide any kind of exclusive or even dominant model in the modern development of employment relationships. This becomes more apparent when the promise is unilaterally made by the employer, where no bargaining or negotiation between the parties has taken place.

This complication in relation to voluntarily promises is not limited to question of the exchange of promises, i.e. when the employer makes an announcement or a promise unilaterally which does not need or require the employee's returned acceptance. There is also, generally, the absence of an explicit request by the employer who announced a voluntary promise, such as an enhanced equality policy, to his employees beyond then continuing to perform their pre-existing duties. This is directly linked to the central issue of contract formation, and to

whether a voluntary promise is capable of forming a contractual obligation, or is appropriate for being incorporated into the contract of employment.\textsuperscript{174}

The aim of this chapter is to examine - in relation to voluntary promises - these standard requirements for contract formation in common law, and the extent to which courts have been consistent in applying such requirements into the contract of employment. It will also examine the development, if any, of the formation principles which govern contract law, and their ability to respond to the question of when a promise is enforceable.

This chapter will create the general baseline for forthcoming chapters, and will open the debate regarding the current approach that employment tribunals have adopted in order to distinguish between binding and non-binding promises, as will be considered further in Chapters Three and Four. It will also provide a basis concerning when an employer's departure from their promises can be permissible, as will be considered further in Chapters Four and Six. This debate, as indicated in Chapter One, is essential to promises made outside the contractual framework, such as in manuals, handbooks and collective agreements, which have been referred to as 'voluntary promises'.

\textbf{2.2 Offer and Acceptance}

\textsuperscript{174} Malone and others v British Airways [2010] EWCA Civ 1225
2.2.1 Introduction

The requirement of offer and acceptance as a first step towards entering into and creating a binding obligation is essential to the argument of what constitutes a binding promise. If the offer is considered under a unilateral contract analysis, then the acceptance of the offer is not bound by the employee saying 'I accept' to perform the act, but rather by simply performing the requested act or forbearance. Accordingly, is a voluntary promise given in an employment relationship the kind of promise for which courts ought to consider the formation requirement under a unilateral or bilateral contract analysis? This is a significant question in the discussion regarding the nature of the legal entitlements that can be created from promises introduced by the employer in formal statements.

This importance relies upon the legal rules that are required to form a contract. Unlike a unilateral contract, a bilateral contract treats the question of entitlements or whether or not a promise is binding in the light of the original contract of employment, and its capability to become a term of the original contract, rather than as extraneous contracts where the intention of both parties, and the suitability for incorporation into the contract, as being the core factors in

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176 Rogers v Snow (1573) Dalison 94; Great Northern Ry v Witham (1873) L.R. 9 C.P. 16, 19.
deciding whether the term is binding. Conversely, unilateral contract analysis focuses upon whether a unilateral offer has objectively been made; it is the objective commitment rather than the subjective intention that is the core determining factor. If the wording is clear then a unilateral offer is made in which acceptance is illustrated by an employee's performance or act. This agreement will create a separate contract rather than becoming incorporated into the original contract of employment.

The English courts, however, as will be examined below, have considered the employment relationship as being distinctly bilateral without giving sufficient consideration to the unilateral approach, and to promises made outside the contractual framework. The following discussion will deal with the issue of voluntary promises by considering how courts and tribunals have viewed the employer's offer under contract formation rules.

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178 Carlill v Carbolic Smoke Ball Co [1893] 1 Q.B. 256. See further discussion on the issue of creating commitment at Para 3.2.2 below
179 Atrill and Ors v Dresdner Kleinwort Ltd and Anor [2012] IRLR 553. Cf Hombourg Houtimport BV v Agroship Private Ltd (The Starsin) [2004] 1 AC 715
180 Ibid
181 See Chitty on Contract, Para. [2-078]- [2-085]
182 See for example Secretary of State for Employment v ASLEF (No 2) [1972] 2 All ER 949; Grant v South-West Trains Ltd [1998] IRLR 188 discussed below. Cf Atrill and Ors v Dresdner Kleinwort Ltd and Anor [2012] IRLR 553.
2.2.2 Creating an Offer

In English law, an offer of a unilateral contract is legally made when the offer is announced by the employer and is therefore capable of being accepted. The promise must be sufficiently determined and communicated effectively to the employee. It follows that the focus is ‘simply on how the reasonable recipient of the promise would have understood the offer’. In employment law, the question of whether or not an employer intended to make an offer of a unilateral contract would, therefore, be assessed by objective means, in that the offer would have to be a clear and definite promise. The more uncertain or unfocused the voluntary promise is, the less likely the employer will be found to have made a unilateral offer conferring a commitment.

Any offer which is phrased in ‘aspirational’ or ‘idealistic’ language will not create a commitment capable of creating a binding obligation upon the employer. In Grant v South West Trains Ltd an equal opportunities policy containing a commitment by the employer not to discriminate against its employees on the grounds of sexual orientation was not a contractually binding term. The language of the policy was held to be in ‘very general, even idealistic,

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183 Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2012] IRLR 553,[83]
184 See Further analysis on the complex issue of objectivity, Para 3.5, below
185 Grant v South-West Trains Ltd [1998] IRLR 188; Kaur v MG Rover Group Limited [2005] IRLR 40
187 Grant v South-West Trains Ltd [1998] IRLR 188
188 [1998] IRLR 188
terms’, and this was a key factor in the court deciding that the commitment was not an offer intended to create a legal obligation. The language of the commitment was not conclusive enough for the court to deny its enforceability, however. The court was also influenced by the way in which the policy was broadcast, the way its terms were connected to the individual contract of employment, and the existence of express provisions and the formal status of the policy. These elements or facts were ‘indicative that no contractual rights were in the mind of the employer’, and that the commitment was a mere statement of policy rather than a contractual obligation. The test of whether the promise was sufficiently certain to constitute a commitment, and the way it was communicated to the employees, resembled the test stated above regarding whether or not an offer can be treated as one capable of creating a unilateral contract. However, in Grant, Curtis J. was much influenced by the status of the document, since it was ‘a policy document, he found that this was of itself incompatible with the intention to create legal relations’. In a unilateral contract model the status of the document would not bear any substantial weight. The most significant criteria is whether the employer has offered an objective commitment—in other words, ‘when looking at how a unilateral promise...is

189 Ibid, (Curtis J), [14]
191 This is different to the bilateral approach where an objective intention and aptness must be asserted in order to create a binding obligation. See Chapter Three, Para 4.3, below for further analysis.
interpreted, the authorities show that it is necessary to focus simply on how the reasonable recipient of the promise would have understood the offer. ¹⁹²

In *Grant*, Curtis J was also influenced by the way in which the policy was communicated by the employer to their employees. The emphasis on the way it was promulgated, rather than on whether or not it had been communicated, signifies a consistent departure from the unilateral contract model. The fact that employees ‘were told of this policy in the foregoing way rather than through the machinery of negotiation’¹⁹³ was another key factor taken in *Grant*, to conclude that the employer did not intend its commitments to be legally binding. This is clearly a bilateral contract analysis where an exchange of promises is essential to create a binding obligation. In the US - as will be examined in the following chapters¹⁹⁴ - such an approach has been abandoned in most states, where the focus is on whether or not an employer has made a commitment which is capable of creating an offer of a unilateral contract.¹⁹⁵

The relevance of communicating an offer to the employee in order to create an offer of a binding obligation was considered in *Duke v Reliance Systems*.¹⁹⁶ In this case it was said that a policy unilaterally introduced by the employer cannot form a term of the employment contract, unless the policy has been drawn to the attention of the employees, or has been followed by the parties for a substantial

¹⁹² *Attrill and Ors v Dresdner Kleinwort Ltd and Anor* [2012] IRLR 553, [83]
¹⁹³ *Grant v South-West Trains Ltd* [1998] IRLR 188,[14]
¹⁹⁴ See Chapter Five and Six
¹⁹⁵ See Chapter Four for detailed analysis.
¹⁹⁶ [1982] ICR 449
period without any exception.\textsuperscript{197} The court does not explain the need or the legal significance of the requirement that the offer must be drawn to the attention of the employee. An employer who has introduced a voluntary promise in, for example, a handbook, has surely communicated it by this outward manifestation or by making it available to the employees, with or without the actual knowledge of an individual employee.\textsuperscript{198} In addition, the alternative route offered by the court as evidence of intention - that a practice has been followed without exception for a substantial period - is incapable on its own in establishing that an offer of a legally binding obligation has emerged as a result.\textsuperscript{199}

The Court of Appeal in \textit{Albion Automotive Ltd v Walker}\textsuperscript{200} accepted that an employer's positive communication of unilateral offers to its employees was acknowledged as a key factor in determining that the employer intended to be bound by their promises. The Court of Appeal ruling seems to suggest that where a unilateral promise has been communicated to the employees by the employer or by management in what constitutes clear and unambiguous language, then such a promise is sufficient to create an offer of a unilateral contract without requiring anything in addition.\textsuperscript{201}

\textsuperscript{197} Ibid. 452

\textsuperscript{198} \textit{Sagar v Ridehalgh} [1931] 1 Ch 310


\textsuperscript{200} [2002] EWCA Civ 946.

\textsuperscript{201} See \textit{Attrill and Ors v Dresdner Kleinwort Ltd and Anor} [2012] IRLR 553. See the discussion on unilateral approach in Chapter Four.
2.2.3 Acceptance of the Offer

It was noted above that the acceptance of a bilateral offer is made by the exchange of consent, promise or counter-promise - i.e. by saying 'I accept' - whereas the acceptance of a unilateral offer is made by an act or series of acts without a counter-promise being made.²⁰²

It was also noted that, in employment relations, there is no particular controversy when the offer is clearly bilateral; for example an offer of a job where the employee need only accept by giving a counter-promise. Where voluntary promises or unilateral offers are introduced by the employer in formal statements or policies, however, or where ‘the nature of the promise is inconsistent with the notion of individual acceptance’,²⁰³ the question of acceptance becomes more complex. The difficulty concerning voluntary promises in an employment relationship arises when the employee is already employed and, accordingly, performing his duties under his original contract. How, in this situation, would the employee show that he has accepted the offer when he is doing nothing more than performing his normal, or pre-existing duties?

²⁰² Conduct will, however, only have this effect if the offer and acceptance were made with the intention (ascertained in accordance with the objective principle) of creating legal relations. Chitty on Contract, [2-076] -[2-078]

²⁰³ Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2012] IRLR 553
English courts, being loyalists to bilateralism, were consequently led to consider such a question under the test of incorporation. This means that when the promise is volunteered by the employer, courts are only concerned with examining whether such a promise is capable of being part of the original contract of employment. The focus was only made to the commitment - i.e. whether it is apt - and to the intention of the parties, whether the employer has objectively intended his promise to be part of the employment contract, and hence incorporated. However, as will be examined in the next chapter, this test has not always provided a coherent conclusion, especially where the promise is clearly apt but the intention appears to point in a different direction.

In Lee v GEC Plessey Communication, for example, the court regarded, when a promise is apt and objectively intended, that the continued performance of the employee provides an acceptance that the term is appropriate for incorporation into the contract. While some authority, although still not settled, under general contract law allowed implied acceptance of bilateral offers by silence, the general contract law principle is that an exchange of promises to create a

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204 National Coal Board v National Union of Mineworkers [1986] IRLR 439. See further discussion on the test of term incorporation Chapter Three, Para 4.3, below.

205 Cf Malone and Ors v British Airways Plc [2011] IRLR 32; with National Coal Board v Galley [1958] 1 All ER 91. See further Chapter Three.


207 E.g. Jayaar Impex Ltd v Toaken Group Ltd [1996] 2 Lloyd's Rep. 437; Felthouse v Bindley [1862] 11 CB.(N.S.) 869; affirmed [186] 1 NR. 401. Even with such authorities’ existence, silence seldom constitutes acceptance of new terms, as other objective factors must also assist and direct to the conclusion that silent can be regarded as an acceptance. See Financial Techniques (Planning Services) v Hughes [1981] IRLR 32.

bilateral contract is only conferred by the affirmative acceptance which must be expressed clearly by the promisee and must also be set positively towards whatever set of terms the assent is directed.\textsuperscript{210} Hence, the absence of an exchange of promises where clear acceptance is provided would, in relation to bilateral contracts,\textsuperscript{211} generally be regarded as there being no contract.\textsuperscript{212}

It will be argued in the forthcoming chapters that a unilateral contract approach to voluntary promises provides a more consistence and coherent legal principle that is better rooted in contract law.\textsuperscript{213} It also reflects more appropriately with the modern development of employment law, where reliance rather than exchange is the better theory explaining enforcement in employment relationships.\textsuperscript{214}

2.3 Consideration

2.3.1 Introduction

In almost any legal system there is a mechanism used to identify agreements that will be viewed as enforceable contracts. The influence of the bargaining theory of contracts in English common law has set the doctrine of consideration to


\textsuperscript{212} Peter Lind and Co Ltd v Mersey Docks and Harbour Board [1972] 2 Lloyd's Rep. 234. See further Chitty on Contract [2-027]

\textsuperscript{213} See chapter Four

\textsuperscript{214} See Chapter One above.
provide this function, in order to distinguish between gratuitous promises\(^{215}\) and those promises that form the basis of a contractual obligation.\(^{216}\) This is highly relevant to the central discussion regarding the legal formation of binding promises, contained in explicitly non-contractual documents. Voluntary promises, introducing for example a promise of enhanced redundancy or additional payments and bonuses, are issued by the employer without any overt request for something furnished by the employee in exchange.

Provisions in these documents were traditionally regarded as part of the codified form of the employer's managerial prerogative that governed and ran the operation of the workplace.\(^{217}\) Therefore, these provisions could, under the traditional view, be unilaterally altered or modified to accommodate the changes needed to embrace the effectiveness and efficiency of the employer's business or services.\(^{218}\) Under the implied duty of co-operation, an employee is required to adapt to such modifications, and an unreasonable refusal by the employee will

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\(^{215}\) i.e. promises to confer a benefit by gift; *Re: Cory* [1912] 29 TLR 18


\(^{218}\) In *Dryden v Greater Glasgow Health Board* [1992] IRLR 469, the EAT held that the introduction of a new policy on the prohibition of smoking at work fell into the category of a 'works rule'. It had no contractual effect and, therefore, could not be used as a foundation for a constructive dismissal claim. Per Lord Coulsfield, 'Where a rule is introduced for a legitimate purpose, the fact that it bears hardly on a particular employee does not, in our view, in itself justify an inference that the employer has acted in such a way as to repudiate the contract with the employee.'
be treated as breach of the duty to co-operate.\textsuperscript{219} Difficulties arise where these documents contain promissory provisions or statements that confer benefits or substantively govern the legal relationship between the employer and employee. In such circumstances, the employer may seek to achieve better performance, increased loyalty and reduce staff turnover by promising enhanced terms.\textsuperscript{220}

Courts and tribunals have, generally, addressed the question of the legal position of such promises by looking at whether or not the intention of the parties can render the promise binding. Under the orthodox theory of bargaining, as noted in the earlier chapter, the test of valuable consideration is the essential requirement to create a binding obligation.\textsuperscript{221} The discussion below will consider how courts have viewed the importance of this requirement in finding a binding obligation, how it has been applied, and the modern approach to such an application.

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\textsuperscript{219} Secretary of State for Employment \textit{v} ASLEF (No 2) [1972] 2 All ER; \textit{Sim v Rotherham Metropolitan Borough Council} [1987] Ch 216. See further Chapter Three below.

\textsuperscript{220} See for example the discussion above regarding the courts finding in \textit{Quinn v Calder} (1996) IRLR 126, and \textit{Albion Automotive Ltd v Walker} [2002] EWCA Civ 946, which concerned provisions of enhanced redundancy payments. The way the provision was communicated to the employee was the key determinate of the parties’ intention. In neither case did the parties argue the question of valuable consideration.

\textsuperscript{221} See \textit{National Coal Board v National Union of Mineworkers} [1986] IRLR 439. Cf \textit{Malone and Ors v British Airways Plc} [2011] IRLR 32. See Chapter Three and in particular the discussion on the issue of the \textit{objective} intention of the parties to a provision and the English approach to incorporation at Para 2.5 below.
2.3.2 Meaning and Definition

Consideration has traditionally been defined as something that constitutes a benefit to one party, and a detriment to the other, or where one receives either.\textsuperscript{222} The adequacy of the consideration is left for the parties to consider at the time of making the agreement; it is not open to the courts to consider the adequacy of the consideration or the fairness of the deal.\textsuperscript{223} The promise of mere peppercorn is capable of constituting good consideration despite it being inadequate.\textsuperscript{224} Voluntary promises in employment law, however, present a model where an employer promise, ‘is not normally the result of a bargained-for exchange according to which reciprocal additional performance is promised by the employee.’\textsuperscript{225}

This can be observed, for example, where an employer promises an equal opportunity policy or a redundancy scheme as will be explained below. As noted in the previous chapter, the development in employment law has witnessed the

\textsuperscript{222} H Collins, The Law of Contract, (4th ed, London, LexisNexis UK 2003). In Currie v Misa (1875) LR 10 Ex 153, per Lush J, p 162, consideration was considered in the following terms: “A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”. The House of Lords in Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915] AC 847, (Per Lord Dunedin), 855, approved Sir Frederick Pollock’s statement that consideration could be defined as “the price for which the promise of the other is bought”.

\textsuperscript{223} Chappell and Co v Nestlewhere [1960] AC 87. The House of Lords held that consideration can be satisfied regardless of the value of what has been exchanged.


departure of the exchange to bargain theory or at least a weaker application of it.\textsuperscript{226} Hough and Spowart-Taylor noted that the classical model of exchange, where anything requested by the promissor will be counted as a benefit, does not easily appear to fit within the employment context.\textsuperscript{227} According to the argument of Collins, two distinct models are embraced by classical doctrine of consideration - the first and more dominant model is based upon request, whereas the second is concerned with a substantive benefit being gained or a detriment being suffered. The second alternative considers that a substantive evaluation of benefit and detriment, rather than the request, is more essential.\textsuperscript{228}

Voluntary promises in employment relationships, as noted earlier, illustrate a type of promise where the emphasis on request is not the dominant model of exchange.\textsuperscript{229} This is because voluntary promises are often merely 'volunteered', outside a bilateral process. The alternate version is of more significance to voluntary promises in employment relationships since the employer's voluntary promise ‘is not usually dependent upon the employee suffering a detriment in order to 'purchase' the additional reward.'\textsuperscript{230} For example, an employer who promises his employee an enhanced redundancy payment or additional pay and bonuses is not always dependant on further suffering or a new determinant.

\textsuperscript{226} See Chapter One for analysis on contract theory, Para 2.3, below
\textsuperscript{230} Ibid
Accordingly, the classical model of the doctrine does not provide a satisfactory explanation to its enforcement in employment relation. Furthermore, Mindy Chen-Wishart noted that while the bargain theory provides the overwhelmingly superior explanation of contractual liability, the strength ‘of this orthodoxy is such that bargain consideration has had to be 'invented' where it is lacking to justify enforcement’.231 The courts have, on occasions, stretched the doctrine of consideration to enforce an exchanged bargain which would not, prima facie, come within its structure.232 At other times, they have barred the enforcement of undertakings and promises that seem worthy of enforcement.233

Of the courts' departure from the orthodox model, this can be illustrated in the case of Shadwell v Shadwell,234 where the court found good consideration in a promise made between a young man and his uncle where the uncle promised to pay him an allowance for marrying his fiancée.

The court enforced the promise on the basis that the subsequent promise was given for good consideration.235 The court's findings, given that consideration is justified on the basis of the exchange to bargain, is difficult to follow.236

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231 M Chen-Wishart, 'Consideration, Practical Benefit and the Emperor’s New Clothes’ in Beatson and Friedmann (eds), Good Faith and Fault in Contract Law (Oxford University Press 1995), original emphasis, page 123
232 See Shadwell v Shadwell (1860) 9 CBNS 159; Lee v GEC Plessey Telecommunications [1993] IRLR 383
233 E.g. compare Stilk v Myrick [1809] 2 Camp 317; and Hartley v Ponsonby [1857] 7 E and B 872
234 [1860] 9 CBNS 159
236 Ibid
case was obviously decided within the above mentioned 'benefit/detriment' scope as noted by Collins. Chen-Wishart argued that *Shadwell* provides an illustration that ‘[t]he stretching of an existing rule to reach desirable results is well known in the common law but this does not mean that the rule lacks substance’. 237

However, *Shadwell* has shown an excessive stretching of the rules where consideration can hardly be recognised. It suggests that courts, when seeking to evade the strict application of the classical doctrine, invent consideration in the case to avoid denying its necessity. 238 The case dealt with consideration under a pre-existing duty. As was discussed earlier in the chapter, employment relationships also follow the same trend. Modern developments in employment law have shown the courts' readiness to accept a relaxed application of the rules of consideration outside the classical definition of 'valuable consideration'. 239

This relaxed application of the rules of the doctrine and the broadening of its concepts poses the question of whether consideration is a necessary 'solving mechanism' to distinguish between enforceable and non-enforceable promises in modern employment law.

To elaborate, in English Law the doctrine of consideration provides a mechanism to identify agreements that will be viewed as enforceable contracts.

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239 *Lee v. GEC Plessey Telecommunications Ltd* [1993] IRLR 383; *Edmonds v Lawson* [2000] IRLR 319 CA
With regards to employment relations, however, the difficulty that arises from the strict application of this mechanism is that it may be inadequate to enforce seriously intended promises due to consideration not being supported. This difficulty is particularly illustrated in unilateral promises made by an employer in formal statements such as company manuals, policies or voluntary agreements.

While the bargain theory provides a traditional explanation of the enforceability of contractual terms and promises in agreements, courts have, in modern employment law, shown a willingness to allow flexibility and modification to the general principle of contract law in order to prevent the contractual doctrine being at odds with the dynamics of employment relations. In *Lee v GEC Plessey Telecommunications*, the court held that unilateral promises made by the employer to their employees could be binding to the employer and their employees. As will be discussed further below, practical benefit can be obtain by the employer's state of mind in securing, for example, better performance, stability at work or reducing the turnover of workers. The court has moved accordingly from the classical doctrine and was rather influenced by the principle held in *Williams v Roffey Bros and Nicholls (Contractors) Ltd*. Hough and Spowart-Taylor observed that the decision of the Court of

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240 Douglas Brodie, ‘Reflecting the Dynamics of Employment Relations: Terms Implied from Custom or Practice and the Albion Case’, [2004] ILJ 159
241 [1993] IRLR 383
242 See next paragraph, 2.3.2, for further discussion on the development of practical benefit
243 [1990] 1 All ER 512, [1990] 2 WLR 1153
Appeal in *Edmonds v Lawson*\(^{244}\) confirmed a shift in English jurisprudence regarding the question of consideration. In this case that concerned the status of a pupil barrister and her contractual relationship with the employing chambers, the Court of Appeal held that the consideration existed of the benefit the chambers acquired from attracting talented pupils.\(^{245}\)

This development in employment law is highly relevant to the question of voluntary promises. It supports the argument that when an employer announces a voluntary promise, consideration is accordingly inherently furnished. This position can be recognised in the assertion of Russell LJ in *Roffey*\(^{246}\):

> But where, as in this case, a party undertakes to make a payment because by doing so it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.

Accordingly, the assertion by Russell LJ that continuing relationships provide a practical benefit is significant in employment relationships, since employers are gaining particular benefit from the continuing work of the employee. This supports the argument that when a voluntary promise is made by the employer, consideration is inherently presumed by the mere performance of the employee.

This broadened concept of consideration, where employers are viewed to gain practical benefits arising out of continuing employment, as will be observed

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\(^{244}\) [2000] IRLR 319 CA


\(^{246}\) [1990] 1 All ER 512, 524
further in the forthcoming chapter, is relevant to the argument made in the previous chapter that the bargain theory of contract is no longer an adequate model, or at least the predominant theory, adopted in the employment context. Moreover, the employer's offer of an enhanced provision is made with the aims of achieving higher morale, an attractive working environment, better performance, less disputes amongst staff and lower staff turnover. This approach to consideration is adopted by most of the United States' jurisprudence, as will be examined in Chapter Five.

This approach that the rules of consideration are satisfied upon the employees' performance and their continuing to work was also confirmed by the recent Court of Appeal's finding in Attrill and Ors v Dresdner Kleinwort Ltd and Anor,\textsuperscript{247} where the Court of Appeal was satisfied that the employer received consideration for its promise to the workforce at large that there would be a guaranteed minimum bonus pool. The promise was made with the aim of stabilising the workforce at a time of disruption in the banking sector, and the bonus pool was at least one factor that was taken into account by the employees in deciding to remain with the employer and not seek employment elsewhere. *Roffey* was not cited in the case, however, which indicates that *Roffey* is now taken to be uncontroversial in employment cases, as will be discussed further below.

\textsuperscript{247}[2013] EWCA Civ 394.
The Court of Appeal in *Attrill* upheld the findings of Mr Justice Owen at the High Court, who was influenced by the Court of Appeal determination in *Edmonds*, and insisted on finding consideration or inventing such by saying that ‘in any event there was consideration given ... by remaining in employment, and either not seeking employment elsewhere or not taking up employment elsewhere, and in all cases not exercising their right to resign’.\(^{248}\) The emphasis was not in the employee suffering any detriment for the promise bought for exchange. The practical benefit available to the employer was sufficient to satisfy the requirement of consideration.\(^{249}\)

This illustrates the modern position regarding the rules governing the creation of contractual obligations in employment law. Although consideration in an employment contract is still required at the formation stage, promises made during employment relationships have not, more frequently been explained by the rules of consideration. Moreover, the Court of Appeal's decisions in *Edmonds* and more recently in *Attrill* suggests that continuing to work can furnish the requirement of consideration. This approach is being adopted with increased frequency in employment law. In any event, the courts' decision confirmed the judges' tendency,\(^{250}\) to avoid the orthodox strict approach in older

\(^{248}\) *Attrill and Ors: Anar and Ors v Dresdner Kleinwort Limited and Anor* [2012] EWHC 1189 (QB), at [184]

\(^{249}\) [2013] EWCA Civ 394,[95]

\(^{250}\) *Shadwell v Shadwell* [1860] 9 CB (NS) 159; *Lee v. GEC Plessey Telecommunications Ltd* [1993] IRLR 383; *Edmonds v Lawson* [2000] IRLR 319 CA
cases,\textsuperscript{251} by softening the structures of the classical doctrine rather than denying its necessity altogether. This indicates that reliance rather than bargain theory is widely adopted by courts in order to accommodate the new approach of consideration where practical benefit is replacing the orthodox rules of consideration.\textsuperscript{252}

Would this make for the position that in employment relationships the rules of performance under a pre-existing duty could not prevent sufficient consideration to be furnished? In other words, does the adoption of the practical benefit in employment relations mean that consideration should always be presumed or implied since employers who introduce voluntary promises to their employees will always gain some particular benefit in return? These questions will be examined next.

### 2.3.3 Performance under a Pre-Existing Contract

The classical doctrine of consideration prevents the enforcement of promises made by the employer to his employee in exchange for an act which the employee is required to perform under an already existing contractual obligation. The classical position is that promises of the same duties are not consideration for reciprocal promises to pay more.\textsuperscript{253} As noted above, under the orthodox rules, consideration must be something that genuinely originates from the

\textsuperscript{251} E.g \textit{Stilk v Myrick} [1809] 2 Camp 317

\textsuperscript{252} See further discussion in Chapter Three, Para 4.3.3, below

\textsuperscript{253} \textit{Stilk v Myrick} [1809] 2 Camp 317
promisee and is independent of the promise. It does not matter to whom the consideration moves, however. Whilst consideration must move from the promisee, it need not move to the promissor. This requirement means that something of value must be exchanged for the promise. Since consideration must be given in response to a promise, it cannot logically include something given or performed before the promise was made. The general principle is that there is not a good consideration when performance pre-dates the promise given, or when it already corresponds with a reciprocal promise.

The leading authority for this position is found in the judgment of Lord Ellenborough in Stilk v Myrick. In this case, a number of sailors jumped ship and the captain of the vessel promised to divide their wages among the remaining crew if those who remained agreed to work the ship home short-handed. After the ship was returned to port, the captain reneged on his promise. The sailors' claim to recover the extra pay they were promised was dismissed on the basis that they had not provided any consideration, and therefore could not enforce the contract. The promised pay increase, as Lord Ellenborough stated, is 'void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from

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254 Chitty on Contract, [3-039]
255 See also Chapter Four, Para 5.4, below for further analysis.
256 1809] 2 Camp 317. Accepted in North Ocean Shipping v Hyundai Construction (The Atlantic Baron) [1978] 3 All ER 1170
London they had undertaken to do all that they could under all the emergencies of the voyage'.

The general principle of Stilk is significant in employment law, in that it illustrates the problem of enforcing benefits promised by an employer in return for the performance of an act already required under a prior contract. The authority of Stilk means that a later promise made by an employer cannot be enforced unless new or fresh consideration is obtained. Consequently, the strict application of this orthodox view would prevent genuine and seriously intended voluntary promises made by employers.

Campbell attempted in his recent article, ‘Good Faith and the Ubiquity of the Relational Contract’, to justify the court's decision in Stilk by arguing that the original contract of the seamen was an existing obligation ‘derived from what would now be called the implied term of mutual trust and confidence in an employment contract’ that provided an element of flexibility that ‘could be fixed within a reasonable compass at the time of the agreement, and it was very important that it should remain fixed over the course of performance. In his view, the element of flexibility derived from the implied duty of trust and confidence embraced that the employee must provide additional work.

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257 Ibid [318]
258 French v Barclays Bank [1998] IRLR 646. See further Chapter Three below
259 David Campbell, ‘Good Faith and the Ubiquity of the Relational Contract’ [2014] 77 MLR 475
260 Ibid, 478
when necessary; the ‘essence of the agreement was that the seamen had to adjust their performance to accommodate the risks of the voyage.’

This suggestion, as will be explored below, does not appear to tie in with recent developments in employment law. This argument does not take into account that a new promise may generate different expectations, which would alter the original obligation that had been derived from the implied duty of trust and confidence. Also, the employees’ duty to obey or adjust performance is not always lawful or reasonable and in Stilk the seamen could argue that working short-handed to bring the voyage to a safe conclusion constituted a threat to health and safety. Furthermore, the principle of consideration adopted in Stilk was subject to some attempt at modification by other judgments - for example, in Hartley v Ponsonby, where a ship became so short-handed from crew desertion that it was dangerous for it to sail. The crew were offered additional wages to sail the ship home. It was held that the mariners provided fresh consideration. The original contract was discharged and in agreeing to continue with the voyage, a new contract was entered into under these arrangements.

Lord Denning was of the opinion that a promise made under a pre-existing contractual duty was enforceable as it conferred a new benefit on the promisee.

261 Ibid, 478
262 French v Barclays Bank [1998] IRLR 646. See Chapter Six
264 Turner v Mason (1845) 14 M .and W; Johnstone v Bloomsbury Health Authority [1991] 2 All ER 293
265 [1857] 7 E and B 872
His opinion was demonstrated in *Ward v Byham*\(^{266}\) where he stated that he ‘always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given’.\(^{267}\) Lord Denning conceded that there may be no legal detriment on the promisee, but he drew attention to the presence of factual benefit to the promissor. This view can be recognised where an employer, for example, offers an enhanced redundancy policy to an employee\(^{268}\) or additional bonuses.\(^{269}\) The employee, as noted above, relies on such a voluntary promise without having always to suffer a detriment.

In *Ward*\(^{270}\) the father of a child promised the child’s mother, after separation, to pay her a weekly allowance provided that she could prove ‘that the child will be well looked after and happy’.\(^{271}\) She was also given the discretion to live with the father or elsewhere. Lord Denning found good consideration on the mere fact that the promise gave a benefit to the person who made that promise. According to Lord Denning, the promissor ‘gets the benefit for which he stipulated, he ought to honour his promise’.\(^{272}\) Again in *Williams v. Williams*\(^{273}\) Lord Denning disagreed with majority and maintained his view that good consideration was

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\(^{266}\) [1956] 1 WLR 496
\(^{267}\) Ibid [498]
\(^{268}\) *Lee v. GEC Plessey Telecommunications Ltd* [1993] IRLR 383; *Fisher v Dresdner bank* [2009] IRLR 1035
\(^{269}\) *Attrill and Ors v Dresdner Kleinwort Ltd and Anor* [2013] EWCA Civ 394
\(^{270}\) *Ward v Byham* [1956] 1 WLR 496
\(^{271}\) Ibid [498]
\(^{272}\) Ibid [498]
\(^{273}\) [1957] 1 WLR 148
furnished when a promise made by a husband to his wife ‘added safeguard to protect himself from all this worry, trouble and expense’.  

While Denning LJ’s main concern in Ward and Williams was the promise itself, he accepted that consideration could still be furnished, even where performance remains under an existing duty, as the benefit of the performance is also given to the promissor. Voluntary promises are normally considered under this analysis, where the employee who is under an existing duty provides practical benefits to the employer by the mere performance of his existing duties. In both cases above, however, the other two judges (the majority) were concerned with the classical model of exchange, in which the benefit and detriment must be requested. The emphasis by the majority was on the detriment that the promisee had suffered due to their undertaking.

Hooley argued that the majority in both cases were concerned with the detriment to the promisee as the foundation of consideration - i.e. that the benefits that the father/husband had received were only the consequences of the mother/wife's undertakings. Accordingly, the majority of the Court of Appeal in both cases, ‘were only prepared to recognise such benefits because they stemmed from additional detriment to the mother/wife, i.e. detriment which she

274 Ibid, 151  
276 Lee v. GEC Plessey Telecommunications Ltd [1993] IRLR 383  
would not otherwise have suffered but for her undertaking’. 278 Lord Denning's reasoning on the other hand, concentrated on the benefit to the promissor, even if there was no request from the promissor or detriment for the promisee's undertaking.

This is particularly relevant to the voluntary promises in employment law where, as noted in Attrill, emphasis on the practical benefits being conferred by the employer is sufficient to satisfy the element of consideration. Accordingly, the strict application of bargaining for exchange has not been easily followed in employment relations. 279

Treitel was of the opinion that while Lord Denning's view - that the mere promise is good consideration - has not been accepted by the majority in the above cases; 280 Lord Denning's view has, nonetheless, been mitigated in other cases to mean that consideration can be satisfied where the promissor conferred benefits from his promisee, 281 even if the promisee suffers no detriment by performing an existing duty. This precisely displays how a voluntary promise in employment relations can be viewed. As noted in the previous section, the employer who promises his employees enhanced or additional pay does not normally acquire a detriment upon the employees in order to receive the

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278 Ibid, 25  
279 See Para 3.3.2 above  
281 E.g Shadwell v Shadwell [1860] 9 CB (NS) 159; Lee v. GEC Plessey Telecommunications Ltd [1993] IRLR 383; Edmonds v Lawson [2000] IRLR 319 CA
additional benefits. This analysis supports Collins's view that courts have, in finding good consideration, relied upon an understanding of the implicit exchange.\(^{282}\) In *Shadwell*, as noted above,\(^{283}\) there was no request, but consideration was implied by the court. It can also be noted that in the leading case of *Williams v Roffey Bros and Nicholls*,\(^{284}\) the court did not deal with the issue of request. In *Roffey* the court dealt with a promise for an additional payment to be made to the other party above the original contract price in order to secure completion of the contract on time. The Court of Appeal held that the promise by the party of a bonus had provided good consideration even though the other party was merely performing a pre-existing duty.

Glidewell LJ noted that the new promise was thereby to obtain a new practical benefit or avoid a disadvantage, "True it was that the plaintiff did not undertake to do any work additional to that which he had originally undertaken to do but the terms upon which he was to carry out the work were varied and, in my judgment, that variation was supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates."\(^{285}\)

Although the Court of Appeal in *Roffey* was adamant that it did not overrule the principle of *Stilk* but only undertook a ‘process of refinement and limitation’ in its application, the court did not seem to explain how *Stilk* differed. Both cases

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\(^{283}\) It was noted above that the court found in this case good consideration in a promise made between a young man and his uncle where the uncle promised to pay him an allowance for marring his fiancée

\(^{284}\) [1990] 1 All ER 512

\(^{285}\) Ibid [523]
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dealt with a pre-existing duty in which the court in *Stilk* found no consideration, whereas the Court of Appeal in *Roffey* held to the contrary.

It is submitted that the plaintiff in *Roffey* was merely doing no more than performing an existing obligation, i.e. completing the flats on time. The new promise was no more than asking the promisee to perform an existing duty for additional benefit where no detriment had been suffered by the promisee. An employer's unilateral offer or voluntary promise is viewed under such an assumption. Furthermore, the benefit and detriment for both parties under the new arrangement would have been the same in any event if the contract had been performed under its original obligations. *Roffey*, in principle, is no different to *Stilk* since the captain also gained partial benefits by avoiding trouble, and saved both time and expense that he could otherwise have accrued for alternative arrangements to get the ship to the port.

The Court of Appeal in *Roffey* took into account the urgency to reform the doctrine of consideration in order to reflect the modern development of contractual relations. This development has now been adopted in employment law, as seen in *Attrill* above, where the unilateral announcement by the employer to pay discretionary bonuses was sufficiently certain to be capable of giving rise to a binding obligation. It further suggests that an employer who makes a promise to an employee satisfies the rules of consideration upon the employee's performance and their reliance upon it.
2.4 Intention to create legal relations

The requirement of the intention is central to the debate regarding the enforceability of voluntary promises in employment relations. Courts would consider the issue of whether a promise is binding by examining the intention of involved parties.286 As noted in the previous chapter, the departure from 'will theory' to exchange made the test a question of objective intention rather than subjective.287 However, the issue is not straightforward in employment law, as there are profound controversies regarding the evidence that courts will adopt in finding the intention of the parties to be bound.288

The rule, as stated in *Rose and Frank Co v. JR Crompton and Bros Ltd*,289 is ‘to create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly’.290 The general principle in finding whether such an intention exists is summarised by Lord Denning in *Merritt v. Merritt*291 in the following terms: ‘the Court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people

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286 See, e.g *Kaur v MG Rover Group Limited* [2005] IRLR 40; *Grant v South-West Trains Ltd* [1998] IRLR 188. See Chapter Three for further discussion on these cases.
287 See Chapter One, Para 2.2.32-3, above
288 See Chapter Three, particularly Para 4.3, below
289 [1923] 2 KB 261
290 Ibid, 293, (on Appeal per Atkin LJ)
291 [1970] 1 WLR 1211
regard the agreement as intended to be binding?"  

Also, in *Smith v Hughes* it was decided that a person's conduct with regard to the quality of the subject matter proposed by the other party is determined by what any reasonable person would assume to be the case regardless of the person's actual intentions. Under the general principle, the parties to an employment contract must have objectively intended both the agreement itself and its constituent terms in order for it to be legally binding and in order for the whole contract to be effective; the burden lies on the party asserting otherwise to prove that no such intention existed.

The answer to the question as to why there is a requirement for a legal intention for contract formation is not straightforward. Smith identified three situations in which the courts use the requirement of legal intention as a reason to refuse the enforcement of the agreement: firstly, where both parties clearly agreed that they did not want their agreement to be legally binding; secondly, where the parties did not want their promises to be seriously taken (e.g., the agreement was only 'aspirational', made 'binding in honour', or the promise was a mere gift or gratuity) whether an intended commitment had been made or not; and

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292 Ibid
293 [1871] LR 6 QB 597
294 Ibid
296 In *Carlill v Carbolic Smoke Ball Company* [1893] 1QB 256, the company argued it was not a serious contract their promise that it will pay £100 to any person who became sick after having used their smoke ball three times daily for two weeks. Their argument was rejected by the court of appeal.
297 *Kaur v MG Rover Group Ltd* [2005] IRLR 40 per Keene L.J at p43.
298 *National Coal Board v National Union of Mineworkers and Others* [1986] IRLR 439
thirdly, where the agreement was made in a social or domestic context. The reason for not enforcing domestic or social agreements is obviously not relevant to an employment relationship. Chen-Wishart argued that ‘[t]here is value in freedom from contract as much as freedom of contract.’ Her view is that agreements made under social and domestic relationships ‘may be binding in morality or etiquette, to be settled by compromise or informal social sanctions, but they should not be the subject of coerced performance or of damages’. Accordingly it is not the concern of Employment Tribunals where, in a social and domestic domain, the intention requirement has not been found, and there has been a refusal to create or enforce the agreement. A promise made to employees who are already in an existing and legally enforceable relationship clearly does not fall within this category, and employment relationships cannot be considered under the social and domestic domain. The remaining two situations, however, have been argued before Employment Tribunals as reasons for refusing to enforce employment contracts.

The question at issue is, therefore, whether the parties have intended to enter into a legal relationship, and if so, was the promise itself objectively intended to be binding. Under the first situation noted by Smith, contract law rules generally allow parties to agree to opt out of legal relationships by way of express or implied terms. The general approach, under the bargaining theory, is that parties are free to negotiate their contractual terms in any way they please or feel

299 Mindy Chen-Wishart, ‘Consideration and Serious Intention’ [2009] SJLS 452-3
300 Ibid, 453
appropriate.\textsuperscript{301} If the parties agree not to be legally bound by their agreement, then ordinary rules under contract law will protect their wishes and be sufficient to demonstrate their clear intentions.\textsuperscript{302}

The general principle in common law where agreements are regulating business relations is, however, that the parties intend legal consequences almost as a matter of course.\textsuperscript{303} In employment relationships, as noted earlier, it is important to distinguish between the questions about the parties' intentions to enter into legal relationships, and the question whether a particular voluntary promise is objectively intended to be binding. The latter question relating to interpretation, which forms the final situation as described by Smith above, is a key concern in employment law, since the parties' intention to create a legal relationship is already presumed.\textsuperscript{304} This is due to the general contract law presumption which recognises that where parties are in a pre-existing relationship, the court will be more inclined to recognise an intention to create a legal relationship.\textsuperscript{305}

\textsuperscript{301} See further Chapter, Para 2.3.6, below
\textsuperscript{302} \textit{Calder v H Kitson Vickers} and Sons (Engineers) Ltd. [1988] ICR 232. Ralph Gibson LJ stated that ‘a man is without question free under the law to contract to carry out certain work for another without entering into a contract of service’ ibid, 250.
\textsuperscript{303} \textit{Rose and Frank Co v JR Crompton and Bros Ltd} [1923] 2 KB 261; and \textit{Maple Leaf Macro Volatility Master Fund v Rouvroy} [2009] EWCA Civ 1334
\textsuperscript{305} \textit{Thomas Judge v Crown Leisure Limited} [2005] IRLR 823,[23] (per Smith LJ). Cf. \textit{Chartbrook Ltd v Persimmon Homes Ltd and another} [2009] 4 All ER 677, in which the House of Lords held that evidence of prior negotiations should generally be excluded, but such exclusion should not prevent evidence from the prior negotiations being used if it would "establish that a fact which may be relevant as background was known to the parties", ibid [42].
The entitlement that can be created from voluntary promises, often made by the employer in formal statements, is still, however, somewhat uncertain. Hepple noted that the courts did not develop a modern approach to the requirements of contract formation and, in particular, the test of ‘intention to create legal relations’.\(^{306}\) The real legal difficulty, in his view, was that the courts had ‘been led to view the issues through the blinkers of the contract/no contract\(^3^{07}\) analysis. Kahn-Freund states that, ‘An agreement is a contract in the legal sense only if the parties look upon it as something capable of yielding legal rights and obligations.

Agreements expressly or implicitly intended to exist in the 'social' sphere only are not enforced as contracts by the courts.\(^3^{08}\) He was of the opinion that the UK legal principle regarding whether a promise or agreement was enforceable and binding in employment law is based on the orthodox contractual model of bargaining that has been widely connected to the question of the contractual intention of the parties.\(^3^{09}\) Any attempt to legally enforce rights and obligations created under voluntary promises can ‘be found in the intention of the parties themselves.’\(^3^{10}\) Thus, the status of the intention to create a legal commitment has been the core factor in determining the normative effect of the promise. This

\(^{306}\) Bob Hepple ‘Intention to Create Legal Relations’ [1970] CLJ 122, 124
\(^{307}\) Ibid
\(^{309}\) Ibid
\(^{310}\) Ibid
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brings matters to the heart of the issue about enforcements - the question about how the parties' intention to a promise is examined.

2.5 Objectivity and Interpretation

The normative effect of provisions as found in, for example, policies or manuals, is applied to contractually intended terms where the intention must be ascertained by objective means rather than the employer's subjective intention.\(^{311}\) The courts' assessment of objective intention and which contractual terms the parties actually agreed upon is not only found in the language of the putative obligation, but also in the factual matrix in which the agreement was distributed and the manner in which voluntary promises were promulgated.\(^{312}\)

The basic principle of how a promise should be interpreted is found in the most cited statement of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*\(^{313}\), that the courts should look to find 'the meaning which the document would convey to a reasonable person having all the knowledge which would have been available to the parties in the situation in which they were in at the time of the contract'\(^{314}\) or which is 'reasonably available to the person or class of persons to whom the document is addressed.'

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\(^{311}\) *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; and *Chartbrook Ltd v Persimmon Homes Ltd and another* [2009] 4 All ER677

\(^{312}\) *Autoclenz Ltd v Belcher and others* [2011] 4 All ER 745

\(^{313}\) [1998] 1 WLR 896.

\(^{314}\) Ibid, 912
It is clear from this that unilaterally-introduced documents such as company manuals, policies, rights and benefits should be viewed objectively, when its provisions are read in the context of their 'background' or 'matrix of facts'. These are the facts or the knowledge reasonably available to the parties which is relevant to establishing how a reasonable person would understand what the parties intended by the contract when it was entered into. In *Bank of Credit and Commerce International SA v Ali and others*, it was held that ‘the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

Accordingly, an intention to create an enforceable commitment may be concluded by either an express statement that the voluntary promise is intended to be contractual or an implied intention to the same effect. ‘In so far as that

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315 See *Bank of Credit and Commerce International SA v Ali and others* [2002] 1 AC 251; *Graham and others v Glendale Managed Services* [2003] All ER (D) 225 (May); *Harris and another v Wood Hall Personnel and Transport Ltd* - [2003] All ER (D) 125 (Jul); *Agnew and others v North Lanarkshire Council* [2010] UKEATS/0029/09/B1 (Transcript); *Anderson and others v London Fire and Emergency Planning Authority* [2013] EWCA Civ 321
316 *Chartbrook Ltd v Persimmon Homes Ltd and another* [2009] 4 All ER677; *Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717; *Manna Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
317 [2002] 1 AC 251
318 Ibid, per Lord Bingham, [8]. The objective ascertains that the parties' intention when considering the background and matrix of fact was described in the following term:

In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.
intention is to be found in a written document, that document must be construed on ordinary contractual principles". 319 A mere statement of intention where voluntary promises are announced or circulated may not conclude the matter, however; the ‘purpose of the agreement and its factual background and surrounding circumstances may show that it was intended to have a more limited effect than would be suggested by its literal words’. 320 Hence, the mere fact that a document contains a statement that the parties intend their agreement to be binding may not be sufficient in itself to treat the agreement as enforceable, as this statement could equally mean that parties only intend for it to be ‘binding in honour’ 321 or that the terms were only ‘aspirational’ 322

This, in practice, may leave employees in a state of limbo as to the status and enforceability of the agreement that has been unilaterally introduced by the employer. Employees may also acquire a legitimate expectation that such voluntary promises made by the employer will be enforceable. 323 Employees who rely upon the express promise that the employer's unilateral promise is intended to be a binding contract, have surely expected that the employers will respect their promises and the employees' dignity. Accordingly, where there is no objective intention in the clear promise offered by the employers, and yet the

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320 Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251, 253
321 National Coal Board v National Union of Mineworkers and others [1986] IRLR 439
322 Kaur v MG Rover Group Ltd [2005] IRLR 40 per Keene L.J at p43.
323 See discussion in Chapter Six, Para 7.8-7.9, bellow on French v Barclays Bank [1998] IRLR 646 and other case.
employees have relied upon the promise, then principles derived from public law can provide an adequate solution to balance the parties' expectation and interests. The principle of legitimate expectation, as will be examined in Chapter Six, provides a better solution where contract law rules cannot be accommodated. This will solve the problem illustrated due to the 'bargain theory' approach in employment relations in such matters that take into account the unique nature of employment relationships, where the reliance of the employee should be acknowledged, so that the protection of the employees' dignity is assured.\textsuperscript{324}

\section*{2.5.1 Implied intention}

It was noted above that an objective intention must be asserted when a promise is made expressly in writing or verbally by one or both parties to create a legally binding obligation. There are, however, cases in which intentions are implied to create a term in a contract, although it is not expressly included therein by the parties.

The general principle under contractual orthodoxy is that for an intention to be implied, a term has been agreed to be enforceable, and although not expressed, a party must show that it was reasonable that such a term had been intended to be binding, and it was reasonable that both parties had agreed to its enforcement,

\textsuperscript{324} Malik v BCCI [1998] AC 20; Judge v Crown Leisure Ltd [2005] IRLR 823, also confirmed by the recent Court of Appeal finding in Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394. See further Chapter Four below
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Accordingly, the test is not what the parties should have agreed or what it would be reasonable for them to have agreed or what would have been unreasonable not to have agreed; the freedom to contract in this situation remains dominant and court will not impose terms into the contract unless objectively intended by both parties.\textsuperscript{326} The general judicial attitude is that ‘contracts are not lightly to be implied’ but where a term can be asserted by implication, courts must be able ‘to conclude with confidence’ that the parties have implicitly intended to create contractual obligations.\textsuperscript{327} The question as to whether such a term is or is not to be inferred in a particular case is nevertheless a question of law.\textsuperscript{328}

In employment law, where there is no express provision that the parties intended their agreement to be incorporated into the contract, courts have been ‘ready to imply such a term since at least as early as the mid-nineteenth century’\textsuperscript{329} insofar as the intention can be shown between the employer and the individual employee. ‘Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to

\textsuperscript{325} Modahl v British Athletics Federation[2002] 1 W.L.R. 1192; Mitsui and Co Ltd v Novorossiysk Shipping Co (The Gudermes) [1993] 1 Lloyd's Rep. 311
\textsuperscript{326} Hispanica de Petroleos SA v Vencedora Oceana Navegaceon SA (The Kapetan Markos N.L.) (No.2) [1987] 2 Lloyd's Rep. 323.
\textsuperscript{327} Blackpool and Fylde Aero Club v Blackpool BC [1990] 1 W.L.R. 1195, 1202; Carmichael and Another v National Power Plc [1999] 4 All ER 897
\textsuperscript{328} O'Brien v Associated Fire Alarms Ltd [1969] 1 All ER 93,CA,
the decision whether or not the inference should be drawn. The overall position is, however, arguably governed by the common law of contract, but the eventual outcome, as will be further examined in the next chapter, has not always guaranteed a consistent result in practice.

(I) Implied terms

It was noted above that whilst the English courts seek to identify the intention of the parties to hold a promise binding, objectivity rather than subjectivity is the appropriate test adopted by the courts in order to deduce the nature of the intention of the parties to the formation of contractual entitlements. In Secretary of State for Employment v ASLEF (No 2), the Court of Appeal held that the policy, which was signed by every employee ‘saying that he will abide by the rules,’ was not in any way a term of the contract of employment but that it was, instead ‘only instructions to a man as to how he is to do his work.’ In the same case two other rule book terms and conditions were held to be ‘incorporated into the contracts of employment insofar as any of the terms and conditions respectively contained in those books are, on their respective true construction, contractual in character.’ Whilst the three judges of the Court of Appeal held

330 In Alexander v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286,[30], (per Hobhouse J)
331 See Chapter Three for further discussion on incorporation
332 [1972] 2 All ER 949
333 Ibid, 965 (Per Lord Denning ) and 979 (Roskill L.J. agreed)
334 National Union of Railwaymen, Conditions of Service, Conciliation Staff of British Railways, and ‘Associated Society of Locomotive Engineers and Firemen, Rates of Pay and Conditions of Service of Men in the Line of Promotion for Footplate Staff’
335 Ibid, 977-978 (Per Roskill LJ)
that the employees who prompted the 'work-to-rule' were in breach of their contract of employment, their reasoning was different and demonstrates the lack of consistency by the courts when attempting to set judicial precedent regarding the issue of whether a provision is intended to create a contractual obligation.

Lord Denning held that the 'work rules' were not terms that could be incorporated into the contract of employment. ‘They are only instructions to a man as to how he is to do his work’ and did not constitute terms of the contract. Nonetheless, there was ‘clearly a breach of contract first to construe the rules unreasonably, and then to put that unreasonable construction into practice.’ The employees' lack of good faith was therefore held to be a breach of the contract of employment. This may arguably be an early indication that a breach of contract accrues though an implied term, as well as a direct breach of the contract or one of its substantial terms. This is relevant to the question of voluntary promises, as will be discussed in Chapter Three and Six, where an argument can be made that a voluntary promise which is not itself enforceable as a contractual term, could give rise to a breach of contract where the employer breached the promise made in ways that destroy trust and confidence.

However, Roskill LJ argued that ‘The crucial question is not, however, what is intended or understood by the phrase 'work to rule', but whether what was

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336 Ibid, 965
337 Ibid, 965
338 See further Chapter Three, Para 3.4, and Six, Para 7.7-9, for discussion in relation to the Court of Appeal’s decision in French v Barclays Bank [1998] IRLR 646
directed to be done and in fact done involved a breach of the relevant terms, express or implied, of the contract of employment.\footnote{Secretary of State for Employment v ASLEF (No 2),[1972] 2 All ER 949, 979} Dissenting from Lord Denning's approach, he indicated that 'in the law of contract questions of intent are usually irrelevant in determining whether or not there has been a breach of contract.'\footnote{Ibid, 979} In his view, the employee could not rely upon an interpretation of the rule which was 'wholly unreasonable' to justify a breach of their duty to obey. In assessing when a term can be implied and, accordingly, intended to be binding, he noted that the correct alternative approach can be found in the well-known illustration of the 'officious bystander'\footnote{The ‘officious bystander’ test was initially introduced in the Court of Appeal’s judgment in Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206 for the test of implied terms.} where the test to imply that a term not expressly stated while the parties were making their bargain is, ‘if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'\footnote{Secretary of State for Employment v ASLEF (No 2),[1972] 2 All ER 949, 979, (per McKinnon LJ),}.'\footnote{See further Chapter Three below. In Deeley v. British Rail Engineering Ltd [1980] IRLR 147, it was held that the cry of “oh, of course,” must come from both parties and not just one of them. Also, the term must not only be obvious but must also be precise; Lister v Romford Ice and Cold Storage Co Ltd [1957] 1 All ER 125. See more recent A-G of Belize v Belize Telecom [2009] 1 WLR 1988, PC [ 21]}. This approach, however, is rarely used in relation to the test of incorporating unilateral or voluntary promises.\footnote{See further Chapter Three below. In Deeley v. British Rail Engineering Ltd [1980] IRLR 147, it was held that the cry of “oh, of course,” must come from both parties and not just one of them. Also, the term must not only be obvious but must also be precise; Lister v Romford Ice and Cold Storage Co Ltd [1957] 1 All ER 125. See more recent A-G of Belize v Belize Telecom [2009] 1 WLR 1988, PC [ 21]} According to Roskill LJ the ‘courts will only imply a term when it is so clear that the only reason why it has not been expressly included is because the parties thought the
need for the provision was self-evident. On this alternative ground he found that there was an implied term that the employee would not seek to interpret the rules ‘so as to disrupt the entire running of the railways system’. Whilst this approach appeared to imply a term in fact rather than in law, Buckley LJ, the third judge, held that there is an implied term in every contract of employment that ‘the employee must serve the employer faithfully with a view to promoting those commercial interests for which he is employed’. Buckley LJ's finding that the employee has a duty to cooperate implied within the contract was the one that generally became followed by the courts.

ASLEF has not moved on from the bilateral analysis approach; the three judges did not consider the issue of a rule-book's classification as an extraneous contract, but whether the provisions were capable of establishing contractual terms under the existing employment contract. The court found that the provisions were a mere reflection of managerial prerogative which were also limited by the contractual express terms. This means that the employer is restrained from requiring his employee ‘to do anything which lay outside his obligations under the contract, such as to work excess hours of work or to work

344 Secretary of State for Employment v ASLEF (No 2), [1972] 2 All ER 949, 979
345 Ibid
346 Ibid, 972
347 See for example, British Telecom. Plc. v. Ticehurst [1992] ICR 383, where the Court of Appeal held that an implied term exists in the contract of employment i.e., that the employee must faithfully serve his employer's interests; also Cresswell v. Inland Revenue [1984] IRLR 190, in which it was held that employees were obligated to adapt to new job requirements based on an implied term of co-operation.
an unsafe system of work or anything of that kind'.

Nonetheless, under an extraneous contract, the employee ‘must serve the employer faithfully with a view to promoting those commercial interests for which he is employed’.

This approach, according to Buckley LJ's view, promotes the goodwill and confidence between the parties, which should be protected.

It must be noted that the court's willingness to recognise the existence of implied terms within a contract of employment, and, as noted earlier, that express terms rest upon a large residue of legal restraints and principles, has been a major factor in the development of the implied duty of mutual trust and confidence.

The emergence of this duty and its continuous legal development, as discussed in Chapter Three, has been significantly attached to reliance theory, and the employee's right to protect its legitimate expectation arising upon the employers' voluntary promises.

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348 Secretary of State for Employment v ASLEF (No 2), [1972] 2 All ER 949, 972, (per Buckley).
349 Ibid, 972
350 See Chapter Six, Para 7.2-7.4, for discussion on the principle of irrationality.
352 See Para 3.4-3.5 below
353 French v Barclays Bank [1998] IRLR 646
(II) Custom and Practice

In *Quinn v Calder*[^354^], the employee attempted to enforce an enhanced redundancy payment, which was not normally paid automatically, but required a decision from higher management on each occasion. The court considered that intention, rather than consideration, was the decisive factor.[^355^] Considerable emphasis was placed upon the way in which the policy was communicated to the employee, and the manner in which it became known to them in order to hold binding the commitment made by the employer; no argument was made regarding the requirement of consideration. Thus 'the positive act of communication of the terms to the employees might well suggest an intention to be bound by them, which does not arise, or not with the same force, merely from the repeated acting upon those terms'.[^356^] The court was influenced by the EAT decision in *Duke v Reliance Systems*[^357^], in which it was considered that in the cases of implication due to custom and practice, consideration should be given to whether such practice or custom has been followed without exception for a substantial period, or the relevant policy unilaterally introduced by the employer has been drawn to the attention of the employees. The court in Quinn found that neither could be established in this case, and accordingly intention to be bound could not be implied.

[^354^]: [1996] IRLR 126
[^355^]: Ibid
[^356^]: Ibid, 128. See further argument on the application of objectivity and the distinction between bilateral contract and unilateral contract in Chapter Three and Four below.
[^357^]: [1982] IRLR 347
The case of the Court of Appeal in *Albion Automotive Ltd v Walker*\(^{358}\) offers another example of the court's tendency to examine the issue under the test of legal intention. Similar to the issue in *Quinn*, the case was also concerned with an enhanced redundancy payment in which an employee brought an action against their employer seeking enhanced redundancy payments on the basis that such payments had been made by the employer to other employees as a matter of practice. As in *Quinn*, neither party had argued the question of valuable consideration or the application of its requirement. In both cases intention, rather than consideration, was the main focus for determining the normative effect of the disputed provision.

In *Albion* the terms of the policy were communicated and drawn to the attention of the employees by their employer. The employer's conduct and practice created a legitimate expectation by the employee that the promised term would be enforceable. The Court of Appeal held therefore that the employer's voluntary promise which has been communicated by the employer in a manner consistent with an entitlement, created an expectation to the workers that those redundancy provisions were legally enforceable.

### 2.6 Conclusion

It has been noted in this chapter that the general position at common law is that a simple undertaking to confer a benefit on another is not enforceable unless all

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\(^{358}\) [2002] EWCA Civ 946
the formation requirements are met; offer, acceptance, certainty, the intention to create legal relations, and consideration. The orthodox theory of bargaining where consideration is needed to satisfy the test that a bargain is concluded between the parties has become an increasing doubt in employment law, where the question of creating contractual obligations concerns voluntary promises.  

Moreover, the promise, or act, of one party to a contract is, according to the classical doctrine, bargained for by the other party's promise or act where both parties exchange something of value. This approach, however, does not explain voluntary promises because promises are unilaterally offered by the employers in the absence of negotiation and an express agreement. Accordingly, developments in employment law have shown a readiness by the courts to step away from the strict application of the orthodox rules on formation in favour of a broader concept of consideration. The Court of Appeal's decisions in *Edmonds* and more recently in *Attrill* suggests that a practical benefit approach to the doctrine of consideration is adopted in employment law. The employer's offer of an enhanced provision is made upon the aim of achieving higher morale, an attractive working environment, better performance, less disputes amongst staff and lower staff turnover. Employees satisfy the rules of consideration upon their performance and their continuing to work. This development in employment law is highly relevant to the question of voluntary promises. It supports the

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359 Cf *Thomas v Thomas* [1842] 2 QB 851, and *French v Barclays Bank* [1998] IRLR 646

360 *Thomas v Thomas* [1842] 2 QB 851

361 This approach is adopted by most of the United States jurisprudence as explored in Chapter Five below.
argument that when an employer introduces a voluntary promise in a formal statement, consideration is presumed to be furnished.

This view regarding employment relationships is more practical, as it takes into consideration the unique dynamics of employment relations discussed in Chapter One above. Further, if the principle is one of practical benefit then consideration, it can be argued, would not add any test of value to formation and would not add any further element to the creation of contractual obligations. An employer who promises additional benefits to his employee if he works harder or finishes a task quicker will find practical benefit, at the very least, by being more certain that the employee will do their very best to achieve the additional benefit or reward and become more motivated.

This dictates that the question of intention, as argued above, is becoming the dominant test when identifying an enforceable commitment by the parties. While intention to create legal relationships is already presumed in the formation of an employment contract, as noted in Attrill, the question of post-formation promises is subject to a more intense scrutiny based on intention. Parties' intention to create a binding obligation remains the core focus of the English court to find an enforceable voluntary promise. As noted above, the line of case law provides that objective intention must be asserted when examining enforceability. The application of such a test, as will be examined in the next chapter, has not,
however, always guaranteed a coherent outcome.\textsuperscript{362} The issue is more complex when the employee relies upon the clear commitment unilaterally announced by the employer, but the implied intention may point at different directions.\textsuperscript{363}

Moreover, if it is accepted that the purpose of contract law is to protect parties' expectations,\textsuperscript{364} the orthodox application of the doctrine of consideration, as viewed in \textit{Stilk}, lacks the adequate tools that could correspond to those expectations.\textsuperscript{365} Employment relationships cannot be confused with sociable ones, and promises made under this relationship ought to be viewed on such an account.\textsuperscript{366}

It was argued above that a voluntary promise, where contract formation rules are accommodated and intention is objectively concluded, becomes a binding contractual term. An employee who relies on voluntary promises, however, notwithstanding the absence of objective intention, surely expects that the employers will respect their promises and the employees' dignity. In this situation the orthodox contract law governing the rules of creating binding obligations appears unequipped to recognise the employees' expectation on the promise, and the employer's need to protect their business efficiency. This

\textsuperscript{362} See next chapter. See e.g. \textit{National Coal Board v National Union of Mineworkers} [1986] IRLR 439; \textit{Grant v South-West Trains Ltd} [1998] IRLR 188; \textit{Malone and others v British Airways} [2010] EWCA Civ 1225

\textsuperscript{363} See Chapter Three below for discussion on \textit{Kaur v MG Rover Group Limited} [2005] IRLR 40; \textit{Malone and others v British Airways} [2010] EWCA Civ 1225

\textsuperscript{364} See Chapter One above

\textsuperscript{365} See further discussion the modern develop on legitimate expectation at Chapter Six below.

\textsuperscript{366} \textit{Attrill and Ors v Dresdner Kleinwort Ltd and Anor}, [2013] EWCA Civ 394
difficulty, as will be examined in the forthcoming chapter, has been addressed by recent developments in employment law, where a readiness by the courts to adopt reliance theory is becoming increasingly predominant. The difficulties of providing an appropriate balance to the parties' interests, wherein the expectation of the employees and the business efficiency are properly weighted, has been solved in some US states by adopting a unilateral contract approach. This possible adoption of a unilateral contract approach to the question of voluntary promises in the UK will be examined in Chapter Four. An alternative approach, in order to provide a better solution where contract law rules cannot be accommodated, is achieved by the principle of legitimate expectation. This will be argued in Chapter Six.
CHAPTER THREE

THE ENFORCEMENT OF 'VOLUNTARY' PROMISES IN ENGLISH EMPLOYMENT LAW
3.1 Introduction

This chapter will show that the enforcement of voluntary promises in employment law has been concluded through either a contractual approach - i.e. whether a term is incorporated into the contract of employment - or where the enforcement of promises would otherwise amount to a breach of the implied duty of trust and confidence. The contractual approach, as noted in the previous chapter, is governed by the rules of contract formation. This chapter will show that courts have not always been consistent when applying these principles, particularly when the circumstances of the case reveals that enforcing an employer’s commitment would ultimately cause significant or serious practical problems for an employer's business and its survival.\(^\text{367}\) In these situations, courts have strained the orthodox formation principles to allow the employer to depart from liabilities that might otherwise have arisen.

Conversely, when courts were faced with situations where commitments were not contractual under the orthodox contract law of formation - i.e. the employee does not have a contractual right to the enforcement but yet the employee has a legitimate reason that his expectation will be protected and honoured - they enforced the employer's commitment by means other than contract law, i.e. because the employer's departure from its promise would result in a breach of the implied term of trust and confidence.\(^\text{368}\)

\(^{367}\) See e.g. Hameed v Central Manchester University Hospitals NHS Foundation [2010] EWHC 2009; Malone and others v British Airways [2010] EWCA Civ 1225. See further Chapter Six.

\(^{368}\) French v Barclays Bank [1998] IRLR 646. See further below
Chapter Three: The Enforcement of 'Voluntary' Promises in English Employment Law

While recent developments have shown an increased recognition for both specific and unique types of contracts, as noted in Chapter One, it has been accepted that contracts of employment are not ordinarily the same as that of commercial contracts, due to the unequal bargaining power between the parties, and the emergence of the implied duty of trust and confidence. This recognition has not, however, explained or provided a clear and sophisticated approach to the entitlement that arises under voluntary promises in employment relations. Taking this into account, the principles regarding the question of entitlements that can be created from voluntary promises in employment law, and how courts have examined and applied the test of normative affect, this chapter will examine whether or not the current approach adopted in English employment law produces a satisfactory result, and leads to a coherent approach to the issue of voluntary promises and their legal effects.

The importance of these questions is that they do not only explore the complex issue of creating entitlements, but they also address the more conflicting issues of, on the one hand, business efficiency in maintaining managerial prerogative power to meet business needs, and, on the other, the protection of any rights or benefits which were legitimately relied upon by an employee because of the promise(s) made by an employer. In light of modern developments, as noted in Chapter One, the considerations of these pressing issues are increasingly urgent.

370 *Autoclenz Limited v Belcher and others* [2011] ICR 1157
371 *Malik and Mahmud v Bank of Credit and Commerce International SA* [1995] 3 All E.R. 545
372 This should not, however, undermine the duty of trust and confidence. See Chapter One for general analysis and Chapter Six in particular.
373 See Chapter One in which it was explained that there is a need for a coherent legal principle to the issue of voluntary promises to strike a balance between employees dignity and business efficiency.
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It will also illustrate that the dominant approach is unclear and incoherent, while seeking to find alternative possibilities.

3.2 Enforcement of Voluntary Promises

The general position in English employment law is that an employer's unilateral representations and promises outside the contractual framework, such as policy manuals, collective agreements and such, are generally regarded as expressions of managerial prerogative for which the employee has a duty to obey.\(^{374}\) For a term in these formal statements to become binding as opposed to managerial prerogative provision, English courts have viewed the correct test to entitlement as one under the analysis of aptness and the parties intention\(^ {375}\) - i.e., only terms which are 'apt' and intended for incorporation can create entitlements.\(^ {376}\) The test of aptness is addressed by asking whether the provision in question is one capable of and suitable for treatment as part of a contract.\(^ {377}\) This approach, however, has not produced a consistent and coherent application or outcome. As will be examined further, unless a promise or a representation has the characteristics of being 'apt' and capable of being incorporated into the employment contract, the employer may unilaterally exercise managerial discretion to change, alter or revoke its polices and representations,\(^ {378}\) regardless of the extent of any reliance of the employee upon the employer's promises or commitments. Accordingly, the question as to whether a provision is binding or a mere managerial policy rests, as

\(^{374}\) Secretary of State for Employment v A.S.L.E.F. (No 2), [1972] 2 All ER 949.

\(^{375}\) See Para 4.3 below

\(^{376}\) National Coal Board v National Union of Mineworkers [1986] IRLR 439

\(^{377}\) Alexander v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286

\(^{378}\) Except when such action was in breach of the implied duty to maintain trust and confidence or statutory entitlement. See Para 4.4 and Chapter Six below for further details.
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noted in the previous chapter, primarily upon the intention of the parties which must be viewed objectively.\(^{379}\) Where intention and aptness appear to point to different outcomes however, as will be considered below, English courts appear to normally weigh intention over aptness. The question of intention is judged by ordinary common law principles, as discussed in the previous chapter, where the general, traditional approach is that for a statement to be a 'sufficient statement of intention' it must show ‘that the parties have directed their minds to the question of legal enforceability and have decided in favour of legal enforceability’.\(^{380}\)

However, a distinction must be made between provisions which, by their wording, are merely aspirational or deal with matters of policy or the broader aspects of the employer's managerial prerogative and terms which affect the individual contract of employment. Recent developments restrict employers from abusing the rights granted under managerial power, i.e. even if not contractual rights.\(^{381}\) This is due to the development of the common law, most notably the implied duty of trust and confidence, and the failure to restrict the employer from exercising their rights, or in acting in an arbitrary or irrational way when undertaking a managerial decision, and thus undermining mutual respect.\(^{382}\)

This development means that enforcement may be created not merely through the formation of contractual rights, but also through other grounds which are not


\(^{380}\) National Coal Board v National Union of Mineworkers and others [1986] IRLR 439, 450, (per Lord Denning).

\(^{381}\) French v Barclays Bank [1998] IRLR 646.

\(^{382}\) See e.g Horkulak v Cantor Fitzgerald [2005] ICR 402; Keen v Commerzbank AG [2006] EWCA Civ 1536 followed by Humphreys v Norilsk Nickel International (UK) [2010] EWHC 1867. See Chapter Six, Para 7.3.1, below for further discussion on irrationality.
directly contractual rights, such as the indirect contractual right where abandoning a non-contractual promise may undermine the implied duty of trust and confidence. The courts' enforcement of voluntary promises on the basis of acquiring contractual normative effect or due to a breach of the obligation of mutual trust and confidence will be examined in turn below.

3.3 (A) Enforcement of Contractual Right

3.3.1 Overview

English courts tend to divide provisions that are unilaterally introduced by the employer into 'terms' which are contractual in nature, and other undertakings which are not. The test as to whether these provisions or voluntary promises can create any rights, or, in other words, whether they have the characteristics to become 'terms' of the contract, has been considered under the ordinary principle of bilateral contract analysis in which English law treats the whole issue as a question of incorporation. There may, however, be a lack of clarity regarding precisely where terms which have contractual normative effect end and where managerial prerogative begins. For example, employers are not normally entitled to unilaterally change the employees' contracted wages, working conditions and hours of work, however, an employer was nonetheless held to be acting reasonably and within its managerial prerogative power when, for example, in the circumstance of schoolteachers, the employers changed the performance

383 French v Barclays Bank [1998] IRLR 646
385 Robertson v British Gas Corp [1983] ICR 351
conditions and their weekly timetable of lessons.\textsuperscript{386} The employer was held to be acting within its managerial power without undermining the contractual employment relationship.

The question, in the case of voluntary promises, becomes more complex when an employer who introduces or announces provisions outside the original contract of employment argues that their promises of a redundancy policy\textsuperscript{387} or a bridging loan scheme\textsuperscript{388} for example, were not intended as binding but as a mere future aim or objective that is subject to managerial prerogative discretion. Employees, conversely, expect to receive benefits promised by their employers when they read and comply with the voluntary promises found in, for example, handbooks or manuals unilaterally introduced by the employer. They may have relied on these provisions and have a legitimate expectation that the promise will be honoured. Which one of the two parties' expectations should prevail is not always an easy question for the court to determine,\textsuperscript{389} as will be demonstrated further below.

3.3.2 The Question of Incorporation

The test as to whether a term of a document is appropriate to be incorporated into an individual's contract of employment was set out in \textit{Alexander v Standard Telephones}\textsuperscript{390}. The test of incorporation, as understood from \textit{Alexander}; is such

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{386} \textit{Sim v Rotherham Metropolitan Borough Council} [1987] Ch 216
  \item \textsuperscript{387} \textit{Kaur v MG Rover Group Limited} [2005] IRLR 40
  \item \textsuperscript{388} \textit{French v Barclays Bank} [1998] IRLR 646
  \item \textsuperscript{390} \textit{Alexander v Standard Telephones and Cables Ltd} (No 2) [1991] IRLR 286
\end{itemize}
\end{footnotesize}
that in considering whether a promise can create a binding entitlement, a court
must test the parties' intentions and the 'aptness' of the term.

This approach was summarised by Hobhouse J in the following terms: 391

Where a document is expressly incorporated by general words it is still
necessary to consider, in conjunction with the words of incorporation,
whether any particular part of that document is apt to be a term of the
contract; if it is inapt, the correct construction of the contract may be that it
is not a term of the contract. Where it is not a case of express incorporation,
but a matter of inferring the contractual intent, the character of the
document and the relevant part of it and whether it is apt to form part of the
individual contract is central to the decision whether or not the inference
should be drawn.

Although the court did not go any further to explain what 'apt' means in this
situation and did not provide any further guidance, subsequent cases have
attempted to provide a distinctive method for regarding when a term is appropriate
for incorporation 392. The principle that can be drawn from the case law regarding
how aptness should be determined suggests that the test is an objective one, and
that it need only be asked whether the term is sufficiently apt in scope. 393 As will
be seen below, the courts' approach to the question of the enforcement of voluntary
promises is considered normally by giving more weight to the intention of the
parties under the ordinary principle of contract law, without giving sufficient
attention to the unique nature of the long term contractual relationship between the
employer and employee, or the employees' legitimate reliance that the employers
are bound by their promises. 394

391 [1991] IRLR 286, [31]
392 National Coal Board v National Union of Mineworkers [1986] IRLR 439; Kaur v MG
Rover Group Limited ([2005] IRLR 40; and Keeley v Fosroc International [2006]
IRLR 961
393 Roseanne Russell “Malone and others v British Airways plc: Protection of
Managerial Prerogative?” [2011] ILJ 207, 209
394 Clark v Nomura [2000] IRLR 766. See further discussion at Chapter Six, Para 7.3,
below.
On finding a distinctive line regarding whether or not a term is appropriate for incorporation, *National Coal*\(^{392}\) drew a distinction between terms which are, by their nature, appropriate to be incorporated in the contract - known as 'substantive' terms - and those terms which, by their nature are 'inapt' to become enforceable by an individual's contract of employment. Terms which are substantive affect the individual contract and relate to an employee's working conditions including hours of work, payment and holiday entitlement,\(^{395}\) terms which deal with disciplinary and grievance procedures would also be apt.\(^{396}\) Thus, a collective agreement entitling employees to enhanced severance payments in the event of termination of their employment on the ground of redundancy was found to be a substantive term which was incorporated into the employment contract.\(^{397}\) Terms that do not affect the individual contract of employment, but merely deal with the broader managerial aspects of the employer-employee relationship, are managerial prerogative and inapt for incorporation.

The principle of incorporation was considered by the Court of Appeal in *Kaur v MG Rover Group Limited*,\(^{398}\) which is considered below. According to the Court of Appeal the test involved considering whether the nature of the words are individualistic or collective; provisions contingent on the cooperation of the workforce as a whole or solely on a collective basis are not objectively intended to be incorporated into the individual contract.\(^{399}\) Whilst the court is consistent

\(^{395}\) *National Coal Board v National Union of Mineworkers* [1986] IRLR 439. The argument made by Mr Dehn, for the defendant, and accepted by Scott J as a ‘sound one’.

\(^{396}\) *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2010] IRLR 702; *Botham v Ministry of Defence* [2010] All ER (D) 264 (Mar) HC

\(^{397}\) *Lee v GEC Plessey Telecommunications* [1993] IRLR 383

\(^{398}\) [2005] IRLR 4

\(^{399}\) Ibid
regarding the test being objectively rather than subjectively determined, the distinction has not always been easily determined, as will be shown below.\textsuperscript{400}

Furthermore, the distinction between individualistic and collective provisions can sometimes be difficult to determine. For example, in \emph{Alexander}\textsuperscript{401} it was held that the 'last in, first out' method of redundancy selection under a collective agreement was not capable of being incorporated into the employment contract - however, in \emph{Anderson v Pringle of Scotland Ltd}\textsuperscript{402}, the Outer House, which dealt with similar facts, held that the term \textit{was} incorporated into the contract of employment. Furthermore, the issue in question here, i.e. length of service, if applying the \textit{National Coal} principle, was indeed one of a substantive term.

Subsequent guidance from the Court of Appeal in \emph{Keeley v Fosroc International Ltd}\textsuperscript{403} provided that a provision of a voluntary promise should be considered by its importance and its effect on the individual when determining whether it should be incorporated into an individual's contract of employment.

Accordingly, in contrast to provisions which are declarations of aspiration or policy, a provision which amounted to a contractual undertaking and/or is part of the employee's remuneration package, ‘even if couched in terms of information or explanation, or expressed in discretionary terms, may still be apt for construction as a term of his contract.’\textsuperscript{404} A provision which deals with ‘redundancy, notwithstanding statutory entitlement, is now a widely accepted feature of an employee's remuneration package and, as such, is particularly apt for incorporation

\textsuperscript{400} See \textit{Malone and others v British Airways} [2010] EWCA Civ 1225; [2011] IRLR 32; \textit{Attrill and Ors v Dresdner Kleinwort Ltd and Anor} [2013] EWCA Civ 394
\textsuperscript{401} \textit{Alexander v Standard Telephones and Cables Ltd} (No 2) [1991] IRLR 286
\textsuperscript{402} [1998] IRLR 64
\textsuperscript{403} [2006] IRLR 961.
\textsuperscript{404} Ibid, [34].
by reference.’\(^{405}\) In *Kaur*, however, this was not conclusive; a redundancy term which is individualist and accordingly appears apt to be incorporated may still be unenforceable for the sake of objective commitment. *Keeley* appears to contrast in principle with *Kaur*.

Furthermore, a review of the method of the courts’ decisions on how aptness should be determined has not shown any consistent result when applying the test of *National Coal*’s ‘substantive term’ as the appropriate guideline.\(^{406}\) This is illustrated when a provision that is a managerial prerogative in nature, is nonetheless capable of granting rights or imposing contractual obligations upon an individual employee.\(^{407}\) For example, where should a promise of an enhanced disciplinary or redundancy policy be placed in the distinction between individualistic and collective? An employer may argue that the former is expressing values that are of a managerial prerogative nature due to any entitlement being dependent on the activities of others in the workforce, whereas the employee could argue that the enhanced procedure is a substantive term affecting the individual employee and providing further job security.

This difficulty is demonstrated by the decision of the Court of Appeal in *Kaur v MG Rover Group Ltd*\(^ {408}\) in which the court considered whether promises to make

\(^{405}\) Ibid [34]
\(^{406}\) *French v Barclays Bank* [1998] IRLR 646; *Hameed v Central Manchester University Hospitals NHS Foundation* [2010] *Attrill and Ors v Dresdner Kleinwort Ltd and Anor* [2013] EWCA Civ 394

\(^{407}\) In *Keeley v Fosroc International* [2006] IRLR 961, the Court of Appeal held that a provision in the employers’ staff handbook, which provided an enhanced redundancy payment to the employee when dismissed on grounds of redundancy, was apt for incorporation into the employee’s contract of employment. Compare *Kaur v MG Rover Group Limited* [2005] IRLR 40, with *Malone and Ors v British Airways Plc* [2010] EWCA Civ 1225. See further Chapter Six below

\(^{408}\) [2005] IRLR 40
no compulsory redundancies in a collective agreement were binding. The two provisions in question were in the workplace collective agreement entitled 'The Way Ahead Partnership Agreement’, signed in 1997, and 'Job Security 2.1'. The first provision stated ‘Employment with the company is in accordance with and, where appropriate, subject to… collective agreements…’ and the second, which contained capital letters said: ‘2.1 It will be our objective to ensure that the application of the 'Partnership Principles' will enable employees who want to work for Rover to stay with Rover. As with the successful introduction of 'Rover Tomorrow-The New Deal' THERE WILL BE NO COMPULSORY REDUNDANCY’.\(^{409}\)

The provision, when examined against the *National Coal* test of aptness, appears to be relating to remuneration package, i.e. redundancy, which is individualistic. This should, strictly speaking, satisfy the test of aptness, however, the courts were influenced by the employer's argument that its provisions were not intended to be incorporated and, if they were, the court could not restrain the employer from terminating the employment of its workers. The Court of Appeal on the examination of objective intention held that a 'no compulsory redundancy' provision in a collective agreement was not incorporated into the employment contract on the grounds that the agreement was only expressing an aspiration rather than a binding contractual term.\(^{410}\) The reason for this conclusion was based on the language of the provisions. The court was influenced by the language and the way the provision was drawn by giving more emphasis to the particular wording design without taking into account that the workers could be vulnerable.

\(^{409}\) Original emphasise, ibid.
\(^{410}\) Ibid, Para [32]-[33]
in their rhetoric and linguistic skills. Workers, who are normally less skilful than lawyers in using legal terminology and in matters of drafting documents and agreements, may think that they have managed to secure a good package from their employers and have won a no-compulsory redundancy deal, but yet the employer can still escape liability and ignore the workers expectations. This means that employers, who normally have easier access to advice on drafting documents, would be allowed to escape liability unless the workers and their representatives have the skills of a lawyer, or appreciate the significance of particular words. This results in weighting the law in favour of the employer and against the vulnerable workers, and gives rise to the question about its adequacy in restraining abuse of power. This will be examined further in Chapter Six, in which it will also be shown that legitimate expectations can provide appropriate protection to the workers' reliance upon the employer's undertaking, while accepting that stepping back from it can be lawful with appropriate justification.

The court refusing the enforcement of the employer's voluntary promises was based not on the promise being inapt, but on other grounds deduced from the language of the provisions that any entitlement would depend on the activities of the workforce as a whole, and therefore could not have been objectively intended by the employer to be incorporated into individual contracts of employment. Although the provisions in question were made expressly in capital letters which defines a 'substantive term' under National Coal's test, Kaur nonetheless refused its incorporation.\footnote{See also the discussion on Malone and others v British Airways [2010] EWCA Civ 1225, at Para 4.3.3 below} Parker LJ, who gave the leading decision, stated ‘I can accept that 'The Way Ahead' does generally have the character of a bargain, struck
between the appellant and the unions, and that what is said in it about compulsory redundancy reflected the statements about more flexible working by the workforce.\footnote{Ibid at [31]} This was not, however, sufficient to bind the parties as ‘It is what one would expect of a collective agreement, which as both sides accept is an agreement but not something which is in itself normally enforceable at law.’\footnote{Ibid at [31]} The court appears to rely in part on the collective status of the provisions in the agreement to determine whether it is intended to be incorporated into the individual contract.

This case illustrates the courts' tendency to treat intention as the conclusive or dominant element on whether a term is capable of creating an enforceable commitment. Even if the provision were of such a nature to support the finding that it was apt, the issue of creating a binding obligation can only be concluded by considering the intention of the parties to create a binding obligation. In \textit{Kaur}, the question of intention can ‘be resolved by looking at the words relied on in their context’.\footnote{Ibid [32]} The language contained in the provisions which were in the future tense and ‘describes enabling employees who want to work for Rover to stay with Rover as 'an objective’ meant that it was only stating what it aimed and hoped to achieve, rather than an immediate commitment of a binding obligation. Furthermore, ‘paragraph 2.3 of 'The Way Ahead' is relevant, as it is the positive counterpart of the statement about no compulsory redundancy’. These features ‘indicate that those words are expressing an aspiration rather than a binding contractual term.’\footnote{Ibid [32]}
Chapter Three: The Enforcement of 'Voluntary' Promises in English Employment Law

The case provides a telling example of the court’s adherence to an exchange model where mutuality of obligation and intention has been generally assessed by the traditional contract law rules rather than the parties' reliance on the commitment, which allows broadened flexibility. This heavy reliance on the strict, traditional contract formation as seen in Kaur resulted in a position where there was an incoherent approach with other lines of cases, particularly the National Coal's 'substantive term' guideline as discussed above. The case provides a clear indication that courts tend to rely upon the test of intention as the determining factor when provision, even if capable to be apt, is at stake.

The courts' emphasis on the test of intention to create an enforceable commitment rather than aptness can also be demonstrated by the findings of the Court of Appeal decision in Grant v South West Trains Ltd in which it was held that an equal opportunities policy, which provided that no one was to receive less favourable treatment on the grounds of sexual preference, was not capable of being incorporated into the employee's contract of employment and hence creating an enforceable entitlement. As noted in the previous chapter the court held that the provision of the voluntary promises was not objectively intended to create a binding obligation. To come to its conclusion, the court was also influenced by the manner in which the policy was announced and circulated, and the connection of the provision to the individual contract of employment - the formal status of the policy and the language of the policy were held to be idealistic. These elements or factors were ‘indicative that no contractual rights were in the mind of the

416 National Coal Board v National Union of Mineworkers [1986] IRLR 439
417 [1998] IRLR 188
employer\textsuperscript{418} and that the commitment was a mere statement of policy rather than of a contractual obligation. The test of whether the promise was sufficiently certain to constitute a commitment, and the way it was communicated to the employee, resembled the objectivity test, as noted in the previous chapter, where courts seek to identify the intention of the parties by seeking evidence other than the employer's subjective motivation. Thus, objective intention can be asserted not only by the language of the provisions but also by the way it is announced and the manner it is promulgated.

The court was influenced by the approach adopted in \textit{Alexander v Standard Telephones and Cables Ltd} (No 2),\textsuperscript{419} in which Hobhouse J attached weight to the actual wording of a policy to determine its appropriateness for incorporation. He considered the clause to be ‘too weak’ and that it needed some ‘cogent’ indication that it was intended to be incorporated into the contract of employment.\textsuperscript{420} The fact that the document expressly stated that it was only a ‘procedure’ undermined its certainty and provided further grounds that it was not intended to create any entitlement. Curtis J was much influenced by the status of the document, since it was a policy document; he found that this was of itself incompatible with the intention to create legal relations.\textsuperscript{421}

The court's conclusion in \textit{Grant} was further restrained by the ordinary contractual approach. The strict English rules on the construction of enforceable promises, where vital importance is attached to the document itself and its formal status,

\begin{itemize}
\item \textsuperscript{418} Ibid, (Curtis J), [14]
\item \textsuperscript{419} [1991] IRLR 286
\item \textsuperscript{420} Para 34
\end{itemize}
were conclusive in that the employer did not intend that the policy created an entitlement. The court was much influenced by the bilateralism approach when concluding that intention was not objectively found in the parties' mutual meeting of minds. This reluctance to bilateralism has resulted, as noted by Hough and Spowart-Taylor, in the absence of given sufficient weight to ‘the argument that the employer could be bound by a promise which it had not actually revoked or amended. In refusing to consider this point Grant in effect treated the promissory words as illusory.’ As will be examined in Chapter Six, an appropriate balance can be achieved by giving sufficient weight to the principle of legitimate expectation.

This brings matters to the question about the courts' consistent application to the objectivity test and the question of what creates an enforceable commitment. This will be considered in the next paragraph.

3.3.3 Development of the Test of Incorporation

It was noted above that the question of enforcement has been considered under the test of incorporation; this is considered by reference to the parties' intentions and the 'aptness' of the provision to constitute a normative effect and therefore form part of the contract of employment. As seen in *National Coal and Kaur*, the test involves considering whether the provision, on the basis of its general nature, is either collective or individualistic. This question of enforceable commitment, as noted in *Grant*, should be determined objectively, rather than by the subjective

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423 See Para 4.3.2 above
intention of the parties. The court's recent decision in *Malone and others v British Airways plc.*\(^{424}\) However, has gone beyond those considerations and has taken the requirement of incorporation to another level.

The emphasis on the 'objective intention' approach to assert a binding commitment, as noted in the example cases of *Kaur* and *Grant*, has been undermined by the more recent case of *Malone and Ors v British Airways Plc*\(^ {425}\), where the Court of Appeal, which was concerned with the question of incorporation, concluded that a commitment to minimum staffing levels was in this case not enforceable. In *Malone*, the collective undertaking regarding crew complements could not practicably be a term of the individual contracts of employment. *Malone* differed from *Kaur* in its acceptance that the provisions regarding staffing levels could create an obligation in the individual contracts whereas in the case of *Kaur* it did not.

Furthermore, in the case of *Malone*, the question of the collective nature of the term was influential in the court's finding of the parties' intention and aptness. In this case BA provided each of its employees with a contract expressly incorporating the collective agreements which were reached between BA and Unite, insofar as they were found to be applicable. Following significant budgetary constraints and massive operating losses BA decided to restructure staff duties in order that BA's service standards could be maintained, whilst its costs and the number of on-board crew employees could be reduced. Such restructuring by BA would reduce the number of cabin crew on their planes and although the level would remain above that which is required by law, it

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\(^{424}\) [2011] IRLR 32  
\(^{425}\) [2011] IRLR 32
would fall below the level stipulated in the collective agreement. An injunction to prevent BA from varying the crew complement provisions was sought by a BA employee in the High Court on the basis that BA would otherwise be in breach of their contractual terms.

Attention was drawn to a 'disruption agreement' that provided for compensation to be received by crew flying with one less member during disruptions. Section 7.1 of the collective agreement entitled, 'Minimum Planned Crew Complements' stated: ‘All services will be planned to the current industrially agreed complements for each aircraft type. Future crew complements will continue to take into account in-flight product and cabin crew rest requirements.’

The High Court dismissed the employee's claim. However, on appeal, the question before the Court of Appeal was whether BA's unilateral reduction of crew complements, below the level negotiated in a collective agreement, amounted to a breach of an individual's contract of employment.

At the Court of Appeal the claimants argued that crew complements were so substantially tied to the working conditions of individual employees that it pointed towards the conclusion that the collective provisions were apt to be incorporated into the individual contract of employment. BA, however, argued that the provision was not intended to apply to every employee but that the obligation was only owed collectively. It was argued that the intention of BA could not have been for an aircraft ‘... to be grounded at the will of one or two

426 Ibid
uncooperative members of staff who refused to board and work if the aircraft was not to carry the full agreed crew complement.\footnote{Ibid, [39]} The Court of Appeal concluded that the parties did not mean such terms to be individually enforceable. Smith LJ, who gave the leading judgment with which the other members agreed, found the issue to be difficult as the commitment to minimum staffing levels was ‘intended partly to protect jobs and partly to protect the crews, collectively, against excessive demands in terms of work and effort’.\footnote{Ibid} While he accepted that the provision may have been apt for incorporation, applying the objectivity test to what ‘the parties must be taken to have intended the provision to mean, I am driven to the conclusion that they did not mean this term to be individually enforceable.’\footnote{Ibid} This subjective element to the objectivity test was influenced, per Smith LJ, by the 'disastrous consequences' for BA if the provision was individually enforceable. ‘What matters is that, if section 7.1 is individually enforceable … the effect could be to delay or even prevent the departure of a flight.’\footnote{Ibid} Furthermore, ‘if three or four crew members were individually to refuse to fly with a reduced crew complement’ then BA would not be able to roster a flight without finding replacements, and likely to be at very short notice. Any attempt by BA to roster its flight ‘with a crew complement less than the minimum legal requirement, there would be a breach of the law and probably a breach of the employer's duty to provide a safe system of work and/or a breach of the implied term of trust and confidence.'\footnote{Ibid}
Whilst BA accepted that a flight with less than the legal minimum number of crew would be likely to be a breach of the employer's duty to provide a safe environment of work and could also be a breach of the implied duty of trust and confidence, any claim for such a breach would be made by the individual employee. The question which must therefore be considered is why the Court of Appeal, which accepted that the provision could create an obligation to an individual employee's contract, concluded that such incorporation was not appropriate in this case. The answer lies in the court's approach to the question of intention, and whether the parties could have objectively intended the terms to be contractually enforceable. The court found that the parties could not have intended to give the term a normative effect given the 'disastrous consequences' for the employer's business. Under what standard the intention of the parties should then be assessed when considering the aptness of a voluntary provision? This issue is considered in the next paragraph.

3.3.4 The Test of Objectivity revisited

It was noted above that the question of whether a promise can be incorporated into the contract of employment has normally been considered by the objective intention of the party to create a binding commitment. In Kaur, for example, the reference to the future was taken by the court to be a clear indication that the promise was not binding, whereas in Grant the way the provision was introduced was found to be an indication that no objective intention was made.

In Malone the Court of Appeal held that if the provision of a voluntary procedure, which prima facie is capable of incorporation by reference, would result in a
negative consequence to the business, it cannot be incorporated into the contract of employment. as such a provision would not be the objective intention of the party. In other words, when considering the objective intention of the parties to a provision made in a voluntary document, the court must take into consideration the legitimate interest of the business and the provision should not cause a 'disastrous consequence'. The court's determination has been subjected to powerful criticism, as it appears to have interpreted 'aptness' as 'appropriateness'. It may also undermine the stability of the legal approach, and the objectivity and subjectivity approaches, in order to determine the parties' intention regarding a provision.

BA had successfully argued that the commitment to minimum staffing levels was not intended to apply to every employee individually, but was only owed collectively. This argument is an important illustration of the distinction between a 'substantive term', which is individualistic, and terms which are by their nature collective. The court was influenced by the distinction as it appears in the leading judgment of Smith LJ, who concluded that the provision did not mean ‘to be individually enforceable’. To come to this conclusion, however, Smith LJ noted the risk to BA if ‘individual crew members could, with impunity, refuse to fly with a reduced crew complement’. If the parties were confronted with such an issue at the time of their ‘negotiation, they would immediately have said that it

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434 Roseanne Russell
435 See Chapter Three, Para 3.5, above.
436 See Para 4.3.2 above.
437 Malone and others v British Airways [2011] IRLR 32 at 39
438 Ibid [57]
was not intended\textsuperscript{439} for their terms to have such an effect. Whilst the court accepted that this was merely theoretical, as no employee had refused to work when 'under crew',\textsuperscript{440} it did not explain why it went beyond the reality of the industrial relationship to test the intention by an extremely hypothetical and rather artificial approach.\textsuperscript{441}

The finding of \textit{Malone} seems ‘to judge the effect of incorporation from the viewpoint of the employer.’\textsuperscript{442} As Russell noted,\textsuperscript{443} there are significant problems with this approach. The authority of Malone appears to depart from the principle of contract law formation rules, as noted in Chapter Two, which has been adopted for a lengthy period in employment law. The court, by imposing a rather subjective approach, is implying that a provision cannot be relied upon at face value.\textsuperscript{444} This would result in undermining the aim of statutes and common law, as noted in Chapter One, to restrain the employer's abuse of power.\textsuperscript{445} It rather leaves employees with uncertainty as to the effect of terms provided unilaterally to them whether in a manual, handbook or collective agreement. In other words, an employee would not be able to rely upon any express term that provides security or benefits in the event that the court could overturn the enforceability of such a term, by looking beyond its expressed meaning if it were found to be against the business's interest. This would bring the entire aim of Gibbons' report, as discussed earlier,\textsuperscript{446} to a halt and render any promises made by an employer in

\textsuperscript{439} Ibid [62]
\textsuperscript{440} Ibid
\textsuperscript{441} Roseanne Russell “Malone and others v British Airways plc: Protection of Managerial Prerogative?” [2011] ILJ 207, 211
\textsuperscript{442} Ibid, 212
\textsuperscript{443} Ibid
\textsuperscript{444} Ibid at 212
\textsuperscript{445} See also Chapter Six below
\textsuperscript{446} See Chapter One, Para 2.1, above
formal statements as illusory;\textsuperscript{447} ‘at a wider societal level, employees may question the point of collective bargaining, leading to a diminution in union membership.’\textsuperscript{448} This point was also shown in \textit{Kaur} above

where many long term, traditional working practices were reluctantly abandoned by workers, the quid pro quo for which was 'no compulsory redundancies' - an undertaking which turned out to be worthless.

Furthermore, this extended objectivity approach\textsuperscript{449} appears to depart from a previous line of cases and proposes ‘that the courts can look beyond the words of the collective agreement to question what a party 'really' intended in circumstances where a particular term appears at odds with, or inconvenient to, a party's interests.’\textsuperscript{450} This is a mere subjective approach to the meaning of the promise, one which is contrary to the orthodox, objective approach.\textsuperscript{451}

Russell was aware that these 'risks are not, however, one-sided.'\textsuperscript{452} Allowing a subjective approach to test what the employer really intended can, especially during the course of collective bargaining, be a safeguard to depart from its promises where enforcement causes 'disastrous consequence' for being contrary to what the employer really meant. The question of what the employers really meant and how would an employee know this bring back the test of intention as noted by

\textsuperscript{447} See further discussion on reliance theory at Chapter One, Para 2.3.2, above.
\textsuperscript{448} Roseanne Russell “Malone and others v British Airways plc: Protection of Managerial Prerogative?” [2011] ILJ 207, 213
\textsuperscript{449} See discussion on the test of objectivity at Chapter Two, Para 3.5, above.
\textsuperscript{450} Roseanne Russell “Malone and others v British Airways plc: Protection of Managerial Prerogative?” [2011] ILJ 207, 212
\textsuperscript{451} This approach was rejected by the recent Court of Appeal decision in \textit{Attrill v Dresdner Kleinwort Ltd} [2013] EWCA Civ 394, [2013] IRLR 548 as discussed in Chapter Four, Para 5.3-5.4, below. See Chitty on Contract, [2-003]
\textsuperscript{452} Roseanne Russell “Malone and others v British Airways plc: Protection of Managerial Prerogative?” [2011] ILJ 207, 213
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Lord Hoffman's in *Investors Compensation Scheme Ltd v West Bromwich Building Society*\(^{453}\) which has been examined in Chapter Two.\(^{454}\)

Furthermore, it would also cause uncertainty to voluntary promises relied upon by the employee and might render promises illusory, increasing the amount of disputes between the parties. The ‘resultant risk to employers is that employees might respond by using their unions for less co-operative measures than bargaining’.\(^{455}\)

As will be discussed in Chapter Four, an alternative solution to this controversy could be achieved by allowing a different reading of the Court of Appeal's decision outside the strict rules of the orthodox contact law. A firm adoption of the principle of legitimate expectation incorporated from public law would mean that when a voluntary promise made by the employer creates legitimate expectation, but it cannot be a term incorporated into the contract of employment due to, for example, a question of intention, the employer cannot resile from it without appropriate justification. This approach is more adequate and serves in a more sophisticated way to respect the employee's dignity and legitimate expectations, and yet allows the employer to revoke their promises when business survival is at stake. Such possibilities will be fully examined and addressed in Chapter Six.

In conclusion, the court's adherence to the bilateral approach appears to weigh heavily on the intention to create a contractually-binding obligation. The test adopted by courts rests on objectivity rather than whether there has been an

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\(^{453}\) [1998] 1 WLR 896

\(^{454}\) See Chapter Two, Para 3.5 and 3.5.1-2, above.

\(^{455}\) Roseanne Russell “Malone and others v British Airways plc: Protection of Managerial Prerogative?” [2011] ILJ 207, 213
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objective commitment made by the employer. Conversely, Malone appears to depart from the general objectivity approach at the cost of legal coherence.

In the recent Court of Appeal decision in Attrill v Dresdner Kleinwort Ltd\(^{456}\), the court took a rather unilateral contract approach to the question of enforcement. This approach, which will be examined in the next chapter, recognises that the emphasis on the objective commitment rather than the intention of the parties is a more appropriate approach to determine binding obligation. The court in Attrill relied on the finding of Smith LJ in Judge v Crown Leisure Ltd\(^{457}\) in which she expressed the view that in the context of an employment relationship there is no issue of an intention to create legal relations; all that is required is the use of sufficiently determined words to create a binding obligation. As will be seen in Chapter Five, this approach resembles the US approach as adopted by the Supreme Court of Minnesota in Pine River State Bank v. Mettille,\(^{458}\) where the court considered the question of whether a promise in a handbook can create a binding obligation under unilateral contract analysis. A promise ‘if in the form of an offer, and if accepted by the employee, may create a binding unilateral contract.’\(^{459}\) For a term to be binding the court is not as conclusive regarding the mutual intention of the parties, but is when regarding the more cohesive test of whether an objective comment has been made to confer a valid offer. The possible

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\(^{456}\) Also known as Dresdner Kleinwort Limited and Anor v Attrill and Ors, [2013] EWCA Civ 394, [2013] IRLR 548. In this case the Court of Appeal considered whether an employer was contractually bound to pay bonuses to employees from a guaranteed bonus pool announced at a staff meeting with the aim of retaining staff at a time of uncertainty. see further discussion on the case at Chapter Four, below.

\(^{457}\) [2005] IRLR 823

\(^{458}\) 333 N.W.2d 622 (1983); see also Hamann v. Park Nicollet Clinic, 792 NW 2d 468 – (Minn2010), Court of Appeals.

\(^{459}\) Ibid, 627
adoption of unilateral contract model by English courts will be examined in the next chapter, and the US approach will be considered in Chapter Five.

3.4 (B) Indirect Enforcement

3.4.1 Overview

It was noted in Chapter One that there is an increase in the courts' recognition of the need to maintain a just balance between the employers' right to exercise an express term on the one hand and the implied duty not to breach the mutual trust and confidence when exercising such rights on the other. While this approach is one unique feature of the employment contract, it has also highlighted the question regarding the extent of managerial prerogative that the employer may exercise, to cope with emerging business needs, in the absence of such express contractual rights. The orthodox view was once that an employer was entitled, where there was an express term, to exercise that contractual authority as they pleased, and the general law was that reliance on an implied term cannot override a mutually agreed term. This view has changed, however, after modern developments in common law and following the introduction of employment law

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462 Nelson v British Broadcasting Corp [1977] IRLR 148. However, see Bank Ltd v. Akhtar [1989] IRLR 507 in which Knox J [512] stated: . . . there may well be conduct which is either calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, which a literal interpretation of the written words of the contract might appear to justify, and it is in this sense that we consider that in the field of employment law it is proper to imply an overriding obligation [of trust and confidence] which is independent of, and in addition to, the literal interpretation of the actions which are permitted to the employer under the terms of the contract.
legislation. Terms conferring discretion must, at common law, be exercised rationally and in a manner that does not undermine the duty of trust and confidence.\textsuperscript{463} In \textit{United Bank Ltd v Akhtar},\textsuperscript{464} the employer's express right under a mobility clause, without allowing or giving the employee reasonable notice to move, entitled the employee to leave his employment and claim constructive dismissal for breach of trust and confidence.

Nonetheless, statute places some restrictions on the freedom of the parties to negotiate terms of employment where express terms unreasonably excluding rights or restricting liability will be avoided,\textsuperscript{465} such as waiving the right to receive the minimum wage,\textsuperscript{466} limiting liability for negligence\textsuperscript{467} or excluding rights under health and safety legislation.\textsuperscript{468} Accordingly, contractual freedom in modern employment law is now governed by statute, and modified by the common law.\textsuperscript{469}

However, whilst legal obligations upon the parties can only arise from prior mutually agreed terms, wither expressed or implied, an employer's power under managerial prerogative is inherent in every contract of employment.\textsuperscript{470} This is a central element in an employment relationship and gives the employer, in the

\textsuperscript{464} [1989] IRLR 507
\textsuperscript{465} See e.g. Health and Safety at Work Act 1974; EU Directive 76/207/EEC (Equal treatment of men and women). See also Brigden v American Express Bank Ltd, [2000] IRLR 94 (where the High Court ruled that the Unfair Contracts Act 1997 can be applied to terms of employment).
\textsuperscript{466} The National Minimum Wage Act 1998; The National Minimum Wage Regulations 1999
\textsuperscript{467} The Unfair Contract Terms Act 1977
\textsuperscript{468} Health and Safety at Work Act 1974
\textsuperscript{469} E.g. French v Barclays Bank [1998] IRLR 646; Clark v Nomura [2000] IRLR 766
absence of contractual limitation, a unilateral power to make decisions to operate and manage their business. This may include amendments and even revocations of any policy or benefit the employer had promised its employee, as long as they were not contractual. This triggers the question regarding the extent to which modern employment law is prepared to go in order to set limits on an employer's managerial power so as not to undermine the implied duty of trust confidence. This question highlights the central dilemma of respecting an employee's dignity which will be considered in the next paragraph.

3.4.2 The Implied Duty of Trust and Confidence

It was noted above that the enforcement of voluntary promises is examined under contractual principles by assessing whether a provision is apt and intended to be incorporated into the employment contract. However, as will be examined below, a unilateral promise may acquire normative effect, not only through a direct contractual right, but on the grounds that a breach of the promised provision will amount to a breach of the obligation of mutual trust and confidence. The enforcement in this situation is not due to the creation of a contractual right of binding terms by relying upon the traditional contract law formation, but due to the indirect contextualisation of the promise where an employer's departure from their promises, which employees legitimately relied upon, will result in a breach of the implied term. This development is influenced by principles derived from legitimate expectations and/or on the basis that the employer will not exercise their prerogative powers inequitably.471

471 See *French v Barclays Bank* [1998] IRLR 646; *Clark v Nomura* [2000] IRLR 766
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The development of employment law, as noted in Chapter One, gave the recognition that the employment relationship is unique, as one that 'creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable.'\[^{472}\]

The development of the implied duty of trust and confidence is the most notable example of this trend in employment law. In the leading case of *Malik v BCCI*\[^{473}\], the House of Lords unanimously recognised that the term of mutual trust and confidence would be implied into the contract of employment at large as a necessary incident of the employment relations. Lord Steyn said the evolution of the implied obligation is a fact, and continued ‘I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.’\[^{474}\]

Lord Nicholls referred to the implied term as an ‘obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.’\[^{475}\]

Brodie noted that following the decision in *Malik*, the implied obligation became entrenched in the common law of the contract of employment where ‘the personal element in employment is reflected in the content of the employment contract.’\[^{476}\]

He noted the implied obligation ‘acknowledges the human factor in employment relations by promoting the dignity of the worker.’\[^{477}\] This indicates that a normative development of the implied term led to greater recognition of the notion

\[^{472}\text{Malik v BCCI [1998] AC 20, 37 (per Lord Nicholls).}\]
\[^{473}\text{Ibid}\]
\[^{474}\text{Ibid at 622}\]
\[^{475}\text{Ibid at 610}\]
\[^{477}\text{Ibid}\]
that employees' reliance upon the implied term (that the employer will not act in a way that undermined his dignity or breach his genuine expectation) must be protected. Taking this background into account, would this provide for the notion that an employer's voluntary promise is enforceable under the employee's legitimate expectation that the employer will not act in breach of the implied duty?

The development of cases involving the duty of trust and confidence, as noted in Chapter One, have shown how rooted the implied duty has been to reflect on the wide range of situations it has covered. Indeed, as noted by Brodie, the development of the duty has shown a visible influence of the term on both stages: the formation of the contract and at the stage of termination.

The Court of Appeal decision in *French v Barclays Bank* has provided another scope of greater development. In this case it was accepted that the obligation of mutual trust allowed the legitimate expectations of the parties to be given legal force. The enforcement of the employer's promise was not the result of the strict application of the exchange theory of contract law in creating contractual obligation, but instead the reliance of the employee on the promise which gave rise to the legitimate expectations.

What makes this case even more remarkable is the court's willingness to accept that a promise made in an employment relationship ‘was in no way intended to be a commercial arrangement’ and hence could not be treated within a strict contract formation under the concept of the free bargaining theory. A promise

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478 e.g. *Transco plc v O’Brien* [2002] EWCA Civ 379
479 e.g. *Mehmud and Malik v Bank of Credit and Commerce International SA* [1998] AC 20; and *Mallone v BPB Industries plc* [2002] EWCA Civ 126
481 Ibid, 648
given in an employment relationship, which is unique in its nature, must be considered in light of the uniqueness of the relationship.\textsuperscript{482}

In \textit{French}, the court was concerned with whether an employee's reliance on clear and unambiguous promises, which appeared in a manual and had applied to other employees in the past, was capable of creating a legitimate expectation and therefore binding the employer. At the heart of the matter was a dispute that had arisen regarding the entitlement that could be created and enforced, regarding the employer's scheme for interest-free bridging loans and the length of time an employee was entitled to such an interest-free loan. Mr French, who was employed by Barclays Bank in a managerial position, was under a contract of employment which contained a mobility clause. To ensure that employees did not suffer any loss in complying with the mobility clause - which gave the bank the right to transfer its employees to any of its offices - the bank had a provision, set out in the staff manual, to provide financial assistance for removal expenses, at the bank's discretion and subject to certain conditions. The financial assistance was provided in the form of an interest-free bridging loan where the sale and purchase of property was involved. The provision had been applied to other employees of the bank. The bank was seeking to invoke a change in the policy or a change to the terms on which loans were made to employees who were requested to relocate.

The Court of Appeal held that the employee's reasonable reliance upon the bank's provision and the bank's previous conduct towards other employees had created a legitimate expectation that the employer would be bound by its promise. 'His

\textsuperscript{482} See further Chapter One above.
expectation would be that the bank would not wish him to suffer financial loss by virtue of the relocation’.483

The court's approach, as will be examined in Chapter Six, mirrored the principle adopted in public law in which sufficient weight is given to the commitment that was patently made by the employer in its formal statement, what the employer had promised and that the promise was sufficient to create a legitimate expectation of the entitlement alleged.484 These tests are in parallel with the approach adopted in the American state of Michigan, as will be seen in Chapter Five, in identifying entitlements under an employment policy.485

Furthermore, the court in French focused upon the clear commitment made by the employer who had also taken the formal step of declaring its formal statement. This was based upon the clear and unambiguous declaration that had been applied to other employees over many years and appeared in terms in the manual at the time when the loan was made.486 The fact that the promise was made in a manual did not exclude the provision from creating enforcement obligation; whilst the relocation scheme itself did not confer contractual rights, departing from it in circumstances in which the court found were not justified, gave rise to a breach of the implied duty to maintain trust and confidence.

Notwithstanding the above, the importance of the court's finding in French lies in its approach - in other words, the Court of Appeal did not reach its conclusion by the traditional approach of contract formation, nor by applying the test of

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483 French v Barclays Bank [1998] IRLR 646, 651
484 See Chapter Six below
485 See Chapter Five, Para 6.7, below
486 French v Barclays Bank [1998] IRLR 646, 651

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'aptness'.\textsuperscript{487} Thus, \textit{French} has clearly indicated that a unilateral promise, which may be contained in a formal statement, can be enforced without relying upon traditional tests save for the principle of legitimate expectation being raised and thereafter relied upon by the employee. Furthermore, the Court of Appeal in \textit{French} concluded that the employee's legitimate expectation was enforceable ‘without consideration of, say, incorporation or detrimental reliance’\textsuperscript{488} and without requiring the plaintiff to establish an estoppel.\textsuperscript{489}

In \textit{French}, the court found that the bank's changes to the bridging loan, which had been granted to assist the employee in moving house when he was relocated at the employer's behest, was a clear breach of the implied term of mutual trust and confidence between the employer and the employee. Moreover, ‘it would add to any undermining of trust and confidence to discover when the bank attempted to change the terms…that the bank had never previously attempted to treat employees in the same way’.\textsuperscript{490}

The court gave more emphasis to the employee's reliance on the unilateral promises made by the employer in the formal statement. The court noted that the promise of the bank's bridging loan ‘was part and parcel of an arrangement made to enable the bank to enforce its policy of employees relocating when requested to do so, with no loss to the employees’\textsuperscript{491} which contributed to and gave rise to a legitimate expectation that must be enforced. Similarly, the EAT decision in \textit{Quinn}

\footnotesize{\textsuperscript{487} See Para 4.3 above \textsuperscript{488}D. Brodie ‘Mutual Trust and the Values of the Employment Contract’ [2001] ILJ 84, 87. \textsuperscript{489} See Chapter Two for examination on contractual right formation. \textsuperscript{490} \textit{French v Barclays Bank} [1998] IRLR 646, 650. \textsuperscript{491} [1998] IRLR 646 at 651}
v Calder\textsuperscript{492}, as discussed in Chapter Two and Four, provided that the normative effect to a unilateral contract was based on the expectations of the parties to an employment contract. The case was approved by the Court of Appeal in 

\textit{Albion Automotive Ltd v Walker}\textsuperscript{493} in which it was held that a policy introduced unilaterally by the employer created a binding obligation as ‘all employees had a reasonable expectation that the enhanced redundancy payments would be made.’\textsuperscript{494} The employer's promise of rights and benefits in the policy, and the subsequent process of drawing its existence to the attention of the employees, can be viewed as creating legitimate expectations that it would be enforced.

Recognition of this trend in employment law can also be understood from a more recent Court of Appeal decision in \textit{Birmingham CC v Wetherill}\textsuperscript{495}, in which a term in the employer's policy in relation to a car user allowance scheme, created a legitimate expectation that the employees relied upon. The court accepted that the employee's reliance and expectation must not be breached irrationally by the employer. An employee who has such a reliance, which can also be based on an existing practice, ‘is reasonably entitled to expect that that practice will not be changed without giving him a sufficient opportunity to adjust his commitments without loss.’\textsuperscript{496}

In summary, the court in \textit{French} and its successors, determined that a commitment unilaterally announced by the employer which creates a legitimate expectation, could be enforceable on the basis of trust and confidence. To hold otherwise would

\textsuperscript{492} [1996] IRLR 126

\textsuperscript{493} [2002] EWCA Civ 946. Also considered in Chapter Two, Paras 3.2.1 and 3.4, above.

\textsuperscript{494} Ibid, per Chadwicj at Para 34

\textsuperscript{495} [2007] IRLR 781

\textsuperscript{496} Ibid, 34 (per Chadwick LJ)
mean that the employer is treating its promises as illusory when it ‘insists on a relocation, offers a bridging loan on the above terms and then seeks to alter those terms to the detriment of [the employee].’ This conclusion is consistent with US jurisprudence, as will be examined in Chapter Five, in which a promise made in a policy statement may bind the employer even when a direct exchange is absent; when a commitment is made by the employer and the ‘employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee, the employer has then created a situation ‘instinct with an obligation.’ French and its successors have therefore opened the door to an approach which needs to be developed further. This is because the development of trust of confidence to enforce promises is influenced and informed by principles derived from public law. Accordingly, if courts adopted and affirmed the doctoring of legitimate expectations in employment law in similar ways to public law principles; it would mean that resiling from a promise protected by a legitimate expectation can result in breach of trust and confidence unless the employers' revocation is lawfully permissible. The examination of these possible further developments derived from public law principles, where courts are able to achieve balance between the parties' interests, will be addressed in Chapter Six. It will provide a solving device to assist courts in situations where orthodox contract law approaches, as seen in the case of Malone above, can produce a problematic incoherence to principles of contract law formation. As will be seen in Chapter Five, US jurisprudence has recognised the need for such development and has

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498 See e.g. Supreme Court’s decisions of Michigan state in Toussaint v. Blue Cross and Blue Shield, 272 NW2d 880 (Mich 1980), 892
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allowed the courts the opportunity to strike a fair balance between the employee's dignity and the employer's business efficiency.

3.5 Conclusion

This chapter has shown that enforcement of voluntary promises in employment law has been concluded either through a contractual approach - i.e. whether or not a term is incorporated into the contract of employment - or due to the enforcement of promises that would otherwise amount to a breach of the implied duty of trust and confidence. Where English courts are concerned with contractual approaches created from a unilateral promise, the courts treat the question as one of whether it is incorporated into the employment itself. Furthermore, the question of incorporation of a provision is viewed, under common law, in light of the employment relationship as a whole - in other words, the issue is analysed as part of the contract of employment, rather than as an extraneous or independent contract.

It was shown that the court’s heavy reliance on strict and traditional contract formation with adherence to bilateralism has resulted in an incoherent approach, particularly with regard to the National Coal Board's 'substantive term' guideline. The court-adopted tools have been inconsistent regarding the issue of whether a term is capable of being incorporated into an individual contract of employment. While the general approach to the question of contractual incorporation is examined under the principle of aptness and intention to create a binding commitment, the line of cases reveals that where aptness and intention could point towards different

500 National Coal Board v National Union of Mineworkers [1986] IRLR 439
outcomes, as seen in *Kaur* and *Malone*, intention prevails. It was noted, however, that the courts in *National Coal, Kaur* and *Grant*, for example, share the trend with *Malone* in that emphasis on intention over aptness when courts are concerned with voluntary promises and enforceable commitments prevails. In all cases, insufficient weight was given to the argument that the employees' reliance upon the commitment that the promise was binding, should prevent the employer from ignoring its promises when they had the choice to revoke their promises but chose not to do so.\(^{501}\) Such an approach was adopted by some American states, and could be firmly adopted by English courts, as Chapter Four will reveal.

Nonetheless, while intention is objectively assessed in English law, the application of such a test has shown controversy in employment law where courts were faced with the need to reach commercially sensible outcomes at the cost of distorting the principles of contract law. This may also be due to the courts' desire to avoid the harsh result if promises by the employer were held to be enforceable. In *Kaur*, for example, it was observed that business urgency was highly relevant and influential in the court's ruling not to enforce promises that would prevent the employer from terminating its employees on redundancy grounds; whereas in *Malone* business survival would be at stake if the court had enforced the employer's voluntary promises. The test of intention in *Malone*, however, appears to be subjective, whereas in the other case above, the test of intention was objectively asserted. While the language of the provisions in *Kaur*, which were pointing to affirmations and mere aims, were found to be the key determination by which the court decided that it was not objectively intended, in *Grant* it was the manner in which the provisions were broadcast, and the formal status of the policy

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\(^{501}\) See Chapter Five and Six for more discussion on this trend.
which became the main element that persuaded the court that the promises were not intended to create contractual obligation.

This line of cases provides an illustration of how the courts' reluctance to adhere to the strict application of contact law renders incoherent results to the question of voluntary promises. A possible approach to avoid this complexity and inconsistency towards voluntary promises, as will be argued in the next chapter, can be made through the courts' adoption of a unilateral contract approach, rather than current bilateral model, to contractual entitlements that can be created from voluntary promises. Such a unilateral model has been adopted by some US states, where courts have developed a model that can respond appropriately to the need of protecting both parties' interests. Examining whether such a unilateral model can be adopted in the UK will be supported by that which has been demonstrated in this chapter and the previous chapter - that a flexible approach to the application of the law of contract is required and would be welcomed in employment relations given its unique and dynamic nature. The recent development of case law, as noted in Attrill, suggests a welcome intention to make such modification to the general principles. The extent, however, of how far English courts can develop this model in similar trends to the US, and in such ways as to provide an appropriate balance between the employer's interests and the employee's expectations and dignity, will be discussed in the next chapter.

Conversely, the development of the implied duty of trust and confidence, as noted above, may additionally or alternatively provide a more coherent and sophisticated approach to the enforcement of voluntary promises. This is due to the indirect contractual enforcement of voluntary promises, where the employees'
reliance on the employer's voluntary promises must be respected, as not to undermine trust and confidence. In *French*, for example, it was the employer's inequitable exercise of its unilaterally introduced policy which resulted in the inconsistent treatment with previous recipients, which was a breach of the duty of trust and confidence. The development of such a trend, as seen in the case of *French*, is derived by the public law principle of legitimate expectation, which will be discussed in Chapter Six. English courts could choose to develop the concept of legitimate expectations to protect the beneficiary of unilateral promises, whilst also permitting the employer scope to depart from the promises where the circumstances justify it. The task of the courts, which this thesis will explore further, is to determine when lawful departure is permitted.

In the US, as will be examined in Chapter Five, both approaches to voluntary promises - i.e. unilateral contract and the principle of legitimate expectation - have already been adopted. The coming chapter will examine both these approaches and the extent and possible adoption of such a trend by English courts.
CHAPTER FOUR

UNILATERAL CONTRACT APPROACH TO ‘VOLUNTARY’ PROMISES IN ENGLISH LAW
4.1 Introduction

It was noted in the previous chapters that parties to an agreement, who make a clear, free and conscious attempt to create a binding agreement, may not be able to do so simply because one or more of the formality requirements have not been satisfied. This can have serious consequences if, as is typically the case, one or both of the parties relied upon such an agreement as being binding. It was illustrated in the previous chapter that the courts' approach to the question of the enforcement of voluntary promises made in explicit non-contractual documents, has not been able to provide consistent or coherent legal principles.

Notwithstanding such incoherence to the question of voluntary promises, English courts have considered the employment relationship to be distinctly bilateral, without giving sufficient consideration to the unilateral contract approach to promises made outside the contractual framework. Moreover, courts have failed to address fundamental questions about the orthodox contractual model, why bilateral rather than unilateral contract analysis has been adopted, and whether or not it can explain the enforcement of such promissory words in light of, for example, bilateralism, consent, exchange of consideration and so on.

Whilst the initial agreement to enter into a contract of employment has been settled as one of a bilateral contract as noted in previous chapters, the aim of this chapter is to consider whether voluntary promises should be viewed separately as extraneous contracts, under the unilateral contract analysis. This

503 See Chapter Three above.
504 See further Para 5.2 below
Chapter Four: Unilateral Contract Approach to Voluntary Promises

unilateral model, as will be shown in the next chapter, has been adopted by most US states as opposed to the bilateral model, to solve the issue and complexity of voluntary promises and to achieve a fairer balance between respecting the employees’ dignity and the employer’s business efficiency. It would be interesting to examine whether such an option is available to English courts; where the unilateral contract model can replace the bilateral contract approach, and the extent the unilateral model in English employment law can re-sample the approach adopted in the US to provide a coherent approach to the issue of voluntary promises.

As the scope and aim of this thesis is the discussion of the legal effect of voluntary promises made outside the contractual framework, it is only intended to discuss this issue and, consequently, does not cover the status of the employee. To confirm this distinction, a voluntary promise is one made when an employer makes a promise to his employee where acceptance is not required by an immediate counter-promise. Formal statements made by the employer and explicitly non-binding contractual agreements - for example a company policy, handbooks, manuals, and collective agreements - are all examples of an employer’s voluntary promises. It will be argued that the unilateral contract approach to voluntary promises provides more adequate tools of explaining enforcement, and guarantees better protection to the employee’s reliance upon the promise than the bilateral approach that has been mostly adopted by the courts. It will show that recent developments in employment law have acknowledged and adopted such trends, and will examine the possible scope of further developments.
4.2 The Unilateral/Bilateral Divide

It has been indicated that a contract is one in which both parties enjoy some rights and bear obligations respectively. English contracts, however, distinguish between bilateral and unilateral contracts in that a bilateral contract is an agreement in which each of the parties to the contract makes a promise or set of promises to the other. Mutual assent must be exchanged between the parties, where the offeree must accept the offer by exchange. It is also the general rule that in bilateral contracts an acceptance must be communicated to the offeror in order for the offeree's counter-promise to have any effect. In contrast, an offer of a unilateral contract is made when one party makes a promise of remuneration or benefit, to do something or to withhold from doing something, if the other will do (or withhold from doing) something without making any promise to that effect. Thus, the acceptance, in a unilateral contract, is subject to the performance or act of the offeree rather than the exchange of promises.

As noted above, in an employment relationship, the contract of employment is traditionally treated with an almost definite presumption that it is a bilateral rather

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506 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QBD 256

507 *M her v Richardson* (1813) 1 M. and S. 557; *The Leonidas D* [1985] 1 WLR 925, 937.

508 Chitty on Contract, Para 2-076

509 For example, a promise to pay another £100 if the other party walks from London to York, or a promise of £x money if one finds and returns the promisor's lost cat, or gives up smoking for a year. *The Kurnia Dewi* [1997] 1 Lloyd's Rep. 533; *Hamer v Sidway*, 124 N.Y. 538 (1881), *Rogers v Snow* (1573) Dalison 94; *Great Northern Ry v Witham* (1873) L.R. 9 C.P 16; *Hamer v Sidway*, 124 N.Y. 538 (1881).
than a unilateral contract.\textsuperscript{510} A promise made in an employment relationship, even if made unilaterally and outside the contractual framework, whether before or after the start of work, has been considered under the bilateral contract approach.\textsuperscript{511} Accordingly, courts have continued to consider the issue of the enforceability of voluntary promises under the test of whether a term is appropriate and is intended to create a bilaterally binding obligation, rather than by whether such a promise is capable of creating a unilateral offer.\textsuperscript{512}

This brings matters to the question of whether the courts are willing to allow separate principles to be established for contract formation in an employment relationship where voluntary promises are considered as extraneous unilateral contracts in addition to the bilateral contract.

In \textit{Gill v Cape Contracts Ltd}\textsuperscript{513}, the answer to this question was in the affirmative. In this case, Cape Contracts Ltd sought to entice employees away from Harland and Wolff in Belfast by offering them higher wages and a guarantee of at least six months of employment. The employees who applied for a position were told that their applications were accepted and were told to hand in their notice to Harland and Wolff, which they did. Cape Contracts Ltd confirmed the arrangements by letter, setting out the terms of employment. Approximately one week later the

\textsuperscript{510} In \textit{Kearney v. Whitehaven Colliery Co} [1893], 1 Q. B. 700, at 711, Lord Esher described the position in the following terms: Now the contract here is a contract of employment. The consideration on the one side is, If you will enter into my employment I will make you one, two, or more several promises." The consideration on the other side is, "If you will take me into your employment, I will make you one, two, or more several promises.

\textsuperscript{511} \textit{National Coal Board v National Union of Mineworkers and others} [1986] IRLR 439; \textit{Alexander v Standard Telephones and Cables Ltd (No 2)} [1991] IRLR 286

\textsuperscript{512} \textit{National Coal Board v National Union of Mineworkers and others} [1986] IRLR 439

\textsuperscript{513} \textit{Gill v Cape Contracts Ltd} [1985] IRLR 499
employees were informed by Cape Contracts Ltd that there was no employment available for them. The employees claimed damages, but Cape Contracts Ltd argued that there was no contract upon which the employees were entitled to sue; they had merely offered the employees a reasonable expectation that they would employ them. This argument was rejected by the court, and it was held that, in addition to the employment contract created 'bilaterally' between the parties, Cape Contracts Ltd’s representations, which were relied upon by the employees, had formed a ‘collateral’ contract giving them a guarantee of six months’ work if they accepted the offer of employment. This is a clear indication that the courts may accept that voluntary promises can create extraneous contracts in addition to, but separate from, the bilateral contract approach. Stating such a principle means that a unilateral contract may also be created in addition to the original contract of employment; the authority in Gill provides that there should be nothing in principle to stop the court from allowing such an additional unilateral contract.

Taking into account the earlier distinction between unilateral and bilateral contracts - i.e. a 'unilateral' contract arises without the offeree having made any counter-promise to perform a required act or refrain from doing a particular act - should these voluntary promises, made by the employer, be construed as unilateral offers under unilateral contract analysis?

To elaborate, in an employment relationship this may well happen as the result of the unilateral introduction of a formal statement or policy by the employer. For example, the contract may provide for Statutory Sick Pay, or that the amount of

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514 See also the below discussion on Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2013] EWCA Civ 394, where it was indicated that voluntary promises were capable of creating a unilateral contract.
Chapter Four: Unilateral Contract Approach to Voluntary promises

any redundancy payment will be in line with the statutory entitlement, but the employer introduces a formal statement that contains promises of a higher level of pay during periods of absence due to illness and an enhanced redundancy payment. The question here is what are the legal consequences of the emergence of such unilateral promises in employment law? In other words, under what circumstances can the employer’s voluntary promise be viewed as a promise of a unilateral offer capable of creating a contractually binding term?

To consider this question there are three elements that must be explored: firstly, has there been an intended unilateral offer; secondly, whether or not the offeree has accepted the offer, and thirdly (which will be discussed separately with more detail below) has the offeree provided consideration for the offeror's promise?

It was shown in previous chapters that the revised version of valuable consideration in employment law, in tandem with the recent development of common law, allowed a broader version of the concept of valid consideration and included practical benefits which could be attached to the continuation of the employment relationship. In other words, consideration is satisfied as the

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516 The requirement of intention and the test of objectivity was discussed in Chapter Two, Para 3.5, above.


518 E.g Edmonds v Lawson and Anor [2000] All ER 31; French v Barclays Bank [1998] IRLR 646
employer - who increases the benefits to their employee - will do so to gain business interests, for example, to create a more loyal and sustained worker and better performances from their staff. The consideration requirement for creating enforceable entitlements in employment relations can be satisfied by the performance of similar acts which the employee has an existing duty to perform.\textsuperscript{519} This development was supported by a shift from 'bargain theory' and the strict application of orthodox rules on contract formation. The rules of acceptance, as noted in Chapter Two, have also been applied in employment relationships with more flexibility so that employee(s) continuation of performance can be viewed as an implied acceptance.

When considering setting a coherent approach to the rules of contract formation, a unilateral model provides a different scope and treatment to the question of what constitutes a binding promise in employment law; while a bilateral contract requires the mutuality of obligation in which exchange of promises and the consent of the employee to the employer’s offer is essential, a unilateral contract, on the contrary, does not require an exchange or counter-promise, but merely requires a performance by the employee to create a binding contract.\textsuperscript{520} In this context, the importance of offer and acceptance is manifested - i.e. a unilateral contract is concerned with whether the employer’s unilateral promise, viewed objectively, can create a clear commitment that employees rely upon and continue

\textsuperscript{519} This approach is adopted by the US, see Chapter Five below. See further, A L Corbin, ‘Does a Pre-Existing Duty Defeat Consideration?-Recent Noteworthy Decisions’ [1918] 27 Yale LJ 362. See generally Roy Kreitner, Calculating Promises: The Emergence of Modern American Contract Doctrine (1st, Stanford University Press, Stanford, California 2007) pp1-96.

\textsuperscript{520} Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2013] EWCA Civ 394
to work; but how does the unilateral model assess the question of what creates an objective commitment?

### 4.3 Creating a binding commitment

It was noted in Chapter Two that in English law for an offer of a unilateral contract to be created, the promise must be sufficiently certain and communicated to the employee. In the unilateral contract the most significant criteria is whether or not the employer has offered an objective commitment.\(^\text{521}\)

In employment law, as noted in Chapter Two, an offer of a unilateral contract is assessed by objective means.\(^\text{522}\) The offer must be clear and definite, while uncertain or vague promises are unlikely to form a unilateral offer or confer a binding commitment.\(^\text{523}\)

It was noted in Chapter Two that English courts have generally examined the question of creating a commitment under the bilateral approach.\(^\text{524}\) For example, in *Pellowe v Pendragon*\(^\text{525}\), the EAT concluded that for a binding commitment to be created it must be inferred, from all circumstances, that it was the intention of the parties that the unilateral promise should form a binding contractual term. This resembles the common approach to the bilateral model and appears to provide a paradigm to the bargaining theory model where the focus on the objective

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\(^{521}\) This is different to the bilateral approach where an objective intention and aptness must be asserted in order to create a binding obligation. See Chapter Two for further analysis on the question of intention.

\(^{522}\) See Chapter Two, Para 3.4, above

\(^{523}\) *Kaur v MG Rover Group Limited* [2005] IRLR 40; *Grant v South-West Trains Ltd* [1998] IRLR 188

\(^{524}\) See discussion at Chapter Two, Para 3.5.1, above on the cases of *Duke v Reliance Systems* [1982] ICR 449; *Pellowe v Pendragon* (EAT/804/98); and *Albion Automotive Ltd v Walker* [2002] EWCA Civ 946.

\(^{525}\) (EAT/804/98); see also *Sagar v Ridehalgh* [1931] 1 Ch 310 where the position was originally adopted
intention of the parties is considered as the appropriate means to explain enforcement. Penn argues that where parties are in a pre-existing and long-term relationship such as an employment relationship, then the contract is relational, and a promise under a relational contract should give enforcement by focusing on the reliance of the party to a clear and unambiguous commitment. This supports the modern development of the unilateral contract approach - as will be examined further below - where the question of creating contractual terms focuses on the objective commitment - i.e. clear and certain - which the employee relies upon by continuing to perform.

The EAT in *Quinn v Calder* argued on the issue of binding commitment by conceiving that the focus needs to be placed upon the interaction that has taken place between the parties and, in the light of that, seeks to infer the obligations that have been undertaken. The sole fact that a promise was made by the employer is not sufficient on its own to conclude that the promise was intended to create a binding obligation, even if the employee became aware of such a promise. What is of more importance is the situation and circumstances in which the offer was made and subsequently received by the employee. This approach is a distinctively bilateral model, and mirrors the court’s approach in *Grant*, discussed in previous chapter, where the court’s approach seems to place considerable emphasis upon how an employer’s unilateral promise was communicated, and on the way it

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526 A relational contract theory was originally developed in the United States by the legal scholar Ian Roderick Macneil. The contract effect is based upon a relationship of trust between the parties since there are implicit understandings of duties and obligations which determine the behaviour of the parties to the contract. See Ian Roderick Macneil, ‘Whither Contracts?’ [1969] 21 Journal of Legal Education 403.


528 See further Chapter One.

became known to the employees. *Quinn* considers the question of communication rather than on ‘whether the policy has been made or become known directly to the employees or through intermediaries’. 530 It is rather ‘whether the circumstances in which it was made or has become known support the inference that the employers intended to become contractually bound by it’. 531

This approach by the EAT in *Quinn* moves the focus away from the ambiguities inherent in patterns of behaviour. 532 Parties’ acts may not themselves give rise to an intention to be bound - ‘the positive act of communication of the terms to the employees might well suggest an intention to be bound by them, which does not arise, or not with the same force, merely from the repeated acting upon those terms’. 533

In the Court of Appeal in *Albion Automotive Ltd v Walker*, 534 the court did not depart from this approach, and as noted in Chapter Two, the court accepted that an employer’s positive communication of its unilateral offers to its employees was acknowledged as a key factor in determining whether or not a binding contractual term had been created. Where a unilateral contract approach is considered, this suggests that where a unilateral promise constitutes clear and unambiguous language, then such a promise is sufficient to create an offer of a unilateral

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530 Ibid, 128. Whether an objective test is required in determining the positive intention is discussed in the next chapter.
531 Ibid, 128.
532 See discussion in Chapter Two regarding the test of objectivity and whether the parties’ behaviour can still be viewed as a key factor in determining the parties’ intention. See further the notable work of Douglas Brodie, ‘Reflecting the Dynamics of Employment Relations: Terms Implied from Custom or Practice and the Albion Case’ [2004] ILJ 159
533 *Quinn v Calder* (1996) IRLR 126, 128
contract without requiring anything further. As Brodie noted, ‘a legal system which recognised the concept of binding unilateral promises would demand nothing more’ to recognise the employers’ intention to be bound by this offer.

In the US, such a unilateral system is adopted where a clear and unambiguous commitment by the employer, communicated to the employee, is sufficient to create an offer of a unilateral contract. Such a position has recently found support in English law by the Court of Appeal decision in Attrill and ors v Dresdner Kleinwort Ltd and anor, where the court was concerned with the enforceability of the employer’s announcement made to its workforce that there would be a guaranteed minimum bonus pool. The court rejected the employer’s argument that the offer was not sufficiently certain to create a unilateral contract. The employer further argued that the announcement in question could not be binding because it was not known to the employee, and subsequently the employee did not communicate a clear acceptance. The court held that where an employer made a promise outside the contract of employment, i.e. a voluntary promise to pay performance-based bonuses, in return for staff retention, that the promise was capable of creating a binding contractual obligation. In this case it was binding because: (i) an offer of a unilateral contract was made as the employer's announcement ‘was in clear and unequivocal language; (ii) the communication to the employee was made by the announcement of the

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535 See Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2013] EWCA Civ 394, discussed below
536 Douglas Brodie, ‘Reflecting the Dynamics of Employment Relations: Terms Implied from Custom or Practice and the Albion Case’, ILJ [2004] 159
537 Pine River State Bank v. Mettille 333 N.W.2d 622 (Minn. 1983). See further Chapter Five below
538 [2013] EWCA Civ 394
539 See further discussion on consideration and practical benefit doctrine at Chapter Two, Para 3.3, above
540 Attrill and ors v Dresdner Kleinwort Ltd and anor [2013] EWCA Civ 394, [135]
employer\textsuperscript{541} in a meeting; the law does not require that every individual employee have actual knowledge of the offer.\textsuperscript{542} The introduction of the announcement, through any method of broadcasting - for example, printed on a note, verbally delivered in a staff meeting, or published on the company intranet - is sufficient communication; \textsuperscript{543} and (iii) a unilateral contract does not require an acceptance by the employee to be communicated, as performance by the employee can also constitute an acceptance, as in this model.\textsuperscript{544}

More significantly, the Court of Appeal adopted the position that ‘in the context of an employment relationship, that if sufficiently certain words are used, then no issue of intention to create legal relations would arise’.\textsuperscript{545} This is clearly a unilateral contract model where the issue is whether the employer has made an offer that can be understood by the employee and thus create a binding promise. Accordingly, if the employer asserts that his promise was not intended to be binding then ‘the onus will be on the party asserting that there is no intention to create legal relations to establish that fact’.\textsuperscript{546}

This trend, as will be seen in the next chapter, strikes a parallel with the approach adopted by most US states that consider the question of voluntary promises under unilateral contract formation.\textsuperscript{547} In seeking to identify contractually binding

\textsuperscript{541} Ibid,\textsuperscript{[47]}. The announcement was made at Twon Hall and “simultaneously broadcast on the company intranet, and could have been seen/heard by those employed in DKIB in other locations, in particular London, on desk top computers or on the large screens mounted in the trading floors”. Ibid.
\textsuperscript{542} Ibid,\textsuperscript{[82-96]}
\textsuperscript{543} Ibid,\textsuperscript{[82-96]}
\textsuperscript{544} Ibid \textsuperscript{[97-100]}
\textsuperscript{545} Ibid
\textsuperscript{546} Ibid, \textsuperscript{[81]}
\textsuperscript{547} E.g. the state of California and Arizona examined in Chapter Five, Para 6.6, below.
promises Attrill followed similar principles to those of most US states, by examining whether an objective commitment has been made by the employer, rather than identifying the mutual intention of the parties, as has been the approach commonly adopted by the English courts. The finding of the Court of Appeal in Attrill, which upheld the earlier High Court ruling, demonstrates the departure from exchange theory in favour of the reliance theory model of explaining contractual enforcement. It also reveals the courts' readiness to step away from the strict application of bilateralism, towards voluntary promises in employment law, and more of a willingness to accept the unilateral contract model. It also suggests that a formal statement or policy that has been unilaterally introduced by an employer will become contractually binding where the basis of the introduction can be construed as an offer to be bound. Since consideration is furnished by practical benefits, as is normally presumed in employment relations, to create a commitment of unilateral contract all that is required is 'clear and unequivocal' announcement.

This brings matters to the question of when and how an employee can demonstrate that an acceptance to the offer of a unilateral contract has been delivered. While the unilateral contract model considers the performance or the request act to form an acceptance, this issue is more complex in employment relations, since employees are, normally, already employed under the same duties or performance.

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548 See further next Chapter Five and Six below.
549 [2013] EWCA Civ 394, CA
550 See chapter Two and Three above
4.4 Acceptance by Performance.

It was shown in Chapter Two that the acceptance of a bilateral offer is made by the exchange of consent, promise or counter-promise - i.e. by saying I accept - whereas the acceptance of a unilateral offer is made by an act or series of acts without a counter-promise being made.\(^{551}\)

It was also noted that, in employment relations, an employer who offered a job to an employee is offering to create a bilateral contract, since the exchange of promises is required to form the bilateral contract of employment. Controversy can occur, however, in the case of voluntary promises, since the employer who announces an additional pay increase, for example, does not require a counter-promise, but merely performance. The voluntary promises or unilateral offers introduced by the employer in formal statements or policies, or where 'the nature of the promise is inconsistent with the notion of individual acceptance',\(^{552}\) the question of acceptance arises. The difficulty is more complex in an employment relationship where the employee is already employed and, accordingly, performing their pre-existing duties under his original contract. Would the mere performance of his duty be considered as an acceptance of the unilateral promise when the employee is already performing in all situations? The unilateral contract approach in employment relationships would evoke further questions which are also rooted in the general law of contract; i) Can the employer withdraw or amend his offer, and, if so, up until what time?  ii) What denotes the employee’s acceptance? and iii) If acceptance is required can it be waived?

\(^{551}\) Conduct will, however, only have this effect if the offer and acceptance were made with the intention (ascertained in accordance with the objective principle) of creating legal relations. See Chitty on Contract, Para 2-076, 2-078

\(^{552}\) Attrill and Ors v Dresdner Kleinwort Ltd and Anor [2013] EWCA Civ 394
The starting point is the examination of the legal principles for the acceptance of a unilateral offer under the general common law of contract. Under common law, when an offer is unilateral there is no need to give advance notice of the acceptance of the offer, and the offer can be accepted by performing - or starting to perform - the required act or forbearance. Can an employee’s starting or continuing to perform constitute an acceptance of the offer, notwithstanding that the argument that full performance of the request act or forbearance has not been completed?

This is a fundamental question of principle and must, therefore, be first examined under the general principle of contact law. Under the general principle of contract law, a unilateral offer, like any other offer, can be withdrawn before it has been accepted. There is, however, uncertainty as to the exact stage at which the offer is 'accepted' so as to deprive the offeror of the power of withdrawal. According to Chitty on Contract, it ‘is less clear whether the offeror can still withdraw after the offeree has partly performed the required act or forbearance’. The general view, however, is that once performance has started, the offeror is not permitted to withdraw their offer. This is because the offeree could not have intended to expose themselves to the risk of withdrawal, and it would otherwise cause hardship to the offeree when they have partly performed the required act or

553 *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256; *Bowerman v Association of British Travel Agents* [1995] N.L.J. 1815.
554 *Errington v Errington* [1952] 1 KB 290; *Beaton v McDivitt* (1988) 13 NS WLR 162, 175
555 *Ditulia Ltd v Four Millbank Nominees Ltd* 1978 | Ch.231
556 Chitty On Contract, 2-078
557 Chitty On Contract 2-78
forbearance\(^{558}\) (e.g. as is the case in respect of a tenant’s acceptance of a new tenancy by not vacating).\(^{559}\) Accordingly, it is plausible to say that in employment relationships performance commences at the moment that the employee(s) starts or continues to work, which confers a binding acceptance and may also satisfy elements of consideration\(^{560}\).

The rules concerning the formation of unilateral contracts provide a better explanation as to the question of voluntary or unilateral promises made by the employer. The rules allow for the unilateral offer of the employer to be binding upon the employee’s continuing to perform their excising duty\(^{561}\). Furthermore, where the employer introduces a formal statement or policy that provides benefit to the employee, it does not need to involve a reciprocal promise on the part of the employee. Such a unilateral undertaking on the part of the employer can constitute the formation of a binding contract\(^{562}\). In *Lee v GEC Plessey Communication*\(^{563}\) it was suggested that where an improvement in the employee's terms and conditions is announced by the employer, acceptance by the employee is implied by merely continuing to work.

\(^{558}\) *Morrison SS Co v The Crown* (1924) 20 L.L.R. 283; *Errington v Errington* [1952] 1 KB 290; and *Beaton v McDivitt* (1988) 13 NS WLR 162, 175.

\(^{559}\) *Roberts v Hayward* (1828) 3 C. and P. 432. Moreover, it is worth noting that, in some cases, such as bankers’ irrevocable credits, a unilateral offer may be binding as soon as it is communicated. See Chitty On Contract, 2-070 and 2-75

\(^{560}\) Chitty On Contract, 2-074. Also accepted by the Court of Appeal in *Lee v. GEC Plessey Telecommunications Ltd* [1993] IRLR 383. For full treatment of the requirement of consideration see chapter two above.

\(^{561}\) Chitty 2-075.


\(^{563}\) [1993] IRLR 383.
The Court of Appeal in *Albion Automotive Ltd v Walker*\(^{564}\) regarded it relevant to the establishment of a binding obligation that the policy was drawn to the attention of the employees by the employer; this can be viewed as increasing the employees’ reasonable expectation that the enhanced redundancy payments would be made.

This suggests that when a unilateral promise – one which constitutes a benefit and an enhancement - is communicated to the employee, the mere fact that the employee continues to work is sufficient to amount to performance. Adopting a reliance theory, the court found that an employee's reasonable expectation that the employer’s promise will be met cannot be undermined if the duty of trust and confidence is to be maintained. The authority in *Attrill and Ors v Dresdner Kleinwort Ltd and Anor*\(^{565}\) displayed the absence of express acceptance by the employees, by the employees’ merely continuing to work.

A controversy in employment relationships may arise, however, in the case of part performance and the intention associated with the employee’s performance. The general rule, as previously discussed, is that an offer may be accepted by conduct;\(^{566}\) conduct will, however, only have this effect if the offeree undertakes the act with the intention of accepting the offer.\(^{567}\) The difficulty may arise in determining, in cases of dispute, exactly what terms have been accepted or agreed. It may even be so greatly disputed that it leads to the conclusion that no agreement

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\(^{564}\) [2002] EWCA Civ 946

\(^{565}\) [2013] EWCA Civ 394.

\(^{566}\) *Weatherby v Banham* [1832] 5 C. and P. 228

was reached at all\textsuperscript{568}. In employment relations, the view that an employee’s acceptance of a unilateral offer is implicitly conceived by continuing to work, and may be faced with the above limitations regarding acceptance by conduct. In particular, when a provision or a policy is not of immediate application - such as bonuses only calculated at the end of each annually year or that has been introduced during employment relations - it may be argued that the fact of continued working is not referable to it.\textsuperscript{569} This may appear as a valid controversy in employment relations to the unilateral model and must, therefore, be addressed.

The general principle of common law, with regard to unilateral contracts, is that the motive behind performance plays a determining factor in deciding what the promissor envisaged by way of performance. As Treitel stated ‘[i]t seems that an act which is wholly motivated by factors other than the existence of the offer cannot amount to an acceptance, but if the existence of the offer plays some part, however small, in inducing a person to do the required act, there is a valid acceptance of the offer\textsuperscript{570}. This brings to the fore the question regarding the employee’s motive when performing his pre-existing duty. In other words, can the employee rely on the employer’s implicit waiver of the need for an express acceptance to his unilateral offer?


\textsuperscript{569} Douglas Brodie ‘Reflecting the Dynamics of Employment Relations: Terms Implied from Custom or Practice and the Albion Case’ [2004] ILJ 159, 162

\textsuperscript{570} Guenter H. Treitel, \textit{The Law of Contract} (10\textsuperscript{th} edn, Sweet and Maxwell Ltd, London, 1999), 37
This issue was considered in *Attrill*,⁵⁷¹ which concerned whether or not the employers’ unilateral announcement to its workforce that there would be a guaranteed minimum bonus pool amounted to a binding obligation. At the heart of the concern was the question of whether the employees remaining in employment had to undertake an act that was performed by reference to the offer of the new terms. The question was initially considered at the High Court in which Mr Justice Owen adopted a rather more flexible approach to the essential requirement for the formation of a binding promise. Being influenced by the Court of Appeal determination in *Edmonds v Lawson*,⁵⁷² he considered the issue under the general rules of a unilateral contract in which the employees’ acceptance is presumed ‘by remaining in employment, and either not seeking employment elsewhere or not taking up employment elsewhere, and in all cases not exercising their right to resign’.⁵⁷³ The Court of Appeal, while affirming this finding, adopted the alternative approach by stating that in employment relations the need for acceptance, when a unilateral offer is made by the employer, is waived.

This approach is more appropriate in employment relations as, as noted above, in the case of dispute, reliable evidence could be practically impossible to find. The finding, nonetheless, brings to the fore another fundamental question concerning the extent that the Court of Appeal and the lower courts have resembled the orthodox doctrine of bargaining in which mutual agreement is tested on an offer-and-acceptance basis. To elaborate, the Court of Appeal’s finding that an employer who makes a voluntary promise ‘has dispensed with the need for any

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⁵⁷¹ [2013] EWCA Civ 394. The Court of Appeal affirmed the finding of the High Court [2012] IRLR 553 QBD.
⁵⁷² [2000] IRLR 319 CA
⁵⁷³ Ibid [184]
Chapter Four: Unilateral Contract Approach to Voluntary promises

response to the offer at all\textsuperscript{574} is a clear indication that modern employment law has departed from the orthodox law of contract as stated by Treitel above. To come to this conclusion, the Court of Appeal in \textit{Attrill} relied upon the observation of Bowen LJ in \textit{Carlill v Carbolic Smoke Ball Company}\textsuperscript{575}, where he stated that ‘...as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself.’\textsuperscript{576} The only sensible implication of this principle in employment law ‘is that all employees who might potentially benefit from the promise would be deemed to have accepted it’\textsuperscript{577} merely by continuing to work. Furthermore, the nature of the promise, where the issue concerns a unilateral offer, implies such a waiver as it does not require an individual counter-acceptance. To conclude otherwise would mean that only those who formally accepted the offer could hold the employer to be bound to a promise made to the entire workforce which ‘would be a bizarre result’.\textsuperscript{578} The Court of Appeal made it clear that such a principle can only apply where there is ‘a promise without any disadvantage, actual or potential, of any kind to the employees’.\textsuperscript{579}

4.5 Employee’s Knowledge of the Unilateral Offer

If the argument that the employee continuing his employment following the employer's unilateral promise is sufficient to constitute an acceptance, the question which then must be asked is what is the legal position where the employee does not know of the employer’s offer? This issue may arise in

\begin{itemize}
  \item \textsuperscript{574} 2013 EWCA Civ 394, CA, [98]
  \item \textsuperscript{575} [1893] 1 QB 256
  \item \textsuperscript{576} Ibid, [269]
  \item \textsuperscript{577} \textit{Attrill and Ors v Dresdner Kleinwort Ltd and Anor} [2013] EWCA Civ 394, [98]
  \item \textsuperscript{578} Ibid [99]
  \item \textsuperscript{579} Ibid [98]
\end{itemize}
Chapter Four: Unilateral Contract Approach to Voluntary promises

situations where the policy or statement was introduced by the employer long before a new employee joined the enterprise. As we have seen in the Court of Appeal’s finding in Attrill, the fact that the employee was in existing employment was one key determining factor. There may also be a situation in which existing employees are unaware of the policy or the unilateral offer introduced by the employer. In such a situation it becomes difficult to argue that acceptance is conferred by such employees continuing to work, or that their expectations as to the benefits of that policy should not be denied.

The rule in English law regarding the formation of unilateral contracts in this situation is unclear. The general view, at least regarding bilateral contracts, is that acceptance in ignorance of an offer cannot create a contract. This is due to the fact that acceptance must be given in exchange for the offer.\textsuperscript{580} However, English law seems to support the contrary, where the act or promise constituting the acceptance was made in ignorance of a unilateral offer.\textsuperscript{581}

In \textit{Meek v Port of London Authority} the court rejected the argument that new employees have a general expectation that they are hired according to the same terms and conditions of employment as existing employees. Instead, the court held that contractual formation cannot be found on that basis, as none of the employees were aware of the terms when they entered into the employment, nor had any of them ‘ever heard of that practice, and none of them took up their

\textsuperscript{580} Chitty on Contract, 2-039
\textsuperscript{581} Gibbons v Proctor [1891] 64 L.T. 594. Treitel argued that the case should not be read as acceptance in ignorance but on the ground that the plaintiff did know of the offer of reward by the time the information was given on his behalf to the person named in the advertisement. Guenter H. Treitel, \textit{The Law of Contract} (10\textsuperscript{th} edn, Sweet and Maxwell Ltd, London, 1999), 36
employment with reference thereto’.\footnote{582} The finding in *Meek* appears to be inconsistent with other authorities on this issue.\footnote{583} It is, instead, more consistent with a bilateral contract approach where acceptance cannot be found without the knowledge that a bilateral offer has been made.\footnote{584} This is due to the simple rules of bilateral contract formation where an acceptance is only made by way of an exchange of a promise or saying ‘I accept’.\footnote{585} Different considerations, however, should be applied in the case of a unilateral offer where mere performance is the requirement to satisfy the formation of a contract. As indicated in Chitty on Contract ‘in the case of unilateral contract it is hard to see what legitimate interest of the promissor is prejudiced by holding him liable to a party who has in fact complied with the terms of the offer, though without being aware of it’.\footnote{586}

In the Court of Appeal’s decision in *French*,\footnote{587} it was not relevant as to whether the employee acquired the knowledge of the employer’s announcement or voluntary promise. As noted in previous chapters,\footnote{588} the employee’s reliance on the employer’s practice and custom gave rise to the enforcement of the employee’s legitimate expectations. Similar trends can be observed by the Court

\footnote{582} [1918] 1 Ch 415 at 421. \footnote{583} *Gibson v Proctor* 55 JP 616. In employment law see, for example, *Sagar v Ridehalgh (H) and Son Ltd* [1931] 1 Ch 310; and *Marshall v The English Electric Co Ltd*, [1945] 1 All ER 653, in which the court accepted that where the employer introduced a policy or ‘practice at a particular factory it may be incorporated into a workman’s contract of service, and whether he knew of it or not, it must be presumed that he accepted employment on the same terms as applied to other workers in that factory’. Ibid, 655. See *Attrill and Ors v Dresdner Kleinwort Ltd and Anor* [2013] EWCA Civ 394

\footnote{584} See further Chapter Two, Para 2.3 \footnote{585} Chitty on Contract, 2-039. See above Para 5.4 \footnote{586} Chitty on Contract, 2-039 \footnote{587} *French v Barclays Bank* [1998] IRLR 646 \footnote{588} See Chapter Two and Three
of Appeal in *Albion Automotive Ltd v Walker*\(^{589}\) which held that the employer’s conduct and practice created a legitimate expectation by the employee that the promised term would be enforceable. It could be argued that the knowledge of the individual employee was also irrelevant in *Albion*, since the courts considered that a practice that is consistent with an entitlement creates expectations that are legally enforceable.

In the more recent Court of Appeal decision in *Attrill*\(^{590}\), as noted above, the announcement by the employer was held to create a unilateral contract. The court came to such a conclusion notwithstanding that some employees, who may have been on leave or away, had missed the announcement. The point was not discussed by the court but there was an indication from its authority to suggest that it was irrelevant whether some employees were aware or not. This suggestion can arguably be understood from court’s assertion that ‘the employees would not share all the facts known to the employer, those matters unknown to them could not be taken into account’.\(^{591}\)

The court concluded that even if the workforce could not have known for a fact that its employer ‘was making the announcement with the approval of the Board, they would certainly assume that as Chief Executive of DKIB he had the requisite Board authority both to promise the bonus and to communicate that promise in the way he did.’\(^{592}\) Furthermore, the employee ‘would also know that important

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589 [2002] EWCA Civ 946  
590 *Attrill and Ors v Dresdner Kleinwort Ltd and Anor* [2013] EWCA Civ 394  
591 Ibid [83]  
592 Ibid [84]
announcements were frequently made by Town Hall meetings.\textsuperscript{593} This appears to clearly indicate that the mere presumption that an announcement could be made by employer is sufficient to conclude that the knowledge of the employee is already presumed. The court accepts that the mere fact that the employee could \textit{‘assume’} or expect announcements, even if they are not aware of the precise wordings, means that the knowledge of the promise is concluded. In employment relationships employees would commonly \textit{‘assume’} that voluntary promises and announcements are made, for example, in policies and handbooks.

The finding of the Court of Appeal reflects, arguably, an adoption of the view asserted by Chitty on Contract above. Furthermore, it strikes a parallel with the modern development of employment law, in particular the development of the implied duty of trust and confidence.

Although the implied duty of trust and confidence in relation to the employees’ knowledge was not argued in this case, the Court of Appeal has clearly not departed from its principles.\textsuperscript{594} It may be correctly argued that the implied duty of mutual trust and confidence prevents the employer who made a voluntary promise from denying its benefits to the employee who is unaware of it\textsuperscript{595}. It therefore

\begin{footnotes}
\item[593] Ibid [84]
\item[594] See further discussion on the implied duty of trust and confidence at Chapter Two. Para 4.4, above.
\item[595] Indications of such a possible trend can be found in previous cases in which, for example, a failure to give the employee necessary support amounted to a breach of trust and confidence (\textit{Wigan Borough Council v Davies} [1979] ICR 411; and \textit{Associated Tyre Specialists (Eastern) Ltd v Waterhouse} [1977] ICR 218), and undermining the self-esteem and dignity of the employee (\textit{Hilton International Hotels (UK) Ltd v Protopapa} [1990] IRLR 316; and \textit{Horkulak v Cantor Fitzgerald International} [2004] ICR 697); unfair treatment (\textit{Greenhof v Barnsley Metropolitan Borough Council} [2006] IRLR 98).
\end{footnotes}
follows that an individual employee who does not know about a particular voluntary promise made by the employer in, for example, a handbook, policy, or general meeting, should not be treated differently or less favourably.\textsuperscript{596} An offer made to the entire workforce should be consistently applied. Allowing those who are aware of the employer’s promise to gain increased rights while denying the same to others who are not aware ought to be a breach of the duty to maintain trust and respect.\textsuperscript{597}

\textbf{4.6 Revising Voluntary Promises}

It was shown above that a unilateral approach to voluntary promises is more appropriate in employment law since it provides a better explanation to the rules of formation than the bilateral model. If, however, a unilateral contract is created, can the employer withdraw their promises, with or without notice, and under what grounds? This issue is crucial in employment law, as relationships are regarded as being long-term and emerging issues, such as serious financial or business urgencies,\textsuperscript{598} and could occur where refusal to allow withdrawal or to amend a unilateral contract commitment may, as seen in the case of Malone, place the whole existence of the business in peril.

It was noted earlier that at common law, a distinction must be made between a consensual and a unilateral variation.\textsuperscript{599} In employment relationships, the

\textsuperscript{596} Greenhof v Barnsley Metropolitan Borough Council [2006] IRLR 98.
\textsuperscript{597} Ibid
\textsuperscript{598} See e.g Fish v Dresdner Bank [2009] IRLR 1035; Kaur v MG Rover Group Limited [2005] IRLR 40; Malone and others v British Airways [2010] EWCA Civ 1225.
\textsuperscript{599} See further below. In some cases there may be statutory intervene to automatically modify terms that are not in accordance with statutory provisions or were not originally introduced, in accordance with the relevant statutes, with immediate effect.
withdrawal or modification of contractual terms is generally governed by the orthodox doctrine that insists on valid consent and new considerations being given in order for the proposed alteration to be legally effective and enforceable.\(^{600}\) Staying loyal to bilateralism, courts have therefore declined to give a positive automatic or implied right for employers to unilaterally vary contractual terms without an employee's consent.\(^{601}\) A recent illustration of this is in the case of *Fish v Dresdner Bank*,\(^{602}\) where the bank, which was adversely affected by the 2008 Banking Crisis, attempted to avoid the payment of bonuses and severance payments, and was consequently held in breach of its contractual obligations. The bank asserted that bonuses should not be paid to the particular employee as the employee should, along with others, share responsibility for the management of a business that had suffered a disaster and should not be entitled to receive a large bonus and severance pay. The court remained committed to bilateralism and rejected the bank’s argument, stating that although it was within an employee's discretion not to insist on his full rights under these circumstances, where an employee does so insist, he is entitled to do so. Therefore, any modification to the contractual terms must be mutually agreed.

Recent developments in employment relations, however, have shown that this general principle is not as straightforward as was originally presumed, and a

\(^{600}\) *Morris v CH Bailey Ltd* [1969] 2 Lloyd's Rep 215, CA; *T Comedy (UK) Ltd v Esay Managed Transport Ltd* [2007] EWHC 611 (Comm) at [29], [2007] 2 All ER (Comm) 242 at [29], [2007] 2 Lloyd's Rep 397 at [29].

\(^{601}\) *Fish v Dresdner Bank* [2009] IRLR 1035

\(^{602}\) [2009] IRLR 1035
potential development to give parties’ reliance legal recognition has become increasingly adopted in employment law.\textsuperscript{603} as will be considered in Chapter Six

In regards to employment relationships, the general principle on variation is that a statement of managerial prerogative, that is clearly not a contractual terms,\textsuperscript{604} can be modified or withdrawn unilaterally by the employer without the need for the employee’s agreement;\textsuperscript{605} i.e. provisions that are not protected by a contractual right, or indirect enforcement due to the implied duty of trust and confidence, that can be altered or revoked unilaterally by the employers.\textsuperscript{606} Conversely, difficulties arise when a distinction between statement of managerial prerogative and contractual term is not so easily identified,\textsuperscript{607} or when an employer alleges that alteration to their voluntary promises is due to a legitimate business reason. This brings about the question as to whether or not voluntary promises that create entitlements under the unilateral contract model can be still unilaterally modified by the employers.

The importance of these questions is that they address the conflicting issues of business efficiency (which will be considered in Chapter Six) in maintaining managerial prerogative power in order to meet the employer's needs, and to retain

\textsuperscript{603} See Chapter Six below.
\textsuperscript{604} In \textit{Wandsworth London Borough Council v D'Silva} [1998] IR LR 193, the Court of Appeal stated that a clear distinction must be made between contractual provisions which give rights to employees and those which the employee is required to comply with as part of their duty to obey and cooperate.
\textsuperscript{605} \textit{National Coal Board v National Union of Mineworkers} [1986] IRLR 439
\textsuperscript{606} The employer nonetheless may still have an implied contractual duty to apply the term of their managerial power equitably and reasonably so as not to breach the duty of mutual trust and confidence between the employer and their employee \textit{Gardner v Beresford} [1978] IRLR 83; \textit{United Bank Ltd v Akhtar} [1989] IRLR 507
\textsuperscript{607} See above at Chapter Three, Para 4.3, on the discussion of terms and mere managerial prerogative provision.
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a right to revise their promises when economics or market necessity arise,\textsuperscript{608} whilst protecting the rights and benefits that employees have legitimately gained due to their reliance upon the employer’s commitments. Accordingly, sufficient consideration of the legal principles should be considered in order to keep a fair balance between the parties' interests.

4.7 Cohesive Approach under Unilateral Contract

In English employment law, the position of when an employer is entitled to modify or revoke their voluntary promises is not straightforward, and courts have acknowledged the complexity of exercising the appropriate balance between protecting the employees’ reliance upon such promises and satisfying the business’s needs and efficiency.\textsuperscript{609} The US courts were also faced with this complexity, and the issue has received much debate, as will be discussed further in next chapter.

On a closer observation of the courts’ findings, however, and by determining the arguments made in both English and US jurisdictions, there are three possible approaches and analytical arguments that can be put forward. The likely approach that English courts may choose to adopt from these three polities will be considered at the end of this chapter. Some of these approaches may apply equality to both unilateral and bilateral contracts, under the general orthodox rules of contract law, but are examined here because it is important to show all the

\textsuperscript{608} See e.g. Fish v Dresdner Bank [2009] IRLR 1035; Kaur v MG Rover Group Limited [2005] IRLR 40; Malone and others v British Airways [2010] EWCA Civ 1225.

\textsuperscript{609} See e.g. Fisher v Dresdner bank [2009] IRLR 1035.
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possibilities of unilateral alterations or revocation rules simultaneously and immaculately.

These three approaches are as follows:

4.7.1 (i) Modification via an Express Disclaimers

It is possible that an employer may wish to overcome any uncertainty by reserving an express right in their unilateral formal statement to retain the power either to unilaterally revoke or to modify any or all of their voluntary promises. This approach, which applies equally to the bilateral model, provides that voluntary promises, although creating a unilateral contract, cannot be modified or withdrawn without both parties' mutual agreement, unless an employer has made an explicit disclaimer that gives the employer such a right. This was suggested by the court in Lee v GEC Plessey Telecommunication, in which it was held that a policy that is incorporated into employees' individual contracts will remain binding ‘unless and until they are removed, either by agreement or under a specific right found within the contract’. Similarly, in Wandsworth London Borough Council v D'Silva it was stated, obiter, that clear and unambiguous language is ‘required to reserve to one party an unusual power of this sort’. This indicates that an implied power to revoke the bilateral requirement to vary is not open to the court, since D'Silva made it clear that for an employer to unilaterally modify its voluntary promises, clear and unambiguous language must be used.

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611 [1993] IRLR 383
612 Ibid, (Connell J), 389, but see further analyses at Para 5.7.3 and 5.8 below.
This approach was also adopted in the US by the Supreme Court of Iowa in *Anderson v Douglas and Lomason Co*\(^{615}\) where it was held that the language of a disclaimer must be considered in ‘the same manner as any other language in the handbook’\(^{616}\) in order to give contractual rights. For contractual rights to be created, clear language presenting an unambiguous commitment and true intentions must be determined.\(^{617}\)

This approach was accepted in English law by a more recent EAT case in *Bateman v Asda Stores*,\(^{618}\) where the unilateral modification clause was clear and unambiguous and thus entitled the employer to implement its changes. The court found that a provision in a staff handbook stating that the employers ‘reserved the right to review, revise, amend or replace the contents of this handbook, and introduce new policies from time to time reflecting the changing needs of the business’,\(^{619}\) was a clear and unambiguous term, and hence was incorporated so as to allow the employers to make changes to pay and conditions unilaterally without the need to obtain their employees’ mutual agreement.

Development in both common law and under statutory provision, however, would prevent an employer from having unlimited powers to make variations.\(^{620}\)

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\(^{615}\) 540 NW 2d 277 (Iowa.1995)

\(^{616}\) Ibid, 287-88


\(^{618}\) [2010] IRLR 370.

\(^{619}\) Ibid

\(^{620}\) For further discussion on the contract law principle governing the rules of contract formation see Chapter Two above. See *D’Silva, (n *) and *Facilities Division v Hayes* [2001] IRLR 81
Furthermore, as noted above, terms which confer discretion on an employer are generally interpreted so as to require the employer to exercise the discretion in good faith, and in a manner which is not arbitrary, capricious or irrational. An employer exercising their discretion under a mobility clause, for example, would be in breach of the implied term of mutual trust and confidence, if it failed to give reasonable notice before transferring an employee. This, however, does not inhibit bona fide changes for business reasons, as noted in Chapter Three.

In Bateman, the introduction of a new pay structure after giving several months’ notice and ensuring that employees did not suffer a reduction in their overall pay, was within the employer’s entitlement and conducted reasonably, even though at least one employee suffered financial losses as a result of the changes. This is a clear indication that an employer wishing to exercise their express right to vary voluntary promises must act reasonably by giving appropriate notice to its employees. It is arguable, however, as to whether the employer would be in breach of the mutual trust and confidence obligation to the employee who suffered substantial detriment due to the change. This argument was not relied upon in the EAT and was therefore not considered by the court.

The case still stands as an authority for upholding the employer’s right to unilaterally vary its voluntary promises where an express variation clause is clearly provided. This opens the door to another fundamental question as to

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621 See Chapter Three, Para 4.4 above. See also Chapter Six, Para 7.2-3, below for further analyses on irrationality.
623 United Bank Ltd v Akhtar [1989] IRLR 507
whether the court’s position in *Bateman* would be any different if the employer’s unilateral variation to its voluntary promises had been attempted in the absence of an express variation clause. In other words, would English courts be willing to imply such a right to vary if no express term is given?

### 4.7.2 (ii) Implied Right to Modification

The case of *Bateman* can be regarded as the authority for the rule that employers who create unilateral contracts have a choice of either including or excluding an express right governing unilateral modification. If an employer chooses not to include such a term, then a simple reading of the law confirms that they cannot later modify their voluntary promises without consent or agreement. If they wish, however, to retain the right to unilaterally modify, then an explicit and clear express term must be made at the time that they introduce their formal statement.

Could English courts develop a new approach that, in certain situations, such a right can be implied? It could be argued that such a development would be more appropriate than an employer choosing to dismiss their entire workforce due to financial or business hardship, and thereafter re-employing them according to new, preferred terms. It could also save courts from any inconsistency or legal incoherence as can be seen in cases such as *Malone* above.° Rather than relying on a subjective intention to determine that a promise was not binding, which could easily cause inconsistency, the court could maintain the coherence of contract formation by determining that a term is binding, but that an employer has an

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624 *Malone and others v British Airways* [2010] EWCA Civ 1225. See important discussion on this case at Chapter Three, Para 4.3.2-3, above.
implied right to modify it when there is a reasonable business reason, such as the one present in *Malone*, i.e. disastrous business consequences and passengers’ safety.\(^{625}\) This is an approach that English courts have rejected under the bilateral contact model but, as the next chapter will illustrate, authorities in the US have adopted such an approach in order to allow the courts the opportunity to strike a fair balance between the employer’s interests and those of the employee.

In the US, as will be shown in the next chapter, courts’ opinions concerning the issue of the unilateral modification of voluntary promises is split between those who are for and those who are against.\(^{626}\) Whilst some states such as Arizona\(^{627}\) and Illinois\(^{628}\) adopt a more orthodox, bilateral model in line with the general principles in the UK, other states such as California\(^{629}\) and Michigan take an alternative approach by accepting that an employer's unilateral creation of an obligation can also be unilaterally modified. This matter will be returned to for a more comprehensive analysis in the next chapter.

### 4.7.3 (iii) Orthodox Approach to Unilateral Modification

It was noted above that the first approach reflects more closely the current bilateral English approach, which rejects any implied right to revoke terms of substantive rights without consent. English courts find it a ‘strong thing’ to permit

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625 See also an ultimate public law approach discussed at Chapter Six below
626 See Chapter Five below
627 *Capital One Bank (USA), NA v. Davey*, 1 CA-CV 13-0109-Court of Appeals (Ariz. 2013); *Demasse v. ITT Corp*, 984 P. 2d 1138-Supreme Court (Ariz: 1999)
an implied term ‘into a contract of employment when that term allows the unilateral variation of the contract’ without both parties’ mutual agreement. An employer attempting to withdraw or modify a voluntary binding promise, such as discretionary bonuses or an interest-free bridging loan, would be in breach of contract and the act could alternatively amount to a breach of the implied duty of mutual trust and confidence. As will be shown in the next chapter, this approach appears to be in line with the Arizona Supreme Court’s decision in Demasse v. ITT Corp., which held that permitting an implied power of unilateral modification to the employer would make any entitlement created by the handbook illusory. To maintain certainty, and to achieve a coherent legal principle, all that is required is for the employer to negotiate with their employees in order to achieve a desirable agreement. This may not appear convenient for an employer, but it would not be so invariably catastrophic for the business.

The approach adopted in Demasse represents an orthodox bilateral model to binding obligations created from unilateral contracts. Once a voluntary promise becomes binding, it provides a secured entitlement to the employee that cannot then be overcome by the employer’s unilateral modification even if such

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630 Facilities Division v Hayes [2001] IRLR 81, CA, per Peter Gibson LJ
631 Wandsworth London Borough Council v D'Silva [1998] IRLR 193, [31]. See also Wickman Machine Tools Sales v LG Schuler [1974] AC 235 which also confirms that this is the normal principle of the construction of contractual terms
632 Fisher v Dresdner bank [2009] IRLR 1035
633 French v Barclays Bank [1998] IRLR 646
634 Ibid
635 984 P.2d 1138 (Ariz. 1999), the court refused to allow an employer's modification of the terms of a handbook contract without additional consideration and each employee's assent.
636 Ibid
modifications are both rational and reasonable.\textsuperscript{637} Employers choosing not to insert an express right to modify have therefore restricted their right to do so, to where there is consent and mutual agreement with their employees.

In short, the authority of \textit{Demasse} provides for the principle that the power to revise or revoke, if not expressed, can only be retained by a bilateral contract approach in which a mutual agreement and, possibly, a new consideration,\textsuperscript{638} is required. This situation prevents promises from becoming illusory. This approach does not seem to depart \textit{per se} from the general approach in English law, as noted above.

If established in English law, would a unilateral contract approach to voluntary promises provide a valid distinction between modifying entitlements arising from voluntary promises or created under a non-contractual document, from those that arise from an employment contract in a bilaterally binding contract of employment?

English law, under the general contract law principle, does not make unilateral contracts any less enforceable, once a contract is formed and created, than bilateral contracts.\textsuperscript{639} As noted earlier, a contractual right, once created, cannot be withdrawn unless mutually agreed by both parties, no matter whether the term was created under a unilateral or bilateral model. This provides for the position that English courts are unlikely to allow the employer a unilateral right to withdraw


\textsuperscript{638} On the necessity of valuable consideration see arguments in both English and US law in Chapter Two and Five respectively.

\textsuperscript{639} See Chapter Two above.
their promises without employee assent. The duty of trust of confidence would also bring another strain to an implied power to unilateral modification.

In the US, as will be seen in the next chapter, courts are split on the issue, and in cases such as Torosyan v. Boehringer Ingelheim Pharmaceuticals the Supreme Court of Connecticut adopted the analysis of Arizona’s Supreme Court in Demasse, and rejected the argument that voluntary promises which create entitlements under the unilateral contract principle can be unilaterally revoked later. The court also argued that to infer acceptance of the modification from the employee's continued employment would leave the employee with ‘no way to insist on those contractual rights for which the employee had previously bargained’. The California Supreme Court, however, in Asmus v. Pac. Bell held that ‘[a]n employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice’. Adopting the reliance theory approach, the courts in California took the view that ‘[i]t would be unreasonable to think that an employer intended to be permanently bound by promises in a handbook, leaving it unable to respond flexibly to changing conditions.’ The employer has the choice to either simply secure agreement to changing the terms by including an express right to vary, or dismiss the workers and re-hire them on the preferred terms.

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641 Ibid, at 99
642 Asmus v Pacific Bell 999 P. 2d 71 (Cal. 2000)
If English courts choose to develop a unilateral approach to voluntary promises it is likely, as noted above, that they will adopt a similar position to _Torosyan_, where contractual rights created through the unilateral model will not be varied without mutual assent. However, if English courts allow further development in a similar trend to the way the Californian approach was adopted, an employer's right to revise would be subject to a legitimate business reasons, and upon the employer providing reasonable notice to their employees. What constitutes a legitimate business reason will be considered in Chapter Six, but courts could develop a trend similar to the band of reasonable responses. The Californian approach appears to be able to respond appropriately to the need for business efficiency, but faces difficulty in the legal justification under current English contract law principles; a further adoption to reliance theory in English employment law may be adopted, similar to California, by giving an appropriate recognition to balance both parties’ interests and expectations. An alternative approach which, arguably, already exists in English law, and has already been developed in the US state of Michigan, is through the development of the doctrine of legitimate expectation, derived from the public law principle in employment law, via the development of the implied duty of mutual trust and confidence. These possibilities will be returned to and discussed further in the forthcoming chapters.

### 4.8 Conclusion

It was shown that the English courts’ reluctance to adopt bilateralism when considering whether a unilaterally introduced promise or document is enough to

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[^645]: See Chapter Six
create a contractual right has produced a muddled legal principle. As seen in the previous chapter, the court-adopted tools, and the heavy reliance on strict and traditional contract formation with adherence to bilateralism has resulted in an incoherent approach and an inconsistency regarding the issue of whether a term is capable of being incorporated into an individual contract of employment.

An alternative reading of the case law with unilateral contract analysis, it has been argued, provides a better explanation to the question of enforcement of voluntary promises, and provides a possible development for better solutions and a coherent approach to employment law.

The general principle is that a binding obligation is created when the parties objectively intend to create legal relations. Under unilateral contract analysis, a unilaterally made promise, if in the form of an offer, and if accepted by the performance of the employee, may create a binding unilateral contract. The question of legal intention, as seen in the cases of Attrill and Judge, is generally presumed to exist in employment relations. Whether a provision is meant to be an offer for a unilateral contract is, accordingly, determined by the outward manifestations of the commitment, and not by the subjective intentions of the employer. For an objectivity test regarding the parties' intention, all that is required for there to be a unilateral contract, is an objective commitment by the employer or an offer that is definite in form. The question of consideration as noted in Lee and Attrill is furnished by a practical benefit.

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646 See further discussion on objectivity test at Chapter Two, para 3.5, above.
647 See Chapter One for more discussion on the principle governing contract formation
648 This approach is adopted by the US Courts; see Pine River State Bank v. Mettille, Mettille, 333 N.W.2d 622; and Hamann v. Park Nicollet Clinic, 792 NW 2d 468 (Minn-Court of Appeals).
Chapter Four: Unilateral Contract Approach to Voluntary promises

If the court was to consider the question of enforceability under a unilateral approach, then all that should be considered is whether or not there has been an objective commitment by the employer that constitutes an offer of a unilateral contract. The commitment could not have been conferred where the promise is unclear or ambiguous. This trend was accepted and adopted, as the next chapter will reveal, in the state of California and others US states. The recent Court of Appeal decision in Attrill opens the door for a unilateral contract approach in English employment law, where further development is needed and may possibly be adopted.649

While the adoption of the unilateral contract model gives more certainty on the employees’ reliance on the promise, it would practically mean that employers will not be able to depart from their unilateral promises, made in their formal statements, whilst the employment relationship is maintained unless mutually agreed. To allow otherwise would undermine legal coherence and an employee’s reliance upon the promises made, and will render such promises illusory. This, as noted above, would come at the cost of the employer’s interests, if commercial exigencies require them to withdraw the promise.

Employers may reserve an express right to the unilateral variation of its voluntary promises, as noted in Bateman and D’Silva, or choose to dismiss their employees and offer a re-engagement on different terms.650 This later possibility under

649 Attrill and Ors v Dresdner Kleinwort Ltd and Anor (Dresdner Kleinwort Limited and Anor v Attrill and Ors, [2013] EWCA Civ 394
common law is subject to reasonable notice where otherwise the employer would be found to be in repudiatory breaches. Employees could insist on the original contact, and either sue for damages resulting from the breach, or terminate the contract and claim damages for wrongful dismissal due to breach of contract. If the employee is protected under the unfair dismissal law, then the employer’s action to dismiss those who refused to accept the new changes is subject to the band of reasonable responses, which will be considered in Chapter Six. Development in both common law and under statutory provision would restrain an employer from any abuse of power. This means that the employer must not act irrationally, for arbitrary reasons, or impose changes in a way that undermines trust and confidence.

A unilateral approach does not provide for an implied power for the employers to vary its promises when business circumstances change. This difficulty is grounded on the contractual approach to voluntary promises which, in English law, means that if a promise was once capable of creating a unilateral contractual right, then the question of whether an employer could later change or modify such a binding term would be a question of contract law. An employer’s power to unilaterally modify contractual entitlements arising from voluntary promises is not implied in the absence of an express right to modify their voluntary promises. Unless English

651 Ibid
653 R. S. Components Ltd. v Irwin, [1973] ICR 535
655 See further discussion in chapter six below. See also Facilities Division v Hayes [2001] IRLR 81; Clark v Nomura [2000] IRLR 766
657 See also Chapter Three above.
Courts adopt an approach similar to the California,658 which provides that an implied right to vary is presumed, the unilateral model can be viewed as increasing the burden on employers, without taking into account the needs of business efficiency. To eternally hold an employer bound to voluntary promises which may become outdated or ineffective without giving the employer the discretion to revise their unilateral promises would, in certain situations (for example in the cases of Kaur and Malone) put business survival at risk.659

An alternative approach to the voluntary promise, as will be considered in Chapter Six, which avoids this unsophisticated approach of orthodox contract law, can be achieved by the principle of legitimate expectation. This doctrine, which is derived from public law principles, is already finding authority supported by the recent developments in employment law,660 as the forthcoming chapters will discuss.

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658 See Chapter Five below.
659 See further discussion at Chapter Six below.
‘VOLUNTARY’ PROMISES: THE US APPROACH TO BINDING AND NON-BINDING OBLIGATIONS
Chapter Five: The US Approach to Voluntary promises

5.1 Introduction

It was shown in Chapters Two and Three that voluntary promises in English employment law can be enforced when an employer’s promise is capable of being incorporated into the contract of employment, ie either by meeting the requirement of orthodox contract law formation or by indirect enforcement where resiling from a promise can amount to a breach of the implied duty of trust and confidence. However, the enforcement of a voluntary promise, as noted in Chapters Three and Four, may result in an incoherent approach, especially if the employer’s business circumstances have altered. In this situation the employer’s unilateral amendment or revocation (due, for example, to urgency or to avoid harsh and disastrous consequences) may result in an action for breach of contract. Most American states, as will be shown in the forthcoming, that adopt a similar set of rules to the English law governing contracts of service have recognized such difficulties and have responded to this issue by developing a legal approach, either through unilateral contract analysis or by adopting the legitimate expectation principle, to allow an employer to depart from its binding or enforceable promise when business circumstances have changed. However, the extent to which these approaches have managed to provide a coherent approach to protect both parties’ interests and provide an appropriate balance to their expectations needs to be examined.

Furthermore, it is interesting to see how these states, which share similar contract law legal instruments with England, have managed to develop a principle that appears to depart from orthodox contract law rules of formation and variation. It is also important to see whether these developments have achieved the desired
Chapter Five: The US Approach to Voluntary promises

coherent approach and whether they can provide an example of how English law could develop similar principles.

Finally, it must be noted that legal writers and academics have generally been divided in their support over which legal framework should be used to analyze the issue of binding voluntary promises under a unilateral contract. While previous literature considered the issue under a unilateral contract or public policy exception, this research will take a new model approach by dividing the courts’ analysis into three categories: the bilateral approach, the unilateral approach and the public law principle. Furthermore, this chapter will focus on three states that each provides a model within one of these three categories. The following three states were chosen for the following reasons:

- **California**, which adopted the unilateral contract approach to handbooks, is known as a state that recognizes the three exceptions to the ‘employment at will’ doctrine, namely, the implied-contract exception, the covenant of good faith and fair dealing exception, and the public policy exception;

- **Florida**, which does not recognize any of the three above-mentioned exceptions, was chosen because it adopts a bilateral contract approach; and

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662 See below for further explication on the exception to the at-will doctrine.
Michigan, because it is the first state to have relied on principles akin to those recognized in English public law, and introduces in private law, for the first time, the doctrine of legitimate expectation.

While these three states represent the legal analysis adopted by the US courts on the issue of voluntary promises, the research will not be limited to their courts but will also consider other US states that have followed their trend.

To achieve such an analysis, this chapter will provide a brief introduction and discussion of the historical development of employment law. It will then consider the legal analysis of voluntary promises by the traditional court approach, the later developed views on the issue, and the courts’ analyses used to support their approaches. The chapter will then evaluate the courts’ progressive approach to the contractual status of employee handbooks, the invention of the so-called ‘handbook exception’, and any further or foreseen developments. It will also examine the contractual and public law analyses that courts have applied by normative and progressive approaches while considering the general question of unilateral promises and their enforceability.

5.2 Early Development in US Employment Law

American law originally adopted the rules of English law regarding employment relationships. However, towards the end of the 19th century English and American law diverged. While English law developed the requirement of reasonable notice when terminating long-term or indefinite employment
contracts, American law developed a different rule of termination in these circumstances. In the US, contemporary common law typically characterizes an employment relationship as an ‘employment at-will’. The employment-at-will doctrine provides that a hiring expressly stating to be ‘at will’, or which is for an indefinite term, is an ‘employment at will’ and may be terminated by either party at any time, with or without cause.

5.2.1 The Emergence of the At-Will Doctrine

Throughout the mid-19th century, US courts and lawyers relied heavily on English precedents but did not often come to the same conclusions. However, the US courts developed a legal presumption that employment contracts were terminable ‘at will’. Unlike US courts, English courts enforced agreements made between parties by establishing the rule of notice. However, this approach

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666 See further discussion, at Para 6.3, below.
669 Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014 , HL, where Lord Atkin stated that notice period is normally ‘confined to weekly or fortnightly contracts., but ‘it extends in the case of collieries to the longer term contracts of accountants, managers, salesmen, solicitors, doctors, and ... to managing directors engaged for a term of years.’, 1028
was never implemented in the US due to the rise of employment at will.\(^\text{670}\) By the 1870s the presumption of yearly hiring in the US began to dissolve and the English concept of reasonable notice had not caught on.\(^\text{671}\) Thus, the time was ripe for a new approach and more fitting rules to govern the question of long-term employment contracts. Attempts were made to provide a solution to the problem until a statement made by Horace Gray Wood came to light.\(^\text{672}\) In his statement, which has since become known as ‘Wood’s rules’, he suggested the following solution:\(^\text{673}\)

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof ... [I]t is an indefinite hiring and is determinable at the will of either party.

Despite the fact that the employee-at-will doctrine has been extensively criticized,\(^\text{674}\) Wood’s rule spread across the nation until it was generally adopted by all US states.\(^\text{675}\)

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\(^{671}\) The leading cases is the authority in *Martin v New York Life Insurance Co*, 148 N.Y. 117, 42 N.E. 416 (1895). See also the United States Supreme Court in *Adair v. United State* 208 U.S. 161 (1908) in which it was held that “the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee”. [174-75]. See generally Michael A. Chagares, ‘Comment, Limiting the Employment-at- Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis’, [1986] 16 Seton Hall Rev. 465, 477-89.

\(^{672}\) G Wood is an American jurist, commenter and Judge who ultimately served on the United States Supreme Court. He died in 1902.


\(^{674}\) For example, in the Supreme Court of Michigan in *Toussaint v Blue Cross and Blue Shield of Michigan* (79 Mich. App. 429 (1977) 262 N.W.2d 848), the Court noted that the statement was ill-supported and inadequate of its explanation. Wood's rule was also criticised as being quickly cited as authority for another proposition. Also Feinman, who was very critical of the Wood’s rule stated that the statement should not have been supported nor adopted for the following reason:
5.2.2 The Employment–At-Will Doctrine

In the early 19th century Wood’s statement became the overriding rule and the dominant doctrine adopted by courts regarding employment relationships. Consequently, in almost every jurisdiction in the US, an employment relationship can be terminated, and employers may discharge an employee without notice, with or without cause, unless the duration of the employment relationship is specified in an employment contract.

The employment at will rule has been the subject of academic and judicial debate for and against the doctrine, with a noticeable decline in support during the last quarter of the 20th century. The origin of the at-will doctrine has also been debated by academics and scholars in the US. While some scholars have argued that the historical origin of the employment at will rule has a respectable, First, the four American cases he cited in direct support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, that the employment at will rule was inflexibly applied in the United States, and that the English rule was only for a yearly hiring, making no mention of notice. Third, in the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed. See Jay Feinman, ‘The Development of the Employment at Will Rule’ [1976] The American Journal of Legal History 118, 126

The rule was recognised and adopted initially by the Appeal Court of New York in Martin v New York Life Insurance Co, 148 N.Y. 117, 42 N.E. 416 (1895), where it became ultimately accepted by almost all other states.

See critics of this theory in the above footnote.

Montana, in 1987, adopted a statute requiring an employer to have "cause" to terminate an employee, see Wrongful Discharge from Employment Act, MoNr. CODE ANN §§ 39-2-901 to -915 (2011).

historical pedigree, others have argued that the at-will doctrine was the likely perception in response to the master-and-servant relationship, within the context of changing economic and social conditions, and linked to the doctrine of freedom of contract.

The doctrine of employment at will has been predominantly associated with the general doctrine of freedom of contract and the age of ‘laissez faire’, which emerged in the early years of the 19th century and was prominent through the 19th century. Indeed, as Gilmore noted, the essence of contract was the voluntary assumption, (i.e. both parties are not forced as opposed to the voluntary (one-sided) promise used elsewhere) of legal obligations which normally brought heavy consequences. The parties were therefore free to design their own relationship through contract; the law would only provide a framework for their agreement and

685 Grant Gilmore, The Death of Contract. Gilmore (Columbus, State University Press, 1974) 15-16
give effect to their design. ‘The prevalent economic and political doctrine of laissez faire complemented contract doctrine in this period’.686

Freedom of contract was, therefore, the notion of the legal presumption that ‘terms of employment are subject to mutual agreement, without let or hindrance from anyone’.687 If either party to the employment contract found that its terms or their relationship did not suit them, then ‘the right to quit is absolute, and no one may demand a reason therefore’.688 Thus, the employment-at-will doctrine was attractive to employers as it allowed them to easily remove any employee who was not productive or who was not competent according to the employer’s standard without concern as to legal consequences.689 However, employers would also face the risk of losing employees, if they left without notice, at times when the market was suffering from a shortage of employees or skilled ones.

In the US the doctrine can also be viewed as providing a valuable effect on commerce and substantial protection ‘to the very foundation of the free enterprise system’.690 Conversely, the effect of the doctrine on employees was the opposite.691 In the absence of specific constitutional rights, the employee who was

687 National Protective Ass’n of Stream Fitters v. Cumming, 107 N.Y. 315, 63 N.E. 369 (1902) at 369
688 Ibid, at 369.
691 See Clyde W. Summers, ‘Employment At Will in the United States: The Divine Right of Employers’ [2000] 3 U. Pa. J. Lab. and Emp. L. 65. In this article, Professor Summers reviews examples of how courts have upheld the at-will doctrine by making it very difficult for employees to sue employers on theories thereby giving employers significant leeway to terrorize their employees (the "divine right" referred to in the article title).
Chapter Five: The US Approach to Voluntary promises

not employed under a fixed-term contract would be subject to the rule of at-will termination whereupon he would have no recourse to legal protection against the termination of his employment; nor would he be entitled to any procedural protection, such as a right to be heard if accused of a disciplinary offence. As the forthcoming discussion will reveal, courts have increasingly moved away from the doctrine of at-will employment due to its often harsh effect and unfair impact upon employees.\textsuperscript{692} It also caused inconvenience to employers as skilled workers could simply walk out without giving any notice.

The unfair and harsh result of the doctrine’s application can be demonstrated in the courts’ findings in various situations.\textsuperscript{693} For example, at-will employees were

\textsuperscript{692} However, some scholars in the field of law or economy (such as Professors Richard A. Epstein; Roger Blanpain, Susan Bison-Rapp, William R. Corbett, Hilary K. Josephs, and Michael J. Zimmer, \textit{The Global Workplace: International and Comparative Employment Law – Cases and Materials} (New York: Cambridge University Press, 2007), 101–102.) have been arguing in favour of the employment-at-will and credit the doctrine as an essential factor in underlying the strength of the US economy. Also professors Tyler Cowen and Alex Tabarrok (Tyler Cowen and Alex Tabarrok, \textit{Modern Principles: Macroeconomics} (New York: Worth Publishers, 2010), 202) were in the view that the doctrine allows more stability in economical workforce otherwise employers become more reluctant to hire employees if they are uncertain about their ability to immediately fire them. Further, in 1992 a major empirical study- which was the first to be conducted in the issue- on the impact of exceptions to at-will employment was published by James N. Dertouzos and Lynn A. Karoly of the RAND Corporation (James N. Dertouzos and Lynn A. Karoly, \textit{Labor Market Responses to Employer Liability}, (Santa Monica: RAND, 1992); available at: http://www.rand.org/content/dam/rand/rand/pubs/reports/2007/R3989.pdf) found that any exception to the employment-at-will would cause decline in aggregate employment. To the contrary, Thomas Miles published a paper in 2000 that no such effect upon aggregate employment can be detected. The exception may increase employment rate and increase labour productivity. (see J.H. Verkerke, ‘Discharge’ in Kenneth G. Dau-Schmidt, Seth D. Harris, and Orly Lobel, eds., \textit{Labor and Employment Law and Economics}, vol. 2 of \textit{Encyclopedia of Law and Economics}, 2nd ed. at 447-479 (Northampton: Edward Elgar Publishing, 2009), 448.)

\textsuperscript{693} See, for example, \textit{Ivy v. Army Times Publishing Co.}, 428 A.2d 831 (D.C. 1981), employee-at-will who testified at an administrative hearing at the request of his employer was dismissed for revealing evidence under oath that consequently proved damaging to employer: also in \textit{Loucks v. Star City Glass Co.}, 551 F.2d 745 (7th Cir. 1977), employer fired his at-will employee for filing workmen's compensation claim; and in \textit{Martin v. Platt}, 179 Ind. App. 688, 386 N.E.2d 1026 (Ind. Ct. App. 1979), employees were dismissed for reporting their employer’s act of bribery.
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not able to seek any remedy for their dismissal even after 45 years of satisfactory performance and being only one year short of retirement;\(^{694}\) this was also the case where an employee was dismissed for refusing to vote for a political candidate supported by their employer.\(^{695}\) Courts, on other occasions, have found employers’ actions in dismissing at-will employees to be perfectly lawful—for example, the dismissal of an at-will employee who refused to continue a sexual relationship with the employer,\(^{696}\) and an at-will employee who voiced concern over the safety of a product manufactured by his employer.\(^{697}\)

Consequently, there was an increased call by many judges and academics\(^{698}\) to revise the law of employment and to abolish the at-will doctrine. For example, in

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\(^{694}\) *Hablas v. Armour and Co.*, 270 F.2d 71 (8th Cir. 1959)

\(^{695}\) *Bell v. Faulkner*, 75 S.W.2d 612 (Mo. Ct. App. 1934)


Fulford v Burndy Corp,\(^{699}\) the court noted that the doctrine of at-will termination is not in the best interests of the economic system or the public good, particularly when such termination is motivated by bad faith or malice or based on retaliation. Again, in Frampton v Central Indiana Gas Company,\(^{700}\) the court recognized the hard consequences of applying the rules in general terms without allowing exceptions. Accordingly, the court created an exception to the rules, stating that employers should not be allowed to dismiss their employee under the at-will doctrine, solely for exercising a statutorily conferred right.\(^{701}\) The rules were also criticized by the Supreme Court of Michigan in Toussaint v Blue Cross and Blue Shield of Michigan;\(^{702}\) they were deemed to be ill-supported and inadequate in their explanation while not covering all situations arising in an employment relationship. The court therefore accepted that an exception to the presumption of an employment at-will could be made by an employer’s voluntary promises or under promises implied in an employee handbook regarding job security and termination procedures.\(^{703}\) In other words, unambiguous promises that dismissal
would only take place ‘for cause’ would preclude the operation of employment at will.

Furthermore, the development of employment law, through legal and economic influences, has also helped to change the judicial attitude to the employment-at-will doctrine. In the last half-century, employment relationships began to witness an increased change where contract analysis, applied by some courts, became increasingly more favourable towards employees than it had been in the past. Most notable was the development of the ‘reliance theory’, as opposed to the ‘bargain theory’, in identifying employment contract formation law, as (as the following discussion will reveal) this greatly contributed to the limitation of the at-will doctrine. Accordingly, in most US states there exists an exception to the rule of the termination-at-will doctrine. These exceptions, which prevent termination at will, are generally categorized under the following: (i) the good faith exception; (ii) the implied term exception; and (iii) the public policy exception. Most US states, and the District of Columbia, recognize the public policy exception. This exception generally means that the employer may not

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On theory of contract See Chapter one, Para 2.3, above for further analysis.

See below. However, Montana was the only state adopting a legislative protection against at-will termination.


Forty three US states including the District of Columbia recognize public policy as an exception to the at-will rule. The only states which do not recognise public policy
dismiss an at-will employee if it would violate the state’s public policy doctrine or a state or federal statute.\textsuperscript{709} Modern development of this exception, as will be examined in the Michigan Model,\textsuperscript{710} has led courts to develop what is now termed as the ‘legitimate expectation principle’, which protect the employee’s interests and yet allow the employer to resile from the expectations when business circumstance alter.\textsuperscript{711}

The good faith exception is the least adopted exception. Only eleven US states have recognized a breach of an implied covenant of good faith and fair dealing as an exception to the at-will doctrine.\textsuperscript{712} However, this exception represents the most significant departure from the traditional employment-at-will doctrine.\textsuperscript{713} Courts, generally, have interpreted the exception to mean that an employer may not terminate an employee's employment in bad faith or when it is motivated by malice. Other courts have stated that employers’ decisions to terminate employment must be subject to just cause.\textsuperscript{714}

\textsuperscript{709} See e.g. Frampton v Central Indiana Gas Company, 297 N.E.2d 425, 428 (Ind. 1973).
\textsuperscript{711} See Para 6.8 below. See Chapter Six for further analysis on the doctrine.
\textsuperscript{712} These 11 states are: Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming.
Chapter Five: The US Approach to Voluntary promises

The third major exception is the implied-contract exception which, in effect, means that an employer may not terminate the employment when an implied agreement for termination only for cause is formed between the parties, even though no express, written instrument regarding the employment relationship exists. The Supreme Court of the United States in *Baltimore and Ohio R Co v United States* provided an explanation on how this contract can arise by defining the implied contract as an agreement implied in fact as ‘founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding’. By the nature of this definition, it is clear that such contract is difficult to establish and the burden of proof is on the dismissed employee. However, as will be examined below in the California model, development of the unilateral contract approach guaranteed more security to the employee and attempt by courts to develop an approach that provides an appropriate balance of protection to both parties’ interests.

To summarize, while the doctrine of employment at will is still the common-law default rule in US employment law, most US states currently recognize one or more exceptions to this rule and are moving away from the doctrine in order to

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715 See e.g., *Pine River State Bank v. Mettille*, 333 N.W.2d 622, (Minn. 1983). Thirty-seven US states (and the District of Columbia) have an implied contract exception. The other thirteen states which do not have such exception are: Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia.

716 261 U.S. 592 (1923)

717 Ibid

718 *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). The position is similar to the English Supreme Court’s ruling in *Autoclenz Ltd v Belcher* [2011] IRLR 820. See also Para 2.2.2 above.

719 See Para 6.6 below

respond to some of its harsh consequences. The most notable example of this trend is what has become known as the ‘handbook exception’. This exception provides that when employers issue handbooks to their employees, this may create binding contractual terms or legitimate expectation that counteracts the presumption of at-will employment.\footnote{A handbook exception has also been recognized for public policy reasons in \textit{Toussaint v. Blue Cross and Blue Shield of Michigan}, 292 N.W.2d 880, 892 (Mich. 1980). See further Jason A. Walters, Comment, ‘The Brooklyn Bridge Is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree’s Assent’ [2002] 32 Cumb. L. Rev. 375. See full discussion below} However, not all states have recognized the content of handbooks as creating ‘handbook exception’.\footnote{See below model of Florida at Para 6.3 below} Those who do, as explored below, have been divided regarding the contractual framework and legal analysis upon which these handbooks are governed and the effect that they grant. For example, in some states, courts have relied on traditional contract-law principles in their approach to binding promises,\footnote{For example contact approach was adopted by the New Jersey Supreme Court in \textit{Woolley v. Hoffmann-LaRoche, Inc.}, 99 N.J. 284, modified, 101 N.J. 10 (1985), and the Minnesota Supreme Court in \textit{Pine River State Bank v. Mettille}, 333 N.W.2d 622 (Minn. 1983). See further below} whereas others have based their analysis upon legitimate expectation public law principles.\footnote{See for example the Michigan Supreme Court in \textit{Toussaint v. Blue Cross & Blue Shield of Michigan}, 292 N.W.2d 880, (Mich. 1980).} While this division appear to show some similarity with the development in English employment law, as noted above, it also shows that courts which have been reluctant about the strict orthodox contract-law principle were not able to provide a coherent approach to promises whereas those who were adopting a more developed approach, such as the Michigan courts, have been able to achieve a better solution to the issue by protecting the employees’ dignity and expectation and allowing the employer, in certain condition, to amend or revoke its promises when business circumstances alter.
In the US voluntary promises or representations, as will be examined in the next paragraph, normally appear in the formal document of handbooks. Accordingly, the following section will examine voluntary promises made in handbooks but it should be noted that the principle is not limited to these documents.

5.3 Handbook Exception

5.3.1 Introduction: Legal analysis to voluntary promises in handbooks

It was noted earlier that the general common-law principle in the US is that an employer is always free ‘to enter into employment contracts terminable at-will without assigning cause.’ However, freedom is also granted to the employer ‘to create a different relationship beyond one at-will’ with its employees by an express or implied agreement. In modern employment relations, in the US, it is increasingly common practice that employees are provided with employee handbooks that usually contain an elaborate expression of the employer’s personal and workplace policies. Employers usually provide their workers with statements of policy instead of, or in conjunction with, an employment contract.

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725 Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, (Mich. 1980), 646


These documents have become increasingly popular in the last half-century and are generally referred to as manuals or handbooks.\(^{729}\)

These handbooks, as noted in earlier chapters,\(^{730}\) may contain policies and procedures for business managerial prerogatives,\(^{731}\) including information regarding grievance and termination procedures and general day-to-day operating rules. They may also provide rights and benefits to the workers, such as bonuses and pay rises, strategies, severance pay, insurance, and holiday pay. The employee may, as is often the case, rely on the rights and benefits made in these formal statements and seek enforcement as to their provisions.\(^{732}\)

The legal position regarding the handbook is a vital challenge, especially when the document is the only source of express provisions between the employer and employee. As noted earlier, the difficulty that these handbooks present regarding the approach to voluntary promises is the same as in the UK.\(^{733}\) In other words, the legal effect and binding obligation that can be created from unilateral or voluntary promises in non-contractual documents is concerned with the

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\(^{730}\) See Chapter One and Two above


\(^{732}\) In Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989), the Supreme Court defined a policy as “a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions; ... a projected program consisting of desired objectives and the means to achieve them...” 443 N.W.2d 112, at 120, quoting “Webster's Third New International Dictionary, Unabridged Edition (1964), original emphasis.

\(^{733}\) See Chapter Two
contractual formation of binding terms, namely, agreement, intention, and consideration.\textsuperscript{734} In the absence of an employment contract, which is often the case in the US,\textsuperscript{735} an employee is left without any protection or remedy against their employer if disputes arise between the parties; the only recourse they have is to rely upon the terms and promises contained in the handbook.\textsuperscript{736} Furthermore, legal recognition of handbooks is not merely concerned with Bryce Yoder’s observation about ensuring a degree of fundamental fairness in the relationship between employer and employee,\textsuperscript{737} but, more essentially, is concerned with providing a coherent legal approach to promises in which an employee’s legitimate expectation of those promises being upheld is recognized. In other words, employers who provide voluntary promises in a formal statement and distribute the statement to their employees should not be allowed to make the workforce rely on its provisions but thereafter be allowed to regress from those promises or treat them as illusory.\textsuperscript{738}

This therefore poses the question that is at the heart of this debate: are unilateral promises that are made in a formal statement, such as an employee handbook or manual, capable of creating a binding obligation, or can the employer dismiss such a claim, under the doctrine of employment at will, on the basis that

\textsuperscript{734} See Chapter Two
\textsuperscript{736} See Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).
\textsuperscript{737} Bryce Yoder, ‘Note: How Reasonable Is ”Reasonable”?: The Search for a Satisfactory Approach to Employment Handbooks’ [2008] 57 Duke L.J. 1517, quoting Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985), modified, 499 A.2d 515 (N.J. 1985) (“All that . . . [is] require[d] of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises.”).
\textsuperscript{738} Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, (Mich. 1980).
unilaterally made promises cannot create binding terms upon the employer due to the employment being able to be terminated at any time, with or without a reason. This in turn raises the theoretical issue whether a contract is confined to a bilateral formation model based on exchange, in which case the promise unsupported by consideration requested by the employer cannot have contractual effects, or whether the courts are now willing to impose contractual obligations on the basis of reliance by the employee. The following section will consider these matters in detail.

5.4 Traditional Judicial Treatment of Handbooks

Judicial attitudes towards voluntary promises made in handbooks, company manuals, or policies were initially uncertain. Some courts merely regarded these documents as a means of detailing the terms of an incomplete employment contract. However, in the early part of the 20th century, courts had adopted a firmer position in most US states that these documents were not contractual and


740. For example in Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 60-61 (1870) the court allowed the consideration of whether the nature of the agreement from all the facts including previous relations between the employer and their workers. See further discussion on the point see J. Peter Shapiro and James F. Tune, “Note, Implied Contract Rights to Job Security”, 26 STAN. L. REV. 335, 340-47 (1974).

therefore voluntary promises made by employers in these non-contractual documents were not enforceable. While most states denied granting employment handbooks any legal effect, they varied greatly in the legal framework upon which they based their analyses and decisions. Many courts relied exclusively on what they regarded as traditional contract law (under both unilateral and bilateral contract formation), whereas others relied on public policy for achieving such results. This approach was influenced by the at-will doctrine that remained dominant.

Courts that denied contractual effect to these unilateral documents, which was based on the bilateral contract approach, had many similarities to the analysis
adopted by the English courts. For example, US courts refused to enforce the employers’ unilateral commitments because there was no legal intention to create contractual obligations, no meeting of the minds between the parties, a lack of valuable consideration, and no evidence of acceptance by the employee.

However, the main focus of the courts under this trend, and the key element of creating a bilateral contract, was the concept of ‘mutuality of obligation’. The concept of mutuality of obligation provides that both parties are under a legal duty to one another and either both, or neither, of the parties to the contract must be bound by the obligation. Thus, as the employee was free to resign at any time and the employer was not able to oblige the employee to continue their employment, the employer had to similarly be free from any obligation to keep the employee.

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747 See previous chapter on the English approach to formation of binding obligation and the requirement of aptness at Chapter Three, Para 4.3, above. See also contract formation at Chapter Two.


750 See Lieber v. Union Carbide Corp., 577 F. Supp. 562 (E.D. Tenn. 1983) in which it was stated that ‘there must be a meeting of the minds between the parties that the policy statement was intended to create contractual rights’. See also Gates v. Life of Montana Ins. Co., 638 P.2d 1063 (Mont. 1982).


In Leikvold v. Valley View Comunity Hosp ( 141 Ariz., 544, 546, 688 P.2d 170, 173 (1984)) it was held that the employment-at-will doctrine cannot limit any of the parties’ freedom to contract. see also analysis made in Toussaint v. Blue Crossand Blue Shield 408 Mich. 579, 292 N.W.2d 880 (1980).

753 Later development, however, have taken the view that the doctrine of employment-at-will is merely a rule of construction, rather than one of substance and, therefore, the
Accordingly, courts took the view that as employees were not required to give a promise in return, no mutuality of obligation existed and therefore no binding obligation had been formed.\textsuperscript{754}

Towards the last quarter of the 20th century,\textsuperscript{755} in conjunction with the increasing criticism directed at the employment–at-will doctrine\textsuperscript{756} and the growing number of jurisdictions finding in favour of employees,\textsuperscript{757} the status of employee handbooks witnessed a state of transition. This was due to a more developed legal analysis regarding handbook jurisprudence that provided new exceptions to the at-will rule. The most notable developments have been the well-known decisions of the Supreme Courts, namely Michigan Supreme Court in \textit{Toussaint v Blue Cross and Blue Shield} and the Arizona Supreme Court in \textit{Pine River State Bank v Mettille}\textsuperscript{758}, which will be discussed in detail below. While \textit{Pine River} was considered under the contract-law principle, the Supreme Court in \textit{Toussaint\textsuperscript{758}} doctrine should not stop the parties from providing that they intended to have their employment relationship not terminated but only in accordance with the term of their agreement. In \textit{Pine River State Bank v. Mettille} (333 N.W.2d 622, (Minn. 1983)at 628) the position was confirmed in the following terms: ‘There is no reason why the at-will presumption needs to be construed as a limit on the parties' freedom of contract. If the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so.’ In \textit{Leikvold v. Valley View Community Hosp} (141 Ariz., 544, 546, 688 P.2d 170, 173 (1984)) it was held that the employment-at-will doctrine cannot limit any of the parties' freedom to contract. See also analysis made in \textit{Toussaint v. Blue Cross and Blue Shield} 408 Mich. 579, 292 N.W.2d 880 (1980). See further below.


\textsuperscript{755}See above footnotes for list of commentators criticizing the at will doctrine.


\textsuperscript{757}\textit{Pine River State Bank v. Mettille} 333 N.W.2d 622 (Minn. 1983).
relied on principles, under public policy, akin to those recognized in public law in England.\textsuperscript{759}

While both Florida and California consider the issue under the contractual formation analysis, they differ with regard to the contractual approach they adopt; Florida adopted the bilateral contract approach whereas California adopted the unilateral contract approach. Michigan, however, provided an alternative to the orthodox contract approach where the principle of legitimate expectation was brought into the private employment law arena. Furthermore, Florida provided a classical contract approach in which the ‘bargain theory’ was still predominantly adopted by its courts, whereas the other two states, in particular Michigan, represented a departure from the bargain theory in favour of the ‘reliance theory’.\textsuperscript{760}

Accordingly, this chapter will argue that, unlike the approach adopted by Florida, both the Californian and Michigan approaches are capable of providing a coherent legal analysis of the issue of voluntary promises and provide adequate tools to respond to the modern development of employment relations and business needs. It will also be argued that Michigan’s approach, in particular, provides for such a development by considering the enforcement of promises as fundamentally rooted in a theory of reliance rather than one of bargain.

\textsuperscript{759} See Para 6.8 below. See Chapter Six for further discussion on the English public law principles.
\textsuperscript{760} See further Chapter One above
The discussion below will, therefore, be divided into three categories, each reflecting on one of the chosen states; the first will consider the courts’ approach to voluntary promises in handbooks under the general principle of bilateral contract analysis, i.e., the Florida model; the second considers the unilateral contract approach, i.e., the Californian model; while the third will discuss the courts’ approach under public law principles, i.e., the Michigan Model.
5.5 The State of Florida: The Bilateral Approach Model to Handbooks

5.5.1 Introduction

Florida adopts the model of bilateral contract analysis, regarding the formation of contracts of employment, in a similar way as that generally adopted by English courts.\(^{761}\) Thus, courts in Florida, by continuing to adopt a bilateral analysis to contract formation in employment relationships, take the view that to create a binding contractual term there must be an ‘explicit mutual promise’.\(^{762}\) However, as will be seen below, this approach has not always been consistent and recent developments have shown a departure from the long settled bargain theory in the state of Florida.\(^{763}\)

This raises the issue of whether unilateral promises or statements in employment manuals and handbooks can give rise to enforceable contract rights in the state of Florida and under what legal principle and analysis the courts have concluded their findings.

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\(^{761}\) See Chapter Two for detailed analysis on formation of contract
\(^{762}\) Bryant v. Shands Teaching Hospital and Clinics, 479 So. 2d 165 (Fla. 1st DCA 1985), at 168.
5.5.2 The Formation of a Binding Contract

The bilateral approach, adopted in Florida, insists on the requirement of mutuality of obligation and consideration in order to give a handbook a contractual effect. Thus, the established position of the law in Florida is that voluntary promises made in employers’ formal statements ‘do not give rise to enforceable contract rights unless they contain specific language which expresses the parties’ explicit mutual agreement that the manual constitutes a separate employment contract.’\(^{764}\) Valuable consideration would not be satisfied without the parties’ mutual agreement being established.\(^{765}\)

This longstanding principle was announced in the leading case of Muller v Stromberg Carlson Corp,\(^{766}\) where the court held that, although the employee handbook in this case (which provided a dismissal policy and procedure) had shown ‘a relatively extensive and sophisticated method of determining the future status of an employee’\(^{767}\), the policy statements by the employer did not give rise to an enforceable contract or establish any binding obligations. While accepting that the development of law in various jurisdictions allowed policy statements by an employer to give rise to an enforceable contract, the court refused to come to the same conclusion without the parties’ explicit and mutual agreement. This requires the orthodox formation rules of contract (offer, acceptance, consideration, \(^{764}\) Quaker Oats Co. v. Jewell, 818 So. 2d 574 (Fla. D.CA 2002); and recently confirmed in Partyline Gifts, Inc. v. MacMillan, 895 F. Supp. 2d 1213 (Fla. Dist. Court, MD 2012) [24].

\(^{765}\) Ibid. See Chatelier v. Robertson, 118 So.2d 241 (Fla. 2d DCA 1960)

\(^{766}\) 427 So. 2d 266 (Fla. 2d DCA 1983).

\(^{767}\) Ibid at 269
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and intention to create legal relations) to be satisfied. The court felt that any relaxation of these legal requirements, in the state of Florida, would be viewed with serious reservations ‘considering the concomitant uncertainty which would result in employer-employee relationships’. The court noted that the ‘basic function of the law is to foster certainty in business relationships, not to create uncertainty’. This statement seems surprising considering that the majority of states are stepping away from the at-will rules due to their complexity and, as noted earlier, the harsh results they produce. The fundamental purpose of contract law is to give effect to what the parties have agreed and to protect the parties’ entitlements under the agreement. Accordingly, employees who are furnished with a handbook rely on its statements to create certainty. Allowing an employer to withdraw from its promises after the workforce have developed a reasonable expectation that the employer will be bound would surely create uncertainty for employees and businesses alike. Thus, the basic function of the law is to protect the parties’ entitlements and prevent the employer from treating its promises as illusory.

However, the court in Muller was reluctant to abandon the orthodox contract-law principle and bargain theory and concluded that enforcement of the handbook without the contracting parties’ mutual bargaining and consent to its terms,

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768 Ibid
769 Ibid at 270
770 Ibid at 270
772 This argument was adopted by other states which developed unilateral contract model. See for example Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)
773 See adoption of this argument in Californian model below
created uncertainty as to the legal position in employment relationships ‘by establishing ambivalent criteria for the construction of those relationships’.\textsuperscript{774}

The findings in \textit{Muller} were later confirmed by the District Court of Appeal’s decision in \textit{Bryant v Shands Teaching Hospital and Clinics}\textsuperscript{775} in which the court rejected enforcing employee handbooks without ‘the explicit mutual promises necessary to create a binding contractual term’.\textsuperscript{776} In \textit{Bryant}, the hospital provided its worker with a personnel policy that stated that it would only dismiss an employee for just cause. However, the court held that even if the employee handbook contained such a provision, it was not sufficient to create a binding obligation or establish a contractual term. Such language, without the employee’s clear consent or mutuality of obligation, was a mere unilateral expectation. As in \textit{Muller}, the court was only concerned with the employee’s express evidence of exchange of promise and mutuality of obligation.\textsuperscript{777} The court did not consider the possibility that, as employees did not object to the promise and continued to perform their duties; this should have been taken as silent acceptance.\textsuperscript{778} Further, in \textit{Johnson v National Beef Packing Co}\textsuperscript{779} the Supreme Court of Kansas, which follows the model of Florida, insisting on the bargain to-exchange theory,\textsuperscript{780} held

\textsuperscript{774} \textit{Muller v Stromberg Carlson Corp} 427 So. 2d 266 (Fla. 2d DCA 1983), at 270
\textsuperscript{775} 479 So. 2d 165 (Fla. 1st DCA 1985)
\textsuperscript{776} Ibid, 168. See also \textit{McConnell v. Eastern Air Lines Inc} 499 So. 2d 68, 69 (Fla. 3d DCA 1986) in which the court held that handbook were statement of mere gratuitous unilateral promises that requires valid consideration and mutual obligation to create a legally binding obligation on the employer.
\textsuperscript{777} See further Chapter Two and Four
\textsuperscript{778} See \textit{National Union Fire Insurance Co. v. Ehrlich}, 122 Misc. 682 (1924). In which it was held that silence will constitute acceptance if the offeree gives the offeror the impression that silence will be considered an acceptance. This court’s ruling was not rejected in Florida but still does not appear to be argued or accepted in employment cases.
\textsuperscript{780} For discussion on bargain theory see Chapter One, Para 2.3.5, above
that company manuals and policies unilaterally introduced by the employer were not enforceable as their terms were ‘not bargained for’.\textsuperscript{781} 

The emphasis on the classical rules for the valid formation of a contract, which restrict creating entitlements to circumstances where there is an exchange of bargains or exchange of promises,\textsuperscript{782} is normally linked with the assumption that exchange theory is the appropriate theory of contract.\textsuperscript{783} 

This trend has been abundant in employment relationships, not only in the UK, but, as the forthcoming discussion will illustrate, in many other states in the US, such as Michigan, California, Arizona, and Minnesota. While some of these states applied a wider or more flexible interpretation to the requirements of contract formation (eg consideration and acceptance) to respond to modern developments in employment relations,\textsuperscript{784} others accomplished this by embarking upon the idea of reliance and that the legitimate expectation of the parties must be protected.\textsuperscript{785} 

The court findings in \textit{Muller}, and its successors, demonstrate the difficulty of applying the bilateral approach, which requires mutuality of obligation to form a contract, to voluntary promises or employee handbooks. Further, the adoption of the bargain theory has led courts in Florida to conclude that an employee’s reliance or ‘belief as to the legal import of an employer's policy or contract ‘has 

\textsuperscript{781} Bryant v. Shands Teaching Hospital & Clinics 479 So. 2d 165 (Fla. 1st DCA 1985) 55; see also Shaw v. S.S. Kresge Co. 328 N.E.2d 775 (1975) adopting the same approach. 
\textsuperscript{782} See above 
\textsuperscript{783} See chapter One, Para 2.3, above 
\textsuperscript{784} See California Model, Para 6.6, below 
\textsuperscript{785} See Michigan
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no bearing’ on the issue of interpretation of that policy or contract’.786 This is so even where the provision relates to the heart of the employee’s remuneration package. Thus ‘finding policy statements in an employment manual relating to overtime pay did not constitute the terms of a contract of employment’.787

One must wonder if the court can reasonably justify its presumption that employers who issue a handbook containing policies and rights are merely intending to provide information or are only furnishing their employee with gratuitous promises with no expectation of receiving any benefit from the employee in return (such as loyalty, a more committed workforce, and better performance). Nor could the courts possibly assume that employees who receive a handbook must be reading its provisions, including those which provide remuneration packages, with the clear understanding that all promises made by the employer are non-binding. A statement in the handbook offering pay for overtime is clearly an example of this.

Furthermore, the bilateral contract analysis adopted by the courts appears to confuse a promise made under a bilateral offer, such as commercial contracts, with a promise of a unilateral offer made by the employer, under the course of employment relationship. That latter promise relies upon the performance of the employee; the performance is conferred by the employee continuing to work,

786 Osten v. City of Homestead, 757 So.2d 1243, 1244 (Fla. 2000); Quaker Oats Co. v. Jewell, 818 So. 2d 574, 576-77 (Fla. 2002); and Laguerre v. Palm Beach Newspapers, Inc., 20 So. 3d 392 - Dist. Court of Appeals, (Fla. 2009)
787 Quaker Oats Co. v. Jewell, 818 So. 2d 574, 576-77 (Fla. 2002); Vega v. T-Mobile USA, INC., 564 F. 3d 1256 - Court of Appeals, (Fla. 2009); and Bank of America, NA v. Crawford, Dist. Court, Case No. 2:12-cv-691-Ftm-99DNF. (Fla. 2013)
rather than an exchange of promises, for an acceptance to be made.\textsuperscript{788} The employer who issues a handbook to its workforce does not exchange promises with the employee (the hallmark of a bilateral contract), but rather awaits the employee’s acceptance by performance (the hallmark of a unilateral contract).\textsuperscript{789} Once a handbook is introduced, the employee continuing to work constitutes an acceptance by performance and thus creates a unilateral contract that binds the employer to its obligations.\textsuperscript{790} This approach was adopted by the State of California, as will be examined below.

\textbf{5.5.3 Development of the Legal Approach}

It was noted earlier that courts in Florida have generally viewed employment relationships as ones of contract, and consequently they have treated the question of the legal effect of handbooks under the principle of bilateral contract formation. Accordingly, courts who maintained a classical bilateral contract approach refused to enforce promises made in handbooks unless an offer acceptance by return of promise, consideration, or mutuality of obligation were clearly satisfied.\textsuperscript{791}

However, later developments in employment law led some courts, which had adopted the bilateral contract approach, to recognize the unfairness of allowing...
employers to distribute statements of policy and manuals that resulted in employees relying on the promises made yet thereafter reneging on those promises.\textsuperscript{792} To resolve the conflict between maintaining the traditional rules for forming a bilateral contract and the requirement for fairness and justice, some courts began to consider voluntary promises in handbooks as a modification to the existing at-will-employment contract, or, following the English trend, rules that were appropriate for incorporation into the contract of employment.

Under the former analysis, the employee continuing to work after receiving his employer’s ‘modification’ constitutes acceptance to, and consideration for, such modification, and hence creates the mutuality of obligation necessary to bind both parties. In Florida, for a provision to be incorporated into the contract of employment the parties must intend to be bound by its terms. Comparable to the English position, the intention of the parties is determined objectively where certain and clear language that expresses the parties’ explicit intention must be shown in order for the court to determine that the term of the manual introduced by the employer became a part of the employment contract.\textsuperscript{793} Again comparable to the English approach, the incorporation of a term into the employment contract can, under certain circumstances, form the basis of an express or implied contract between the parties even if such terms ‘were not expressly incorporated by

\textsuperscript{792} \textit{Carter v. Kaskaskia Community Action Agency}, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974). See also \textit{Falls v. Lawnwood Medical Center}, 427 So. 2d 361 (Fla. 4th DCA 1983) in which a summary judgment was granted by District Court of Appeal of Florida instructing the trial court to resolve the factual dispute concerning whether or not the personnel policies which stated that dismissal as termination for cause were contractual and thus part of the employment contract.

\textsuperscript{793} See also \textit{Sheehan v. Twon of North Smithfield}, C.A. No. 02-1647. (RI. 2010)
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The court did not define exactly what these circumstances were but indicated that the objective intention of the parties was a core element of incorporation. In addition, promises made in a personnel manual may be binding on an employer, by express or implied incorporation of the term into the contract of employment, if objective intention and clear language can be determined. This is similar to the approach of ‘aptness’ in English law as discussed in Chapter Three above.

The recent approach indicated by some courts in Florida suggests a willingness to depart from the strict approach adopted in Muller and to open the door to further developments where it is acknowledged that employers should not ignore their promises particularly when employees have legitimately relied on the promises made. This trend can be observed in the recent decision in Partylite Gifts, Inc v MacMillan where the District Court in Florida adopted the following passage: ‘[t]he principle that promises made in a personnel manual may be binding on an employer is accepted in a clear majority of American

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796 See further Chapter Three above. See e.g. Alexander v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286, [31]

797 University of Fla. v. Collins, 678 So.2d 503, 507 (Fla. 1st DCA 1996); Partylite Gifts, Inc., v. MacMillan, 895 F. Supp. 2d 1213 (Fla. Dist. Court, MD 2012); Walton v. Health Care Dist. of Palm Beach County, 862 So.2d 852 (Fla. 4th DCA 2003) 855-56 895 F.Supp.2d 1213 (Fla. 2012)

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jurisdictions ... The idea that an employer may ignore promises made in a personnel manual is in increasing disfavor in this country.  

Notwithstanding the attempt by some courts to find a more devolved jurisprudence to the question of the employee handbook or manual, *Party lite Gifts*, for example, involved a summary judgment case and the Court held that it should be decided at full hearing. This indicates that the bilateral approach adopted in Florida, remains loyal to the strict requirement of mutuality of obligation and the complexity associated with consideration and objective intention in order to give handbooks contractual effect.  

English courts, as noted in Chapter Three and Four, have increasingly departed from the strict orthodox rules of contract formation.  

Further, the ambiguity of the requirement of mutuality of obligation appears to confuse the formation of ‘unilateral’ and ‘bilateral’ contracts, whereas the requirement of objective intention, as noted in English law, has not guaranteed coherence. In addition, many courts acknowledge the view that the need for mutuality of obligation is deemed synonymous with the need for consideration; while others are of the view that ‘enforceability of a contract depends on

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800 See e.g. *Quaker Oats Co. v. Jewell*, 818 So.2d 574, 576-77 (Fla. 5th DCA 2002)  
801 Ibid  
802 See also Chapter Six form further development in the English approach.  
803 See e.g discussion on the case of *Malone and others v British Airways* [2010] EWCA Civ 1225, [2011] IRLR 32 at Chapter Three, Para 4.3, above.  
consideration and not on mutuality of obligation’. 805 Thus, the proper inquiry should not be concerned with the question of mutuality of obligation but rather ‘whether the employee has given consideration for the promise’ 806 made or given by the employer. This surely brings to the surface the controversy discussed in Chapter Two regarding how to define consideration and what it means. 807

As will be considered below, other states have moved from the model adopted by Florida. Thus, according to one view, the mere performance of services is sufficient consideration to make an employee handbook part of an at-will contract. 808 A second view is that ‘the employee’s action or forbearance in reliance upon the employer’s promise constitutes sufficient consideration to make the promise legally binding’. 809 The first view resembles the approach in California whereas the second is adopted in Michigan.

To summarize, employers have the choice as to whether or not they provide their employees with manuals or make promises of rights and obligations that are not merely aspects of managerial prerogative. Employers who choose to issue handbooks that contain such promises expect to gain some benefit in return; as any reasonable person would appreciate, they do not simply issue them out of altruistic impulses. 810 Employees also expect to receive some benefit when they

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805 Toussaint v. Blue Cross and Blue Shield 408 Mich. 579, 292 N.W.2d 880 (1980) at Ibid at 885 Per Levin, J.
806 Ibid, 885 (Per Levin J)
807 See chapter Two Para 3.3, above
809 Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, (Mich. 1980), 888
810 Ibid
comply with the provisions in a handbook. In the case of *Muller*, above, the unilateral promise by the employer that he would give specific salary increases to his employee in return for his satisfactory job performance is an example of this trend. The employer is surely introducing such a statement in order to gain benefits and the employee would expect that, as they have read and complied with the manual, they should receive the benefit of that promise. Furthermore, the recent attempt in Florida to consider a broader scope of what creates a binding entitlement, even if adopted, may face similar complexity to those in the English law; ie once a contractual right is created, an employer will be in breach if unilaterally departed from it even if the employer behaved rationally and reasonably. As noted in the previous chapter, this can cause employers significant practical problems since business circumstances are normally subject to many changes.

Traditional courts, with an unduly restrictive bilateral contract approach, as seen in Florida, have failed to recognize this. Insisting upon the bargain theory rather than an employee’s reliance in employment relations creates legal complexity and unfair results. However, as the following discussion will reveal, the unilateral contract approach has managed to provide a reasonable solution to cases involving handbook/manual provisions that is coherent, fair, and yet consistent with contract law principles and rules. Conversely, the adoption of legitimate expectation

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811 In *Muller v Stromberg Carlson Corp* 427 So. 2d 266 (Fla. 2d DCA 1983). The court held such promises, even if they relate to payment, without explicit language which expresses the parties' explicit mutual agreement that the promise constitutes a separate biding contract ‘are insufficient to create a binding term of employment’, 268.

5.6 The State of California: Unilateral Contract Approach

5.6.1 Introduction

It was explained earlier that the view of the US courts regarding the contractual analysis of handbooks was split between the bilateral and unilateral contract approach. While Florida was shown to follow the first approach, California is considered to follow the second. However, what difference do these two approaches make to the question of binding promises and the legal effect of voluntary promises? Does the unilateral approach guarantee a different result, or at least provide a better explanation regarding the issue of entitlement? This will be discussed further below.

As stated earlier, the common law of contract distinguishes between bilateral and unilateral contracts; under unilateral contract theory the contract is created when only one of the two parties has made a promise. The promisee is not bound by this promise but may choose to undertake an act, or series of acts, or forbear from doing something. On the contrary, for a bilateral contract to be formed, both parties must make or exchange promises and both are bound by their terms.

814 See further Chapter Four above
815 The difference between a unilateral and bilateral contract is typically demonstrated by the well know example of the Brooklyn Bridge. See John D Calamari and Joseph M. Perillo, ‘The Law of Contracts’ (3rd edn, West Publishing Co 1987) Para 1-10, stating the following terms:

‘If [A says to B] if you walk across Brooklyn Bridge, I promise to pay you ten dollars’ A has made a promise but he has not asked B for a return promise. He has requested B to perform an act, not a commitment to do the act. A has thus made an offer to a unilateral contract which arises when and if B performs the act called for. If A had said to B ‘If you promise to walk across Brooklyn Bridge, I promise to pay you ten dollars’ his offer requests B to make a commitment to walk the bridge. A bilateral contract arises when the requisite return promise is made by B.
promise. Thus, for a bilateral contract to be created and be enforceable, there needs to be ‘mutuality of obligation’ between the parties.\textsuperscript{816} Unilateral contracts have no such requirement and therefore they are an exception to the doctrine of mutuality of obligation.\textsuperscript{817}

Based on this analysis and as an employee is not obliged, if employed at will, to continue to work, can the employee handbook be adequately described as a unilateral contract? In other words, why should courts apply the unilateral contract analysis to the employee handbook, and what are the rules for an agreement to be correctly characterized as a unilateral rather than bilateral contract?

While the dichotomy between unilateral and bilateral analysis is not important when categorizing the employment-at-will contract,\textsuperscript{818} the unilateral approach, by contrast, provides an appropriate and transparent legal analysis to the question of employment handbooks.

This is because, as illustrated in Chapters Two and Three, the nature of voluntary promises suggests that one party is making the offer without negotiating or bargaining with the other party in order to receive a counter-promise. Employers who make voluntary promises normally do so by unilaterally introducing their promises in formal statements, e.g. handbooks, manuals, collective agreements, or


\textsuperscript{817} Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000); Imagine Fulfillment Services LLC v. DC Media Capital LLC, B239081.CA (Cal 2013)

\textsuperscript{818} Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989), 447
company policies, without waiting for a promise in return; the employer is instead waiting for an act to be done by the employee, e.g. continuing to work.

Furthermore, the discussion below will illustrate that the unilateral contract analysis provides both a fair result and a coherent and developed legal approach while also satisfying the traditional contract law principles. In addition, the legal focus in creating a unilateral contract is the objective commitment made by the employer to create a binding contract rather than the objective intention of the parties. This provides more security to the employee and their reliance on the employer's promise; it also prevents the employer treating their promises as illusory by relying on the tools of formation notwithstanding their clear and unambiguous commitment. As noted in earlier chapters, in employment relationships intention is presumed if a promise made by an employer is capable of constituting an offer of a unilateral contract. An offer that can create a binding commitment is considered objectively by a clear and certain promise. This provides a simpler, more coherent, and more adequate approach to the enforceability of voluntary promises, especially when employees have performed according to a genuine and legitimate expectation that the employer will be bound by its promises. Additionally, employers who provide a company policy and/or handbook are only bound by their promises conferring rights and benefits, while benefitting from securing ‘an orderly, cooperative and loyal work force’\(^8\) as a result of introducing such policies. At the same time, employees who receive a company policy and/or handbook would naturally benefit from certain provisions

\(^8\) See *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 613, 292 N.W.2d 880, 892 (1980) ‘the employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.’
that provide them with rights and job security, as long as they remain performing their job.\textsuperscript{820}

Nonetheless, employers may still have the discretion to amend or modify provisions in order to respond to the changes in the market and business environment and to account for any necessary developments and competition.\textsuperscript{821} This is of great importance to the underlying discussion, not only regarding the distinction between the policy of managerial prerogative and binding term but also to the extended discussion of when a promise is binding. While some states adopted the view that employers may unilaterally amend or revoke these binding voluntary promises ‘in certain matters’,\textsuperscript{822} or upon reasonable notice,\textsuperscript{823} others permit withdrawal even if contractual rights were created under a unilateral contract.\textsuperscript{824} The conditions, limitations, and the extent to which such discretion may be applied by the employer will be considered separately below.

The first question that must be determined is whether handbook provisions are capable of constituting an offer of a unilateral contract that the employee accepts by way of performance. Secondly, can such performance satisfy the requirement

\textsuperscript{820} Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000); Prahm v. Pickford Real Estate, CA4/1, D062477M (Cal. 2014).

\textsuperscript{821} Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), ‘Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.’[627]. See However Los Angeles Traction Co. v. Wilshire 135 Cal. 654, (1902) in which it was held ‘contract that is unilateral at inception, may, through the acts of the parties, ripen into a bilateral contract.’ [658]; Baumgartner v. Meek 126 Cal.App.2d 505, (1954); Caldwell v. Dalaray Mines (1945) 68 Cal.App.2d 180, ‘The contract at the date of its making was unilateral, a mere offer that, if subsequently accepted and acted upon by the other party to it, would ripen into a binding, enforceable obligation’. [183]; and more recently Prahm v. Pickford Real Estate, CA4/1, D062477M (Cal. 2014).

\textsuperscript{822} Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), 627

\textsuperscript{823} Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000)

of consideration?\textsuperscript{825} And if so, when can an employer unilaterally withdraw its binding commitment created under unilateral contract model?

### 5.6.2 Formation of Unilateral Contract

In California the courts consider voluntary promises in handbooks or manuals that usually offer additional advantages to employees under the approach of unilateral contract.\textsuperscript{826} Consequently, ‘if they meet the requirements for formation of a unilateral contract, [they] may become enforceable as part of the original employment contract’.\textsuperscript{827} As discussed in Chapter Two, the requirements for the formation of a unilateral contract are satisfied where there is an offer of a unilateral contract that is accepted by the promisee’s commencement of performing a desired task, without the need for a prior or even an accompanying express reciprocal promise of performance.\textsuperscript{828} Thus, unlike bilateral contracts, unilateral contracts do not insist on or require a mutual exchange of promises; nor is it necessary to obtain the consent of the parties to the formation of a binding obligation.\textsuperscript{829} The required formation of a unilateral contract adopted in California provides that where a unilateral promise is made by the employer to his employee

\textsuperscript{825} Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)
\textsuperscript{826} Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000)
\textsuperscript{829} Ibid, see further, Bernard Ernest Witkin 'Summary of California Law' (10\textsuperscript{th} edn. Bancroft-Whitney Company, California, 2005) Vol1 Contract, Para 213.
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the focus is on the clear and unambiguous language of the promise since legal intention and valuable consideration is already presumed.\(^{830}\)

Accordingly, the first question regarding the formation requirements is whether voluntary promises contained in a handbook are capable of constituting an offer of a unilateral contract. As noted in Chapters Four, the language of commitment in a unilateral contract is the key determining factor in creating a binding obligation.\(^{831}\)

For a unilateral offer to be created there needs to be clear and unambiguous language. Accordingly, a statement which does not constitute an offer of unilateral contract is merely a statement of managerial prerogative which can be altered or modified at any time by the employer with or without the employee’s consent.\(^{832}\)

Thus, Californian law considers the employer’s objective commitment made to the employee as the essential ingredient of creating a binding obligation.\(^{833}\) An offer constituting a mere ‘optimistic hope of a long relationship’\(^{834}\) or that an employer will be ‘generally’\(^{835}\) bound is not sufficient to create a commitment. An express statement that the employer is not making an offer to be bound or that he may ‘choose’ to be bound ‘are no more than that and do not meet the contractual

\(^{830}\) See further below. For more examination on the requirement of contract formation and the distinction between unilateral and bilateral contract see Chapter Two and Four above.

\(^{831}\) See also Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000)

\(^{832}\) Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000); Coursolle v. EMC Insurance Group, Inc, No. A10-1036.( Minn. 2011)


requirements for an offer’. The language of the provisions in the handbook must therefore be ‘sufficiently clear and definite’ to create rights or benefits to the employee: ‘If contractual language is clear and explicit, it governs’.

This position appears to show a similarity to the recent English approach, as noted in Chapter Four, and adopted in *Attrill and others v Dresdner Kleinwort Ltd and another*, in which the question of voluntary promises was analyzed under the principle of unilateral contract formation. In seeking to identify contractually binding promises, *Attrill* appears, to great extent, to follow similar principles to California, where the creating of a binding obligation is examined by the objective commitment made by the employer, rather than identifying the exchange of promises and mutual intention of the parties.

Similarly, the requirement of the intention to create legal relations in employment relationships is generally presumed where the statements of the employer provide an objective commitment to its employees. As discussed in Chapter Four, the importance of a unilateral contract approach in employment relations to the question of whether the handbook provisions constitute a sufficiently specific offer, is relevant in order to show that the employer intended to be bound and that the requirement of consideration is easily identified. Furthermore, Californian courts have been willing to find that objective commitments made by the

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837 *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (Cal.1992) 1264
838 *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), 626
840 [2013] EWCA Civ 394. The Court of Appeal affirmed the finding of the High Court [2012] IRLR 553QBD.
employer can also be implied.\textsuperscript{841} An offer of unilateral contract can be implied if the employee has a reasonable expectation of the promise which they have reasonably relied upon. Under Californian employment contract law, evidence of such an implied commitment ‘may arise from a combination of factors, including longevity of service, commendations and promotions, oral and written assurances of stable and continuous employment, and an employer's personnel practices.’\textsuperscript{842}

The unilateral approach to voluntary promises given in handbooks was confirmed by the California Supreme Court in \textit{Asmus v Pacific Bell},\textsuperscript{843} in which it was held that in ‘a unilateral contract, there is only one promisor, who is under an enforceable legal duty’.\textsuperscript{844} Accordingly, an offer of a unilateral contract is accepted if the employee continues with the employment.\textsuperscript{845} Employees are not bound to remain in their employment or prevented from leaving and seeking alternative employment. However, if, following the offer, they continue in their employment, this would constitute an acceptance of the unilateral contract. The court found that, in employment relationships, the mere creation of an offer and acceptance of a unilateral contract in this way satisfies the requirement of valid consideration.\textsuperscript{846} This is because voluntary promises provide additional benefit to the employee, or at least make them ‘more content and happier in their jobs’\textsuperscript{847} which results in them forgoing ‘their rights to seek other employment, assists in


\textsuperscript{842} \textit{Caterpillar Inc. v. Williams}, 1987 482 US 386 - Supreme Court (Cal. 1987)

\textsuperscript{843} 999 P. 2d 71 - Cal: Supreme Court (2000)

\textsuperscript{844} Ibid 184


\textsuperscript{846} See discussion on the English Court of Appeal in \textit{Attrill and ors v Dresdner Kleinwort Ltd and anor} 2013 EWCA Civ 394, particular Para, 5.51-5.53, above.

\textsuperscript{847} \textit{Chinn v. China Nat. Aviation Corp.}, 138 Cal. App. 2d 98 [Cal. 1955], [100]; confirmed by the Supreme Court in \textit{Asmus v. Pacific Bell}, 999 P. 2d 71 (Cal 2000)
avoiding labor turnover, and are considered of advantage to both the employer and the employees.\textsuperscript{848} This broadened concept of valid consideration resembles the revised version of the doctrine of consideration in English law where it has been held that good consideration can be furnished by practical benefit.\textsuperscript{849}

The California Supreme Court in \textit{Asmus} was influenced by the findings of the Supreme Court of Minnesota in \textit{Pine River State Bank v Mettille},\textsuperscript{850} which was the first leading Supreme Court case to allow handbook exceptions to be applied to the at-will doctrine by applying a unilateral contract analysis.

In \textit{Pine River} the court stated that an ‘employer’s offer of a unilateral contract may very well appear in a personnel handbook as the employer’s response to the practical problem of transactional costs.’\textsuperscript{851} The Supreme Court concluded that ‘personnel handbook provisions, if they meet the requirements for formation of a unilateral contract, may become enforceable’.\textsuperscript{852} Accordingly, ‘[w]hether a handbook can become part of the employment contract raises such issues of contract formation as offer and acceptance and consideration’.\textsuperscript{853}

Under the general principle of contract law the requirement for the formation of a unilateral contract is for an offer of a unilateral contract to be made. This offer is a request by the offeror for an act or series of acts rather than a request by way of a

\textsuperscript{848} \textit{Chinn v. China Nat. Aviation Corp.}, 138 Cal. App. 2d 98 (Cal. 1955), \[100]\textsuperscript{849} \textit{Edmonds v Lawson} [1990] 2 WLR 1153. See further Chapter Two above \textsuperscript{850} 333 N.W.2d 622 (Minn. 1983). \textsuperscript{851} Ibid at 627 \textsuperscript{852} \textit{Pine River State Bank v. Mettille}, 333 N.W.2d 622 (Minn. 1983), 627 \textsuperscript{853} Ibid, 625.
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word or rerun of words. However, for a statement to constitute an offer of a unilateral contract it ‘must be definite in form and must be communicated to the offeree’. This triggers the question of whether the employee’s knowledge of the offer, or at least the existence of the handbook, is necessary for performance to constitute acceptance by the employee. This is a key question as the offer is not created until it is communicated to the employee. In the English case of Attrill the Court of Appeal asserted that employees do not share all their knowledge with the employer. The mere fact that there is an announcement or distribution of a handbook by the employer that some employees have received or become aware of is sufficient to satisfy the rules. In the US the issue is controversial, with limited authority ‘suggesting that knowledge of an offer is not a prerequisite to acceptance’. If this is affirmed in the US, it means that the requirement of communication is the mere announcement of the offer or circulation of the handbook. Whether an individual employee has read the handbook or not is not a question for the court to consider. All that is required is that an employer has made an offer that could be received by some employees. To treat those who did not receive the offer less favourably may constitute a breach of good faith or lead to a potential discrimination claim in the US if there is a relevant characteristic which is a cause for the differential treatment. In the UK, as discussed in Chapter Four, it could constitute a breach of the implied term of mutual trust and confidence.

855 Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), 626
856 Attrill & Ors v Dresdner Kleinwort Ltd & Anor [2013] EWCA Civ 394
858 Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000)
Although the Supreme Court in *Pine River*[^59] was dealing with handbook provisions which were introduced to the employee after the start of their employment, the Court felt that it was necessary to also consider the situation on the basis of the unilateral offer being made at the time of hiring or at the time when employment began. The Court made it clear that it was dealing with a newly introduced handbook modifying the pre-existing employment-at-will contract; however, its finding was nonetheless applicable to a handbook offered at the time of hiring. The Court concluded that a handbook could be an enforceable unilateral contract whether it was introduced at the time of the original hiring or later. Courts should therefore only be concerned with the requirement of contract formation rather than when handbooks were introduced.

The Court regarded the requirement of additional valuable consideration no differently than in cases concerning the at-will rule; it ‘is more a rule of construction than of substance’.[^60] Therefore, the requirement of additional consideration is satisfied if the employee, upon receiving the unilateral offer, carried out a specific act, ie continued to work and carry out her existing employment duties. This is a clear departure from the English position as discussed in Chapter Two.[^61]

[^59]: *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983)

[^60]: Ibid, 626. See further discussion on consideration and its modern application at Chapter Two, Para 3.3, above.

[^61]: See *Stilk v Myrick* (1809) 2 Camp 317, accepted in *North Ocean Shipping v Hyundai Construction* (The Atlantic Baron ) [1978] 3 All ER 1170; and *Williams v Roffey Bros. Ltd* [1991] 1 QB 1.
The employee’s continued performance, despite the freedom to resign, constituted valuable and sufficient consideration for the employer’s promises in the handbook to be binding. Consequently, when handbook provisions relate to promises of rights and benefits, such as job security and a termination policy or ‘to such matters as bonuses, severance pay and commission rates’, these promises are ‘enforced without the need for additional, new consideration beyond the services to be performed’. 862 This seems to take the requirement of consideration away from the detriment/benefit scenario and even beyond the concept of practical benefit. The court suggested that where parties are under a pre-existing duty or ought to be in an employment relationship, the mere reliance on the promise that provides the substantive term or creates the additional rights and benefits is sufficient to create an entitlement. The emphasis on reliance is echoed in the legitimate expectation approach adopted by the state of Michigan which will be discussed below. 863

While the approach unilateral contract model in Pine River was followed by many other states, including California and Arizona, the court left two vital questions unanswered; this subsequently created a difference of opinion between various courts and states that adopted unilateral contract model. The first question was, in what manner may an employer, having created a binding voluntary promise under unilateral contract, later limit or rescind that promise? In other words, can the

862 Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), 629. The court also refused the argument that provisions cannot be enforced due to the lack of ‘mutuality of obligation’. Unilateral contract does not require mutuality of obligation but once the requirement of consideration is met; there should not be any additional requirement of mutuality of obligation. ‘The demand for mutuality of obligation...is simply a species of the forbidden inquiry into the adequacy of consideration’. Ibid at 629. See Estrada v. Hanson, 215 Minn. 353, 10 N.W.2d 223 (1943).
863 Similar trend is adopted in the English public law doctrine of legitimate expectation as examined in Chapter Six below.
employer, after creating a unilateral contract, amend or withdraw from its promises under the unilateral contract?

If the answer is positive, the second question that will arise is whether an employer needs to give any notice to the employee of its decision to revoke its unilateral promises?

States which adopted unilateral model have been divided on these two major issues and it may be worth to consider the views both ‘for’ and ‘against’ the revocation of unilateral contract approach when examining the approach adopted by California’s courts.

5.7 Unilateral Modification under the Model of California

5.7.1 Introduction

While the handbook exception is recognized under unilateral contract analysis in California, controversy began to emerge due to courts adopting various views on whether handbooks, policies, and manuals could be unilaterally modified or withdrawn by the employer, with or without notice. The difference of opinion on the issue has been witnessed by the various states that have adopted the model of California, i.e. unilateral approach to handbook terms. While some state courts, such as Colorado and Washington, allowed employers to unilaterally modify

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864 See list of cases above and comments
865 Saxe v. Board of Trustees, 179 P. 3d 67 -Court of Appeals, (Colo.2007); and Ferrera v. Nielsen, 99 P. 2d 458 - Court of Appeals, (Colo.1990),
or rescind the originally introduced handbook, as and when business deemed it necessary, ie in any circumstances, others such as Arizona, Connecticut, and Illinois rejected this approach and refused to permit unilateral modification without a new agreement being formed. California, however, adopted an approach somewhere in the middle by allowing modification subject to reasonable notice. Thus, the forthcoming will consider these three approaches to revocation which have been adopted by the states that accepted unilateral jurisdictions.

5.7.2 The Anti-Modification Approach

While California allows, in certain condition, for the employer’s unilateral amendment and revocation of unilateral contract, it is worth noting that other states, Arizona, New Mexico and Connecticut, that adopting the principle of unilateral contract model as an exception to the at-will termination doctrine, have refused the employer’s unilateral modification. The legal analysis upon which this approach has been based is the general principle of bilateral contract. This analysis rejects alteration to the contract after it has become binding unless there is agreement from the parties and fresh or additional consideration has been

870 See further discussion below
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The traditional common law of contract substantiates courts adopting the anti-modification approach and provides justification that is firmly rooted in contract law to support their position.\textsuperscript{873}

Applying this analysis in the context of handbooks, the employee's performance or continuation of work after the employer has unilaterally issued a handbook or manual would create a binding obligation that cannot unilaterally be revoked.

This approach was adopted in the Arizona Supreme Court in \textit{Demasse v ITT Corp}\textsuperscript{874} where it was held that the employee handbook originally issued by the employer could not be unilaterally modified.\textsuperscript{875} The prohibition of unilateral modification applies whether the contract was formed unilaterally or bilaterally.

\textsuperscript{872} Restatement (SECOND) of Contracts (1981) § 45. The section was mentioned in \textit{Demasse v ITT Corp}, \textit{ibid}, but was not given enough exploration. See also

\textsuperscript{873} Under common law the question is not straightforward where three views on the issue can be deducted. The old view is that offeror may revoke his offer or amend at any time so long that the performance has not been completed. \textit{Petterson v Pattberg}, 161 N.E. 428 (N.Y. 1928); \textit{Bartlett v. Keith}, 325 Mass. 265, 90 N.E.2d 308 (1950). The other two views considered that the offeree, once started to perform, has relied on the promise of the unilateral offer which must be protected from any unfair revocation by the offeror. To grant such protection one view concluded that once the offeree starts to perform then a bilateral contract arise. \textit{Los Angeles Traction Co} v. \textit{Wilshire}, 135 Cal. 654, 67 Pac. 1086 (1902). A more coherent view concluded that the starting to perform creates a unilateral contract which bind the offeror to its offer and, therefore, the terms becomes irrevocable. \textit{Marchiondo v. Scheck}, .78 N.M. 440, 432 P.2d 405 (1967); \textit{Hutchinson v. Dobson-Bainbridge Realty Co.}, 31 Tenn. App. 490, 217 S.W.2d 6 (1946). For further discussion on these views see Maurice Wormser, ‘The True Conception of Unilateral Contracts’ [1916] 26 Yale L.J. 136.

\textsuperscript{874} 984 P.2d 1138 (Ariz. 1999)

and whether the contract was expressed or implied.\textsuperscript{876} To modify or withdraw from a binding contract, including a unilateral contract, the employer is required to obtain the employee’s consent or acceptance of that offer and consideration.\textsuperscript{877} The court considered that even if it was prepared to accept that the employer issuing a new or revised handbook ‘constituted a valid offer, questions remain whether the ... employees accepted that offer and whether there was consideration for the changes ... [the employer] sought to effect’.\textsuperscript{878} In addressing the issue of consideration, the court determined that the employees’ continued ‘employment alone does not constitute consideration for modification’.\textsuperscript{879} The court also refused to accept the argument that continued employment after the issuing of the amended or new handbook constituted acceptance. To allow otherwise, employees would have had no choice but to resign in order to preserve their rights under the original contract. ‘Thus, the employee does not manifest consent to an offer modifying an existing contract without taking affirmative steps, beyond continued performance, to accept.’\textsuperscript{880} The court concluded that to allow unilateral modification or the rescission of a contract would render most handbook contracts illusory.\textsuperscript{881}

While \textit{Demasse} appear to follow a contractual analysis rooted in contract law, they appeared to ignore the employer business efficiency when business or market circumstances alter or when employers have good and reasonable cause to modify or withdraw voluntary promises. If courts where faced with similar facts to that

\textsuperscript{876} \textit{Demasse v. ITT Corp}, 984 P. 2d 1138 (Ariz: 1999), 1144
\textsuperscript{877} Ibid, 1144
\textsuperscript{878} Ibid, 1144, emphasise added
\textsuperscript{879} Ibid, 1144, emphasise added
\textsuperscript{880} Ibid, 1145
\textsuperscript{881} Ibid, 1145-1146
discussed in the English case of *Malone*\(^{882}\) previously discussed in Chapter Three, then courts would either distort the principles of contract law, in similar way to that done by the English court in this case, in order to reach commercially sensible outcomes, or put the business at serious risk if such revocation was not permitted.

### 5.7.3 ‘Reverse’ Unilateral Approach

It was noted above that unilateral contract approach adopted in California was followed by most American states as an exception to at-will termination. The vast majority of the states that followed the same model of California have also allowed employers to unilaterally amend or revoke a handbook have relied on a ‘reverse’ unilateral approach,\(^{883}\) which means that as the employer created the handbook unilaterally, the employer may also repeat the same process which led to the formation of the unilateral contract.\(^{884}\) The underlining legal principle adopted by these courts was that modification of the manual constituted an offer by the employer which employees accepted by continuing to work.\(^{885}\) Thus, in *Ferrera v Nielsen*,\(^{886}\) for example, the Court of Appeal in Colorado held that an employer could modify or rescind promises made or contained in a handbook simply by issuing a new handbook. The analysis to this finding was based on the grounds that an employer who issues a policy manual or handbook unilaterally

\(^{882}\) *Malone and others v British Airways plc* [2011] IRLR 32


\(^{886}\) 799 P.2d 458 (Colo. 1990)
without their employees’ consent may do the same again at any time. Further, the Court of Appeal held that where a handbook or manual was issued without an express reservation to unilaterally modify or terminate its provisions at a later date, such a reservation was presumed. The Court maintained that it did not depart from unilateral contract law rules when reaching its conclusion. A similar assertion was made by other courts that followed the approach adopted by the Court of Appeal in Ferrera. However, the difficulty with such a claim is that it rests on dubious legal grounds; creating a unilateral contract means that an obligation is created which cannot simply be revoked on the basis that it was formed under a unilateral rather than bilateral contract. In Asmus, George CJ asserted that allowing unilateral modification or termination of a handbook or its terms was ‘entirely inconsistent with fundamental tenets of contract law’. Allowing an employer to unilaterally modify or terminate any terms that were originally contractual, without consent and/or additional consideration, was conflicting with traditional requirements for contract modification.

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888 Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Ac. 1086; Marchiondo v. Scheck, 432 P. 2d 405, 78 N.M. 440-Supreme Court (NM. 1967). In Strata Production v. Mercury Exploration, 916 P. 2d 822 – (NM. 1996) the Supreme Court of New Mexico held that even ‘partial performance on an offer for a unilateral contract also renders the offer irrevocable.’ [footnote2]. The Supreme Court confirmed its finding again in its more recent finding in Abreu v. New Mexico Children, Youth and Families Dep’t, 797 F.Supp.2d 1199 (NM. 2011)
889 Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000); dissenting, 191
While the ‘reverse’ unilateral approach has been adopted by most courts in the US, the legal and business analysis adopted to justify such an approach is hard to justify under orthodox contract law principles. The starting point is that the employer is always free to decide whether or not the employer he issues a handbook to the employees. However, at the same time employers who do not issue a handbook are not likely to gain any practical benefits associated with providing employee handbooks, such as promoting a more efficient workforce, higher morale, an attractive working environment, better performance from staff, less disputes and lower staff turnover. By contrast, employers who choose to offer such manuals and handbooks are likely to receive these practical benefits which would otherwise not be secured. Furthermore, courts have recognized that any modification or termination of handbook provisions could cause employers to lose the more productive members of their workforce whose recruitment was the likely reason for the policies being issued in the first place.

However, courts supporting the reverse approach have generally argued that the employer’s discretion to reverse is necessary because business circumstance are likely to alter and in certain situations (such as dire economic circumstances), the

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891 See above footnotes
892 Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)
894 See Para 6.7.1 above
895 Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989), 119. However the court use this finding to argue that such a threat provides a compelling deterrent and prevents companies from modifying or terminating handbook terms except when completely necessary.
employer’s business could be at risk if revocation was not permitted.\textsuperscript{896} Thus, the employer needs to be allowed the ability to revoke burdensome promises in order to prevent it having to choose to dismiss its entire workforce and close its business.\textsuperscript{897} However, it could be argued that, in such circumstances, all that is required is negotiation between the parties in order to create a new agreement. This may inconvenience the employer but not be catastrophic for the business; employees are unlikely to refuse to negotiate where they could risk losing their job by forcing their employer to close its business. In the US, an employee’s refusal to negotiate could be regarded as an act of bad faith;\textsuperscript{898} in the UK it could possibly be argued that the employee was in breach of the implied duty of trust and confidence.\textsuperscript{899}

The finding in \textit{Ferrera} that unilateral modification is an implied right included in every handbook, suggests that every right created or implied in an employee handbook can become revocable, despite the employees’ reliance upon it. However, employers should not be entitled to create an inducement in order to attract and retain a skilled and loyal workforce, which employees rely upon and which therefore creates a reasonable expectation and obligation, but thereafter have the discretion to give notice to withdraw and subsequently disregard those obligations, without a bona fide business reason, due to the employer perceiving


\textsuperscript{897} Ibid


\textsuperscript{899} Such possibility can be derived, for example, from the court’s ruling in \textit{Transco Plc (formerly BG Plc) v O’Brien} [2002] I.C.R. 721; \textit{Mahmud v Bank of Credit and Commerce International SA} [1997] IRLR. See Chapter Three above
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them to be inconvenient.\textsuperscript{900} Pratt stressed that to allow an employer, who made a promise of rights or benefits in a handbook that has induced the reliance of employees, to then ignore such provisions would surely violate fundamental notions of fairness.\textsuperscript{901} However, fairness to an individual employee must not preclude fairness to the business and other employees. In other words, it must be taken into account how preventing employers from changing polices or handbooks when there is a legitimate business need could result in the business running into difficulty and ultimately putting other employees at risk of losing their jobs as a result.\textsuperscript{902}

Thus, the approach of legitimate expectation doctrine, as discussed in the forthcoming section and in Chapter Six, provides a more sophisticated approach than the approach based on contract law principles. This because the doctrine allows the employer to depart form promises protected under legitimate expectation, but this will depend on how the employer can justify its departure and more justification is required for some rights than others.

In an attempt to respond to the harshness that absolute unilateral modification can cause to employees who might be faced with sudden and immediate termination

of their reliance or expectation, while also protecting the need to give employers adequate discretion to change their handbooks when business and market needs require such a change or modification, some courts have required the employer to give reasonable notice of the modification in order for it to be effective. However, the difficulty with this approach is that it does not explain the legal basis that supports such a requirement and why an employer would need to give notice if modification is initially allowed. Nor it is clear how and what constitutes reasonable notice. This is examined in the next section.

5.7.4 Revocation upon reasonable notice

Under traditional contract law the employee’s acceptance of the original offer creates a binding obligation on the employer that cannot be revoked; once a contract has been created by acceptance, the employer may not unilaterally vary or rescind it. Thus, once the employer is under a contractual obligation to its employee, the employer cannot then alter its obligation without consent. The employee, who relied upon the offer by starting to perform, or continuing to work, must therefore receive protection from an arbitrary revocation by the employer. To allow otherwise would mean that employees have no way to enforce any right

903 For instance in Grovier v. N. Sound Bank, 957 P.2d 811 (Wash.Ct. App. 1998) the court upheld the employer’s decision to dismissal an employee who was given three days to accept the new handbook but refused to sign to the modified sick leave, holiday and vacation pay.
907 Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902)
gained from their handbook, ‘which would result in the loss of the very right at issue’\textsuperscript{909} and would ultimately undermine fairness and justice that the law seeks to achieve.\textsuperscript{910}

However, as noted above, fairness and justice must apply to both parties and, accordingly, in certain situations businesses may have a compelling reason or legitimate ground for needing to change their handbooks and manuals. To ignore such facts would put businesses at risk of closing and, consequently, dismissing their entire workforce. Accordingly, requiring employees’ consent and additional consideration in each and every situation could cause difficulties to businesses and may result in adverse consequences.

Yoder suggested the ‘rule of reasonable notice’ as an alternative to both approaches;\textsuperscript{911} this would be a better alternative than to allow an absolute unilateral modification right or total restraint of any right to modification without agreement. Relying on the authority of Asmus,\textsuperscript{912} he argued that courts should not allow any modification to the contractual handbook unless a ‘proper


\textsuperscript{910} Some anti-modification courts have relied heavily on the ground of fairness in its approach to reject employer unilateral modification. See for example Toth v Square D Co, 712 F. Supp. 1231 (D.S.C. 1989), arguing that permitting the employer to amend the originally contracted handbook would be ‘patently unjust’. Ibid, at 1235. The court considered the adoption of unilateral modification makes the handbook, in effect, not worth the paper it was printed. Ibid, at 1235. See also Brodie v. Gen. Chem. Corp., 934 P.2d 1263, 1268 (Wyo. 1997) holding that unilateral modification of an employee handbook would substantially interfere with the employees' valuable contractual right and undermine fairness.


\textsuperscript{912} Asmus v. Pacific Bell, 999 P. 2d 71 (Cal 2000)
reasonableness standard’ is adopted. However, he limited the proper reasonableness standard to the notice itself, not whether the employer’s reason to modify was reasonable or legitimate. His view of what constitutes reasonable notice depends upon the nature of the promise being modified. He argued that ‘for notice to be reasonable (1) it must include a time requirement, and (2) the amount of time necessary should vary depending upon the nature of the promise’.\(^\text{913}\) However, the nature of the promise is difficult to determine and is likely to be subjective from one employer to another. This could create uncertainty in the law rather than solve the situation regarding the modification of handbooks. Contract analysis, as noted above, is objective rather than subjective. Furthermore, the difficulty with this proposal, as Yoder himself accepted, is that employers who modify many provisions in a handbook would face practical difficulties as each change would require a period of notice before it would be deemed ‘reasonable’.\(^\text{914}\) Additionally, this proposal, although finding support in some court decisions,\(^\text{915}\) did not solve the question of how reasonable notice can be defined, constituted, and ultimately achieved. More importantly, the suggestion remains difficult to reconcile with traditional contract principles.\(^\text{916}\)

An attempt to provide an explanation regarding the requirement of reasonable notice was made in *Fleming v Borden*.\(^\text{917}\) In this case, where the court held that unilateral modification of the contracted handbook was permitted, but only when


\(^{916}\) See above analysis 6.7.1

\(^{917}\) 316 S.C. 452, 450 S.E.2d 589 (1994).
the affected employee was provided with reasonable notice of the alteration, the court explained its finding by stating that employment relationships and market conditions are ever-changing and, therefore, employers should be allowed to respond to such changes as they evolve.\textsuperscript{918} Accordingly, ‘the employer–employee relationship is not static’,\textsuperscript{919} and employers should and must ‘have a mechanism which allows them to alter the employee handbook to meet the changing needs of both business and employees’.\textsuperscript{920} To hold a fair balance between the business needs and the employees’ rights, a notice of the intended modification must be given to the employees to give them time to prepare and create a new expectation.\textsuperscript{921} This is parallel with the principle of legitimate expectation where a balance of the parties’ expectations must be appropriately weighed.\textsuperscript{922}

The requirement that an employer must gain every employee’s consent in order to show that there has been successful renegotiation with each employee is not practical; an employer could otherwise ‘find itself obligated in a variety of different ways to any number of different employees’.\textsuperscript{923} Courts adopting such an approach have also concluded that ‘[i]t would be unreasonable to think that an employer intended to be permanently bound by promises in a handbook, leaving it unable to respond flexibly to changing conditions’.\textsuperscript{924} As a result of this approach, an employer would simply have to secure agreement to change the provisions or dismiss the current workers and re-hire them on the preferred terms. In English law, as discussed in Chapter Six, the court applies the test of band of reasonable

\textsuperscript{918} Ibid at 595
\textsuperscript{919} Fleming v. Borden, Inc, 450 S.E.2d 589 (S.C. 1994) 595
\textsuperscript{920} Ibid, 595
\textsuperscript{921} Ibid, 595-96
\textsuperscript{922} See Chapter Six.
\textsuperscript{923} Ibid at 120.
\textsuperscript{924} Ferrera v. Nielsen, 799 P.2d 458 (Colo. Ct. App. 1990), at 460
response to overcome the difficulties of such problematic outcomes. However, its application is limited to certain contract law and statutory requirements and restraints. This is examined further in Chapter Six.

However, it can be argued that the alternative is already suggested by the California Supreme Court in *Asmus*, which held that ‘[a]n employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees’ vested benefits’. The assertion that any changes should not interfere with the ‘employees’ vested benefits’ could indicate where a variation to an employee’s vested benefits is inevitable in order to ensure the survival of the business, employers must provide reasonable notice to their workforce for the change to be effective. However, any right to withdraw by the employer made in bad faith or ‘upon a showing of either actual malice, ie, publication of a false statement with actual knowledge of its falsity or reckless disregard for its truth, or malice in fact, ie, publication of a false statement with bad faith or improper motive’.

The question of what constitutes legitimate business needs under the orthodox principle of contract law, as noted above, is difficult to be construed. An employer may argue that its need to increase its business profits is good business reason. If

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925 Employment Rights Act 1996 s98(1)(b). See Chapter Six
the argument is accepted, it would give employers a free hand to erase almost all commitments and leave all promises illusory. There is also the difficulty of the contract law principle, as noted above, which prevents the employer from breaching or unilaterally revoking its contractual term even if it acted reasonably. However, the principle of legitimate expectation derived from English public law offers an appropriate examination and justification on when an employer’s withdrawal or resile can be lawfully justified and hence permissible. This is discussed in Chapter Six.
5.8 The State of Michigan: The Legitimate Expectation Model

5.8.1 Introduction

The state of Michigan was the first state to recognize the handbook as an exception to the at-will doctrine that fell outside orthodox contractual rules. Michigan courts departed from the orthodox contract-law formation approach and adopted the principle of ‘legitimate expectation’ in order to conclude that entitlement created from unilateral promises arises from the employees’ reliance on a clear and unambiguous promise. While the enforcement of promises under the principle of legitimate expectation is created outside the traditional contract-law rules of formation, the employer’s breach of promises protected by legitimate expectation amounts to contractual breach.

The leading and most frequently cited case supporting such an approach is *Toussaint v Blue Cross and Blue Shield*, in which the defendant employer furnished its employees with handbooks containing provisions that promised to ‘provide for the administration of fair, consistent and reasonable corrective discipline and to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only’. Toussaint, who was a

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930 579, 292 N.W.2d 880 (Mich. 1980)

931 Ibid, 893
middle manager, was later discharged by Blue Cross without a finding of just cause. He then brought a suit against his former employer for wrongful termination of employment and breach of contract. 932

The Court of Appeals held that a contract of indefinite duration was ‘terminable-at-will’ and ‘cannot be made other than terminable at will by a provision that states that an employee will not be discharged except for cause’. 933 However, the Michigan Supreme Court rejected the finding of the Court of Appeals. The issue before the Supreme Court was whether a voluntary promise, including a discharge-for-cause policy, made by the employer to his employee in a handbook constituted a binding obligation upon the employer. 934 The Court held that such a policy could bind an employer if the ‘employer’s written policy statements set forth in the manual of personnel gave rise to legitimate expectations’. 935

In *Toussaint*, the court refused the longstanding bilateral contract approach that the enforceability of the provisions of an employee handbook must depend upon ‘mutuality of obligation’ 936 or that such a policy must be bargained for. 937

Departing from the orthodox contract formation rules, the court instead relied on principles akin to those recognized in public law in England to find that ‘an

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932 Ibid, 884
934 Ibid, 883-84
935 Ibid, 292 N.W.2d at 885
936 Ibid at 885 (Per Levin, J).
937 Ibid. This was explained by the judgment opinion of Levin J on the following terms: ‘We hold that [HN6] employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee’. Ibid, 892.
employee’s legitimate expectations may be based on the employer’s written policy statements set forth in an employee manual or handbook’. The court took the view:

1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term — the term is ‘indefinite’, and

2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee’s legitimate expectation grounded in an employer’s policy statements. 938

Thus, when a promise acquires legitimate expectation, the employer’s unlawful breach or departure constitute breach of contract. For legitimate expectation to give rise to protection, all that is needed to be shown is that the employer has chosen ‘to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee’. 939 Accordingly, the employer that makes a voluntary promise in a formal statement that is reasonably capable of creating a legitimate expectation to the employee ‘may not treat its promise as illusory’. 940

938 Ibid, 855
939 Ibid. See Pucci v. Nineteenth, 565 F. Supp. 2d 792 - Dist. Court, ED(Mich. 2008), 808. The rules was also adopted by Alabama Supreme Court in Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 – (Ala. 1987). The court held that holding that ‘the language contained in a handbook can be sufficient to constitute an offer to create a binding unilateral contract. 735. See also Smith v Birmingham Water Works, Court ND, CV 12-J-3493-S (Ala. 2013)
In *Rood v General Dynamics Corp*, the Michigan Supreme Court concluded that a voluntary promise could create an entitlement if it could be sufficiently shown ‘either (1) that there was an express or implied agreement … ; or (2) that the employer’s policies and procedures created a legitimate expectation’.\(^{941}\) To determine whether a voluntary promise is reasonably capable of creating a legitimate expectation, the statement ‘must be clear and unequivocal’.\(^{942}\)

In Michigan the courts relied upon the concept of ‘legitimate expectation’ in situations where employers made voluntary promises to their employees for various rights and entitlements, such as: security benefits, additional bonuses, disciplinary policies, termination procedures, and pension plans.\(^{943}\) In these situations, where legitimate expectation was found, the employer had created a contractual commitment to its employees.\(^{944}\)

In *Toussaint*, considerable importance was placed by the court on the principle of legitimate expectations. The approach adopted, as the forthcoming explores, is similar to the English public law principle where a promise is protected by

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legitimate expectation by the employee’s reliance on the promise, when situation permits, without the need of meeting contract formation rules.\textsuperscript{945} The employer who issued an employee handbook allowed for the employee’s legitimate expectation to arise and accordingly ‘had then created a situation ‘instinct with an obligation’\textsuperscript{946} such that employees could reasonably and justifiably rely on that handbook's promises … Refusing the longstanding bilateral contract approach, the court held that where a unilateral promise by the employer was made in the employee handbook, ‘there is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor’.\textsuperscript{947} This clearly indicates that where a commitment by the employer is made, all that is required to form an obligation is the employees’ continuance to work which will constitute an acceptance and valuable consideration.\textsuperscript{948} This supports the argument that enforcement of a voluntary promise under the reliance theory, as noted in Chapter One, provides an appropriate explanation that is capable of reflecting on the modern development of employment law. Accordingly, ‘the employee's action or forbearance in reliance upon the employer’s promise constitutes sufficient consideration to make the promise legally binding’.\textsuperscript{949}

The Michigan approach to the doctrine of legitimate expectation that can be acquired upon reliance struck a parallel with the English public law principle; the

\textsuperscript{945} Ibid
\textsuperscript{946} Ibid, 892 (quoting \textit{Wood v Lucy, Lady Duff-Gordon}, 222 NY 88; 118 NE 214 (1917); and \textit{McCall Co v Wright}, 133 AD 62; 117 NYS 775 (1909)).
\textsuperscript{947} Ibid, 900-901
\textsuperscript{948} For analysis on the requirement of consideration See chapter Two above
\textsuperscript{949} Ibid, 292 N.W.2d at 900-901
Michigan court allowed the introduction into the private law of employment principles analogous to those in English public law.\(^950\)

In summary, Michigan simply invokes the idea that reliance on an employer’s promise is binding once it is reasonably capable of creating a legitimate expectation of the entitlement claimed.\(^951\) This reflects the possible approach of the English public law approach as discussed in Chapter Six. The Michigan courts adopt the view that an employer creates binding entitlements when:

> [an] employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “‘instinct with an obligation’.\(^952\)

In addition, Michigan courts also noted that the employment relationship will be enhanced where an employer chooses to establish handbook policies; while an employee relies upon handbook policies for peace of mind associated with job security and the conviction that he will be treated fairly, the employer also ‘secures an orderly, cooperative and loyal work force’.\(^953\)

Accordingly, the employer who chooses to promulgate an employee handbook that improves the employment relationship, provides incentives to its employees, and fosters loyal workers who can produce a more productive and cohesive work

\(^950\) See Chapter Six below  
\(^951\) Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, (Mich. 1980)  
\(^952\) Ibid, at 892  
Chapter Five: The US Approach to Voluntary promises

force,\textsuperscript{954} ‘may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy, presumably with a view to obtaining the benefit ..., the employer may not treat its promise as illusory’.\textsuperscript{955}

Furthermore, the public policy approach provided that the handbook exception was not established by any of the traditional means of forming contracts.\textsuperscript{956} Thus, in Toussaint and Bankey v Storer Broadcasting Co (In re Certified Question),\textsuperscript{957} the courts dealt with the requirement of consideration by asserting that a promise in a handbook does not need independent consideration as the mere existence of employment, namely, service for remuneration, is sufficient consideration. The court in Toussaint alternatively declared that the ‘employer’s promise constitutes, in essence, the terms of the employment agreement; the employee’s action or forbearance in reliance upon the employer’s promise constitutes sufficient consideration to make the promise legally binding’.\textsuperscript{958} Furthermore, in Bankey the court adopted the view that independent consideration is a rule of construction rather than a rule of substance. Thus, a mere commitment by the employer and the reliance of the employees upon that commitment by continuing to work is sufficient to create a binding obligation. This reflects a departure from the orthodox definition of consideration or at least an extension to its application.\textsuperscript{959}

\textsuperscript{955} Toussaint, 292 N.W.2d at 895
\textsuperscript{957} Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112, 113
\textsuperscript{958} Toussaint, 292 N.W.2d at 900. See also Adolph v Cookware Co of America, 283 Mich 561, 568; 278 NW 687 (1938)
\textsuperscript{959} See further Chapter Two above
In *Bankey* the court concluded that consideration serves as the evidentiary function of determining parties’ intention to create a binding obligation; its absence, however, does not prevent the finding of a binding contract.\(^{960}\) Thus, the court stated that consideration can be found in the practical benefit that employers obtain from issuing handbook policies containing promises of benefits and rights for their employee.\(^{961}\) This position has equally been reached in the development of consideration in the UK as noted in Chapters Two and Four which opens the possibility in English law to follow the approach of Michigan. The court in *Bankey* identified the practical benefit by which the ‘employer secures an orderly co-operative and loyal workforce and the employee the peace of mind associated with job security and the conviction that he will be treated fairly’.\(^ {962}\)

While Michigan adopted the approach that voluntary or unilateral promises made by the employer in the employee handbook could create enforcement under the rules of legitimate expectation, the question of whether an employer may ultimately modify its promises was not as straightforward.

The courts’ approach to this issue and the legal analysis adopted is considered below.

### 5.8.2 Unilateral Modification under Michigan Model Approach

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\(^{962}\) 443 N.W.2d 112, at 138-139
Following the Michigan Supreme Court’s findings in *Toussaint*, courts that relied on the principle of legitimate expectation to establish that promises made by employers in employee handbooks were binding have generally accepted that modification by the employer can be made on the same basis on which they allowed its enforceability in the first place. To elaborate, the Michigan Supreme Court in *Bankey v Storer Broadcasting Co*[^63] addressed the question of whether an employer may unilaterally alter or rescind these provisions to regain the status of an employment at-will. In this case the employee, Bankey, was employed for thirteen years before his employer terminated his employment. The employer issued a Personnel Policy Digest, in 1980, which stated that the company would not terminate employees without just cause. However, a year later, in 1981, the company revised the Digest policy to allow for discharging its employees without the requirement of just cause. Bankey claimed that his dismissal was in violation of the employer’s 1980 Digest policy and he accordingly brought a lawsuit against Storer for breach of contract. The employer, however, argued that there was no breach on its part as the revised policy, issued in 1981, terminated the previous one and restored the original at-will employment relationship.

The Federal District Court found, as a matter of law, that Storer could not unilaterally modify the 1980 policy in order to regain the right to terminate at will, and that the employer was still bound by the for cause requirement.[^64] In answering a certified question regarding whether the employer’s written policy statements may, thereafter, be altered unilaterally by the employer without the employees’ consent or notification, the Michigan Supreme Court concluded that


[^64]: Ibid, 114.
an employer may unilaterally terminate or alter provisions of employee handbooks as long as reasonable notice was provided to the affected employees.

The Court reached its findings by applying the ‘legitimate expectation’ concept employed by the Toussaint court that adopted a similar principle to the English public law to conclude that employees’ reliance upon an employer’s promise can create a binding obligation if legitimate expectation is conferred.\footnote{See further on public law principle at Chapter Six below. The court in support of its finding not to allow employers’ unilateral modify employee by stated: If an employer had amended its handbook from time to time, as often is the case, the employer could find itself obligated in a variety of different ways to any number of different employees, depending on the modifications which had been adopted and the extent of the work force turnover. Furthermore, were we to answer the certified question as plaintiff Bankey requests, many employers would be tied to anachronistic policies in perpetuity merely because they did not have the foresight to anticipate the Court's Toussaint decision by expressly reserving at the outset the right to make policy changes. Bankey, 443 N.W.2d at 120.} Rather than considering the applicability of contract law principles and, in particular, the unilateral contract theory to the consequent modifications of the employees’ contractual terms, the Michigan Supreme Court was primarily concerned with the effect of such revisions on both the employer and the employee.\footnote{Brian T. Kohn, ‘Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks’, [2003] 24 CARDOZO L. REV. 799} Being influenced by the public law doctrine of legitimate expectation, the court found that, as enforceability of the handbook ‘arises from the benefit the employer derives by establishing such policies’ such as securing an ‘orderly, cooperative and loyal workforce’, the employee would be averse to any subsequent policy change except when completely necessary.\footnote{Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989)} This means that a handbook provision will continue to bind the parties until overridden by the employer’s reasonable notice.
Additionally, the court noted the view that in today’s economic climate where companies must have the ability to adapt to business changes in order to remain competitive, not allowing employers to unilaterally modify or adjust their formal policy statements unless they obtain the consent of each affected employee would mean that ‘many employers would be tied to anachronistic policies in perpetuity.’\textsuperscript{968} The court suggested that where successful renegotiation with each employee was not possible, an employer could ‘find itself obligated in a variety of different ways to any number of different employees,’\textsuperscript{969} which would have an adverse effect on its business.\textsuperscript{970}

Explaining the legal rationale for its decision, the court concluded that legitimate expectation which gives rise to the enforceability of handbook provisions, outside the orthodox rules of contract law formation, may also give the same right to enforce the modified policy. An employee should be able to legitimately expect that an employer’s promise, made in the employee handbook, not to discharge an employee unless for just cause, would be binding on the employer; however, he cannot legitimately expect that such a promised policy could never be revoked by the employer.\textsuperscript{971} As will be noted in Chapter Six, in English public law legitimate expectation may also be overridden by weighing the expectation against any overriding interest relied upon for changing the policy or for competing public

\textsuperscript{968} Ibid
\textsuperscript{969} Ibid
\textsuperscript{970} The Michigan Supreme Court noted, however, that its decision to allow unilateral modification of handbook should not be viewed by employers as one allowing changes made in bad faith, such as ‘the temporary suspension of a discharge-for-cause policy to facilitate the firing of a particular employee in contravention of that policy.’ Ibid at 120.
\textsuperscript{971} Ibid. The court stated that ‘[i]t is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved.’ Ibid at 120.
interest. However, in English law revoking legitimate expectation or resiling from it, can be a breach where it is unjustified.

Thus, *Bankey* acknowledged that, following the authority of the court in *Toussaint*, promises made by the employer in a handbook are binding while in force, but that the employer may still revoke them. Furthermore, where promises contained in a handbook concern policy rights, employees cannot expect them to be indefinitely irrevocable as ‘[t]he very definition of ‘policy’ negates a legitimate expectation of permanence’. The court relied on the dictionary definitions of ‘policy’ to conclude that an employee’s handbook provisions create nothing more than ‘a flexible framework for operational guidance, not a perpetually binding contractual obligation’. The emphasis upon the definition of policy by the Supreme Court in *Bankey* suggests that courts accept a distinction between voluntary promises creating policy containing unenforceable expectations and those which create enforceable commitments. This is similar to the English approach of distinguishing ‘terms’ which are contractual in nature and other provisions which are not. As noted in Chapter Three, English courts treat provisos which are not enforceable, under contractual right or due to the duty of trust and confidence, as mere instances of managerial prerogative. Referring to policy in *Bankey* as a flexible framework which provides operational guidance

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972 *R v North and East Devon Health Authority ex p. Coughlan* [2001] QB 213 at [57].
975 Ibid, 120
976 Ibid

Accordingly, where promises create legitimate expectation, rather than creating contractual term, under the ordinary rules of contract law formation employers may revoke them upon giving their employees reasonable notice. This approach was adopted in \textit{Kelly v City of Meriden} in which the court concluded that legitimate expectation could be revoked by the employer as it is ‘necessary to effectuate the interests of the employer in efficiently managing its business’.\footnote{\textsuperscript{978} 120 F. Supp. 2d 191, (D. Conn. 2000) 198. See also \textit{McClain v. Pfizer, Inc.}, No. 3:06CV1795 (VLB), (2008); and \textit{Torosyan v. Boehringer Ingelheim Pharm.}, 662 A.2d 89, 99 (Conn. 1995).}

However, such ‘privilege is lost upon a showing of either actual malice … or malice in fact, ie, publication of a false statement with bad faith or improper motive’.\footnote{\textsuperscript{979} \textit{Gambardella v. Apple Health Care, Inc.}, 969 A. 2d 736 - Supreme Court (Conn.2009) 744; \textit{Gallo v. Barile}, 935 A. 2d 103 - Supreme Court (Conn. 2007); \textit{957 P.2d 811} (Wash. Ct. App. 1998).}

In \textit{Grovier v North Sound Bank},\footnote{\textsuperscript{980} 957 P.2d 811 (Wash. Ct. App. 1998).} the Court of Appeal of Washington held that the employer was entitled to alter or modify its policies contained in the employee handbook. Relying heavily on the principles adopted by the court in \textit{Bankey}, the Court considered that an employer, if not allowed to change its policies, ‘could find itself obligated in a variety of different ways to any number of different employees. The resulting confusion and uncertainty would not be conducive to
harmonious labor management relations’.\textsuperscript{981} Adopting the same approach taken in \textit{Bankey}, the Court concluded that ‘the law should not tie employers to anachronistic policies in perpetuity merely because they failed to expressly reserve at the outset the right to make policy changes’.\textsuperscript{982}

While the Michigan approach of legitimate expectation provides a developed approach by allowing employers to resile from promises when business circumstances alter, and accordingly assist the employer to avoid disastrous consequences when faced with situations similar to those noted in \textit{Malone},\textsuperscript{983} the employer can withdraw from its promise by giving reasonable notice. However, given notice, if Michigan courts’ were faced with \textit{Malone} type of problem, would not provide a solution to all type of cases, namely when the employer needs to act quickly enough to avert serious problem. Conversely, the Michigan approach, it is argued, appears to generally weight the employer’s interests above those of the employee. The assessment of what is reasonable notice is difficult to construe and, even if this obstacle can be overcome, the position of allowing an employer to resile from its promise, when employees have a legitimate expectation that it will be honoured, means that there are no substantive limits on employers wishing to resile. This in practice makes promises enforced by legitimate expectation a mere disguise for managerial prerogative provisions, as discussed in Chapter Three, because employers are capable of removing any right or expectations at any time subject to notice. Under the principle of English public law, as examined in


\textsuperscript{982} Ibid

\textsuperscript{983} \textit{Malone and others v British Airways plc} [2011] IRLR 32, see Chapter Three for further discussion.
Chapter Six, the doctrine of legitimate expectation requires employers to justify their decision, and the justification required may be different according to the impact on the employee and on the business. Accordingly, the legitimate expectation doctrine derived from English public law in employment law offers an appropriate balance of both parties’ interests that is coherent and more sophisticated.

5.9 CONCLUSION

This chapter has established that the modern court approach in the US is that promises made unilaterally by the employer in formal statements, such as employee handbooks or manuals, has increasingly departed from the bilateral model adopted in Florida which appear to be reluctant to enforce voluntary promises. The legal analysis adopted by other states, which allowed its enforcement, is based under either the unilateral contract model or the doctrine of legitimate expectation. Most jurisdictions in the US have recognized the need to reduce unfairness and the often harsh consequences inflicted upon the employee when an employer’s promises are unable to be enforced. This trend of development finds its support largely in the reliance theory and the courts’ departure from the bargain or exchange theories. Whether the enforceability of handbook terms is recognized under unilateral contract analysis or the doctrine of legitimate expectation is not a matter for immediate concern. However, as noted above, while unilateral contract may attract those favouring a traditional approach, the Michigan approach provides a more developed approach under reliance theory and allows for the modification of unilateral promises.984 This is because legitimate expectation creates an enforceable obligation outside the orthodox rules

984 This will be examined even further in Chapter Six below.
of contract law formation and can, accordingly, be withdrawn by the employer outside the principles concerning contractual rights.

However, while the concept of unilateral alteration or revocation under unilateral approach in California appears to conflict with standard contract law principles, allowing the employer to depart from its legitimate expectation by mere notice, as the position adopted in Michigan, does not conflict with contract law principles, since it was created outside the orthodox rules of contract formation, it is still faces difficulties in defining how reasonable notice is construed. Most importantly, the Michigan approach to resiling from legitimate expectation makes every promise, which creates expectation or rights, subject to withdrawal without taking into account the impact upon the employee and without insisting on the employer to justify its action. This would render promises made in the handbook ultimately uncertain since employers would be allowed to promise anything to their employees and then revoke such promises at any time in the future; essentially, any entitlement the employee had secured could be erased overnight.985

English law applies legitimate expectation principle it differently from Michigan. As explored in Chapter Six, a promise protected by legitimate expectation can only be lawfully when there is a permissible justification. Thus whilst the Michigan model is of interest for its shared reliance on legitimate expectation, English law is and indeed arguably should pursue a different path. This is potentially more satisfactory than the Michigan model which holds that

985 Demasse v. ITT Corp, 984 P. 2d 1138 (Ariz: 1999)
enforcement of promises arises from a legitimate expectation can be revoked without the need to consider the impact of the promise and the importance of the interest to the employee. In English law a promise need not become contractual but, revoking it or resling from it, can be a breach where it is unjustified. This invites a more sophisticated approach constructed around a fair balance between the employee’s interests and the employer’s. In order to fashion this development, as we shall see, the English courts must evolve a hierarchy of interests possessed by the employee in order to determine how much justification is necessary before revocation can be justified. This is pursued in Chapter Six.
CHAPTER SIX

‘VOLUNTARY’ PROMISES AND THE DOCTRINE OF LEGITIMATE EXPECTATION; A PUBLIC LAW ‘INJECTION’ INTO THE PRIVATE LAW OF CONTRACTS OF EMPLOYMENT
6.1 Introduction

The earlier chapters revealed that, in UK employment law, if a promise satisfies the formation requirements of the law of contract, as stated in Chapter Two, the employee will be entitled under ordinary contract law to bring an action for breach of the promise notwithstanding that the employer behaved rationally and reasonably in departing from its promises.986

Voluntary promises, as noted in Chapter Two, would not normally be expected to have this effect because of the ostensible lack of consideration. However, development of contract law, as examined in Chapter Two, in reforming the doctrine of consideration and the courts’ willingness to find valuable consideration where there is a practical benefit, mean that more voluntary promises are likely to attain contractual status. This can, however, cause significant practical problems for employers as business circumstances can alter.987 In such cases, the court, sympathetic to upholding what might for present purposes be termed as the legitimate business interests of the employer in departing from such promises, have strained the orthodox formation principles to allow the employer to escape liability that might otherwise have arisen. As already seen, Malone988 is a telling example where the objective test that is a principal bulwark of the law of contract was disregarded in favour of a more subjective approach. This was examined in Chapters Two and Three above.

986 See in particular Chapter Two and Three above.
987 See chapter Three and four below.
988 Malone and others v British Airways [2010] EWCA Civ 1225, See Chapter para 4.3-4.4 above.
If an employee does not have a contractual right to demand the performance of the promise, they may nonetheless be deemed as having a legitimate expectation that the promise will be honoured. An example of this was *French* as discussed in Chapter Three. The juridical basis for this outcome is the doctrine of mutual trust and confidence, which holds that while the promise itself may not be an *express* contractual term, there may be circumstances in which any departure from it will result in a breach of the implied term. This development is influenced and informed by principles derived from public law. As explored later,* the latter acknowledges that resiling from a promise protected by a legitimate expectation can be lawful, but much depends on the justification that the public authority puts forward. It therefore follows that the same promise may result in a breach of contract (where resiling from it is impermissible) or be lawful (if revocation is permissible). The purpose of this chapter is to explore when a legitimate expectation arises in employment law and when resiling from it is permissible. The focus will necessarily be on those ostensibly voluntary promises that do not satisfy the formation requirements of the law of contract, but yet where a departure from the promise may result in a breach of trust and confidence. It will be necessary to explore the principles derived from public law to inform this evaluation and in particular to discover how far those principles can be transposed without modification into employment law. It will be particularly interesting to explore how in public law a promise of a substantive benefit cannot necessarily be overridden by a rational and reasonable decision

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989 See Para 7.8 below
and whether this principle may have implications for employers given that tribunals are using the legitimate expectation doctrine as a problem-solving device in employment law.

More significantly, the advantage of the legitimate expectation approach is that it does allow for important business decisions (however defined) to override promises, therefore allowing the courts and tribunals the opportunity to strike a fair balance between the employer’s interests and those of the employee. In other words, it avoids the unsophisticated approach of orthodox contract law and may assist courts when faced with a Malone-type problem from distorting the principles of contract law in order to reach commercially sensible outcomes.

6.2 Employment Law and the Scope of Judicial Review

The public law intervention in or impact upon the private law is still, to a great extent, argued by academics and judges with no clear or satisfactory settlement on the issue. However, employment relations have not received the same attention in academic research, most particularly with regard to the


991 See further below for example of the arguments of Laws LJ and Sedley LJ
principle of legitimate expectation. As noted in Chapter One, courts have accepted that while employment is generally a matter for the private law of contract, employment contracts are, nonetheless, ‘very different from those in which commercial contracts between parties of equal bargaining power are agreed’.992 Thus, there is a greater need to recognize natural justice and to restrain the abuse of power by an employer, as the forthcoming discussion will illustrate.993

This conclusion should not be surprising as, as examined earlier, both the private law of employment and public law have the uniformity of restraining the abuse of power. ‘More generally, the desire to guard against abuse of power has been an important driving force in the development of both public and private law.’994

Laws LJ stated that, in modern law, the distinction between private and public law bears no real difference to the essential basis upon which the common law proceeds to stop or prevent the abuse of power.995 ‘It proceeds upon a footing which is alike logically anterior to the public power of legislature and the private power of contract.’996 Woolf LJ took a similar view, stating that there is no single universal test which is capable of distinguishing between public law and

992  Autoclenz Ltd v Belcher [2011] IRLR 820
993  See further Para 7.3-4 below
996  Ibid 464.
private law.\textsuperscript{997} The consequences of this uniformity of principles have not been fully appreciated.\textsuperscript{998} The concern is not restricted to which court should hear a complaint relating to an employment contract, but rather whether private law courts have, in practice, borrowed from public law doctrines and whether there has been a convergence or an overlap in public and private law principles. Of course, if the answer is in the affirmative, one will need to look at the situation in which such intervention can or has been accepted and the extent to which courts have been ready to allow public law intervention.

Morris and Fredman argued against the assumption that private law can easily be disentangled from public law. They noted that both are so interconnected, for example in the case of public employment relationships, that it is essential to consider public and private law principles simultaneously.\textsuperscript{999} Nonetheless, UK employment law and the relationship between an employer and its employee are considered to be regulated under the umbrella of private law. However, in relation to certain limited types of public servant (i.e. officeholders), public law has been incorporated into employment relationship,\textsuperscript{1000} most notably regarding the application of judicial review to public employees.

\textsuperscript{999} Sandra Fredman and Gillian Morris, ‘Public or Private? State Employees and Judicial Review’ [1991] LQR 298
\textsuperscript{1000} In some countries (such as France and Germany) public employees are wholly governed by public and administrative law, see Simon Deakin & Gillian Morris, \textit{Labour Law}, (5th ed, Hart Publishing, Oxford 2009), Para 2.5
In public law the traditional justification for judicial review is the doctrine of ultra vires whereby courts may quash the decision of a public body where it is found to be outside the boundaries set by Parliament.\(^{1001}\) The concept was further developed to apply more broadly to situations where ultra vires applies if there is an abuse of power;\(^ {1002}\) in these situations judicial review can be pursued against a decision maker in order to challenge their decision on the grounds of illegality, *Wednesbury* unreasonableness, or procedural impropriety.\(^ {1003}\)

The grounds for judicial review have also been available to public employees, most particularly to officeholders, in order to stop the abuse of power by a decision maker.\(^ {1004}\) Judicial review is normally sought in situations where financial compensation is not the aim, or at least the main aim, of an employee.\(^ {1005}\) Thus, an employee may be primarily seeking judicial review for one or more of the following: (a) to quash or invalidate a decision, (b) to cease from or to discontinue a particular course of action, or (c) to demand the performance or the fulfilment of a legal duty or obligation.\(^ {1006}\) This seeking of judicial review is not, however, open to all employees; generally employees who

\(^{1001}\) *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

\(^{1002}\) *Council of Civil Service Unions v Minister for the Civil Service* (the ‘GCHQ’ case) [1985] AC 374 (see Lord Diplock’s judgment, 410-11)

\(^{1003}\) See further discussion on *Wednesbury* test below. In GCHQ case; [410-11]. See further below

\(^{1004}\) GCHQ case *Council*. See further below

\(^{1005}\) See further Stephen Sedley ‘Public Law and Contractual Employment’ [1994] ILJ 201

\(^{1006}\) See further Harry Woolf, *De Smith’s Judicial Review*, (7th ed, Sweet & Maxwell, 2013).
qualify to proceed with a judicial review application need to show that they fall in a specific category (ie officeholders).\textsuperscript{1007}

However, the category of ‘officeholders’ has been debated in case law\textsuperscript{1008} and academic literature\textsuperscript{1009} with no straightforward or conclusive definition being reached. While judicial review is not available for ordinary employees who merely have contractual rights that are not underpinned by statute,\textsuperscript{1010} the situations in which judicial review may be available and the category of the employee, most notably ‘officeholder’,\textsuperscript{1011} that is able to have recourse to this

\textsuperscript{1007} R. (on the application of Shoesmith) v Ofsted [2011] EWCA Civ 642. In general terms, officers and servants of the Crown hold office during the Crown's pleasure, unless otherwise stated by statute. Whilst the right not to be unfairly dismissed is provided to Crown servants, such right is not thought to be extended to officeholders under the Crown. Thus an officeholder may, in certain circumstances, challenge a dismissal decision or the disciplinary action by way of judicial review. See Dunn v R [1896] 1 QB 116 CA. See also Malloch v Aberdeen Corpn [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL; R v Lord Chancellor's Department, ex p Nangle [1992] 1 All ER 897, [1991] ICR 743, DC. See also, R v Secretary of State for the Home Department, ex p Benwell [1985] QB 554, McClaren v Home Office [1990] ICR 824, cf R v East Berkshire Health Authority, ex p Walsh [1985] QB 152.


\textsuperscript{1010} Reg v East Berkshire Health Authority, ex parte Walsh [1985] QB 152

\textsuperscript{1011} R. (on the application of Shoesmith) v Ofsted [2011] EWCA Civ 642
remedy and where the application of judicial review has been available, is at best complex.\textsuperscript{1012}

This is because development in employment law has provided a broader concept to officeholder and has shown that employees who are not strictly ‘officeholders’ may have rights to proceed by way of judicial review.\textsuperscript{1013} For example, in \textit{Council of Civil Service Unions v Minister for the Civil Service} (‘GCHQ’),\textsuperscript{1014} the case involved workers at GCHQ who were members of a trade union. The case, it is argued, provides for the reading that employees who were not strictly officeholders had the right to proceed by way of judicial review; however, because of the national security issues it was deemed to be inappropriate for the courts to intervene.

\textsuperscript{1012} The requirement of status has not been cohesively maintained. In \textit{Malloch v Aberdeen Corp} [1971] 2 All ER 1278 HL, at 1294 Lord Wilberforce referred to such confusion and noted that: ‘[a] comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to the observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.’ For example, ‘specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied’, ibid. See \textit{Barber v Manchester Regional Hospital Board} [1958] 1 All ER 322, [1958] 1 WLR 181; \textit{Palmer v Inverness Hospitals Board} 1963 SC 311; \textit{Vidyodaya University of Ceylon v Silva} [1964] 3 All ER 865, [1965] 1 WLR 77, PC; \textit{Vine v National Dock Labour Board} [1957] AC 488, [1956] 3 All ER 939, HL; \textit{Glynn v Keele University} [1971] 2 All ER 89, [1971] 1 WLR 487.

To summarize, while the entitlement to commence judicial review proceedings is limited to a small group of employees under the category of ‘officeholder’, modern developments have revealed the courts’ willingness, where the correct criteria is determined, to apply and adopt principles evolved from public law into private employment law. The emergence of new developments in employment law, notably due to the evolution of the implied obligation of mutual trust and confidence, as will be further examined below, has shown a convergence of public law elements into employment law. The extent of this convergence adoption will be discussed next.

### 6.3 Public Law influence in Employment Relations

#### 6.3.1 Irrationality Approach in Employment Law

It has been shown that there is an increased tendency by the courts to adopt and ‘inject’ public law principles into the private law of employment; a notable development of this trend is the principle of ‘Wednesbury’. An employer’s voluntary promise made in formal statements or policies is subject to the principle of irrationality in order to prevent any abuse of power.\(^{1015}\) This can be observed from the recent High Court’s decision in *IBM United Kingdom Holdings Ltd v Dalgleish*,\(^ {1016}\) where it was held that the employer was not in breach of its promise by changing the pension plans; an exclusion power has

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\(^{1015}\) See argument, at Para 7.2.3, below, on e.g. *Clark v Nomura* [2000] IRLR 766 and *Wetherill v Birmingham City Council* [2007] IRLR 78, that provides a clear example of the courts position being on the affirmative.

\(^{1016}\) [2014] EWHC 980 (Ch)
been validly introduced into the main plan and the purported exercise of the exclusion powers were not for an improper purpose. However, the consultation and the manner changes had been carried gave rise to a breach by Holdings of its duty of good faith and of its contractual duty of trust and confidence. Accordingly, in the forthcoming discussion it will be shown that, while developments under Wednesbury reject managerial decisions that are arbitrary or irrational, an employer’s departure from its promises may also be irrational under the Wednesbury test.\textsuperscript{1017}

In employment relations the development of the implied term of mutual trust and confidence can be regarded as imposing greater constraints on the employer acting irrationally.\textsuperscript{1018} Under this development, revising or revoking unilateral promises must be conducted rationally. Therefore, the employer is required to exercise its discretion in a manner which is not arbitrary, capricious, or irrational.\textsuperscript{1019} Hence, the court’s role under the Wednesbury test is only to quash extreme decisions which are lawful but incapable of being justified. This

\textsuperscript{1017} See recent High Court decision in Holdings Ltd v Dalgleish [2014] EWHC 980. See further Para 7.2.3 below.

\textsuperscript{1018} French v Barclays Bank [1998] IRLR 646. See discussion below on the case at Para 7.8-9. For further discussion on the duty of trust and confidence see Chapter Three, Para 4.4 above.

\textsuperscript{1019} Courts’ decisions, such that as in Keen v Commerzbank AG [2007] ICR 623, Horkulak v Cantor Fitzgerald [2005] ICR 402, and more recently by the Court of Appeal in Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] IRLR 715, support such observations and provide further strength to this argument. See the discussion on these cases below.
principle, as discussed below, has been incorporated into the duty of trust and confidence.\(^{1020}\)

The modern development of the *Wednesbury* test has moved away from the view once understood from the dictum of Lord Greene MR which indicated that the test was only to be used in extreme situations and that there was a very high standard required in order to satisfy its application. Thus, the *Wednesbury* test, in practice, has softened over the years so as not to be restricted to a single standard but rather to apply flexibly according to the particular context.\(^{1021}\) To elaborate, the standard was considered in *Council of Civil Service Unions v Minister for the Civil Service*\(^{1022}\) (the ‘GCHQ case’), where Lord Diplock described ‘irrationality’ as one of the three established grounds for judicial review, which covered ‘what can now be succinctly referred to as *Wednesbury unreasonableness*’.\(^{1023}\) It applies ‘to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’\(^{1024}\) and, thus, irrationality can ‘stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review’.\(^{1025}\)

The formulations of Lord Diplock have been criticized for not being able to provide a suitable conceptual toolkit that can clearly be followed to determine

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\(^{1020}\) See further Para 7.3.2 below
\(^{1021}\) See further below
\(^{1022}\) [1985] AC 374
\(^{1023}\) Ibid, at 410, this was alongside ‘illegality’ and ‘procedural impropriety’.
\(^{1024}\) Ibid, at 410
\(^{1025}\) Ibid, 411.
whether a decision maker has acted irrationally. The emphasis on ‘defiance of logic’ and ‘decision which is so outrageous’ makes the doctrine of irrationality, to a large degree, impractical, as judicial reviews often occur where a decision is ‘coldly rational’. Similarly, the learned editors of Wade & Forsyth’s Administrative Law comment that.

Virtually all administrative decisions are rational in the sense that they are made for intelligible reasons, but the question then is whether they measure up to the legal standard of reasonableness. ‘Irrational’ most naturally means ‘devoid of reasons’ whereas ‘unreasonableness’ means ‘devoid of satisfactory reasons’.

Furthermore, Jowell and Lester noted that the Wednesbury test is unsatisfactory for three reasons. Firstly, it is ‘inadequate’ as it does not provide sufficient justification for judicial intervention. Secondly, its context is ‘unrealistic’ because it only applies to absurd or bizarre behaviour whereas judicial reviews are needed regarding more practical situations. Thirdly, it is ‘confusing’ because it only allows ‘the courts to interfere with decisions that are unreasonable, and then defines an unreasonable decision as one which no reasonable authority would take.’

To overcome this complexity where the formulations of Lord Diplock appear to be a high threshold for the applicant to cross, courts have alternatively

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1027 William Wade and Christopher Forsyth (eds), Administrative Law (10th ed, OUP Oxford; 2009), 296.
1029 Ibid , 861
Chapter Six: The Doctrine of Legitimate Expectation: A Public Law 'Injection'

interpreted the test of *Wednesbury* differently; the question which should be asked is not whether the decision is beyond the range of reasonable responses, but why? To answer this question, courts must find the reason ‘in the statute, expressly or by implication, or in some other general but separately identifiable principle of the common law’. Lord Carnwath was supportive of this approach as it is in accordance with ongoing developments in public law.

Alternatively, in *R v Chief Constable of Sussex, ex p International Trader’s Ferry Ltd*, Lord Cooke stated that the *Wednesbury* test should be approached in terms of ‘reasonableness’ rather than ‘unreasonableness’. This, in effect, encourages the court to consider the question of whether the decision can be justified, instead of whether the decision is wholly unjustified. This approach, if firmly adopted in employment relationships, would provide an alternative test that courts could apply with regard to the effect of voluntary promises. Employers who revoke a promise due to a legitimate business reason (ie to protect the business from an impending disaster) would therefore have this decision considered on the basis of whether it is justified and reasonable.

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1030 See below for further discussion on the range of reasonable responses
1035 *Malone and others v British Airways* [2010] EWCA Civ 1225
However, the emphasis on reasonable can also pose great difficulties since what would be reasonable is not uncontroversial.

Notwithstanding the above criticism, irrationality continues to play an essential part in the grounds for judicial review. The importance of the role of Wednesbury is that it insisted on the courts developing and formulating a standard in a more modern and suitable way. An important feature of this trend provides that the Wednesbury principle does not have a single standard but instead applies flexibly according to context. This can be observed by the notion of Laws LJ in R v Education Secretary, ex parte Begbie that ‘fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law ... but each is a spectrum, not a single point, and they shade into one another’. He went on to note that in relation to the Wednesbury principle it was now well established that the standard ‘constitutes a sliding scale of review, more or less intrusive according to the nature and gravity...

1036 For example irrationality was equated with ‘absurdity’ or ‘perversity’, see R v Hillingdon LBC Ex p. Puhlhofer [1986] A.C. 484, at 518; and CA v Secretary of State for the Home Department [2004] EWCA Civ 1165; [2004] Imm. A.R. 640, para.27. Also the test of whether the decision was ‘within the range of reasonable responses’ is being increasingly adopted, see for example Boddington v British Transport Police [1999] 2 A.C. 143; Edore v Secretary of State for the Home Department [2003] EWCA Civ 716; Also in R v North and East Devon HA Ex p. Coughlan [2001] Q.B. 213, the Court of Appeal held, [65] that: Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an irrelevant factor)

See further discussion below

1037 [2000] 1 WLR 1115
1038 Ibid [78]
of what is at stake’.\textsuperscript{1039} This concept means that the principle should be applied by reference to the ‘nature and gravity of what is at stake’.\textsuperscript{1040}

A direct application of this principle in employment law provides that courts would view voluntary promises as commitments subject to rationality tests. However, a promise which creates legitimate expectation, as examined below, makes the employer’s rational decision to resile from its promises lawful, unless departing from the promise constitutes an abuse of power, ie resiling from legitimate is impermissible.\textsuperscript{1041}

Under the \textit{Wednesbury} principle, whether an employer is acting irrationally by revoking its voluntary commitment depends on the nature and gravity of both the employees’ reliance on the commitment and the claim to breach of the promise. Some commitments may entail a greater deference than others and hence a distinction must be drawn between, for example, revoking a promise due to an employer’s legitimate need to protect the survival of his business and other needs which have lesser gravity. In \textit{Bugdaycay v Home Secretary},\textsuperscript{1042} Lord Bridge stated that courts should ‘subject an administrative decision to the more

\textsuperscript{1039} Ibid [78]; observing the notion of Sir Thomas Bingham MR in \textit{Ex p. Smith} [1996] 1 AER 257 at 262 and its reviewed authorities in \textit{Coughlan} (n) (48A)


\textsuperscript{1041} See further Para 7.10 below

\textsuperscript{1042} [1987] AC 514
rigorous examination, to ensure that it is in no way flawed, according to the
gravity of the issue which the decision determines’.\textsuperscript{1043}

This triggers the discussion in Chapter Four regarding the application of the
range of reasonable response in employment law, which will be considered next.
As will be noted below, employment cases concerning the implied duty of
mutual trust and confidence have expressly applied the \textit{Wednesbury} principle by
linking its standard to the duty of mutual trust and confidence.\textsuperscript{1044} However, the
emergence of public law principles in shaping developments in private law and
the influence of public law principles remains unsettled.\textsuperscript{1045} The main principle
that ties them together is the restraint of abuse of power. To demonstrate this
further, the following section will provide an analysis and some examples of the
courts’ increased willingness to adopt principles of public law, most notably the
\textit{Wednesbury} irrationality test in employment relations. It will also analyze the
effect of public law principles on employment relations.

\textbf{6.3.2 Further Developments in Employment Law}

It was shown above that there are a growing number of different situations in
employment law where public law principles have been implemented in order to
judge the decision or action of an employer and even a trade union.\textsuperscript{1046} The
range of reasonable responses test and its line of cases in employment law is an

\textsuperscript{1043} Ibid, 531
\textsuperscript{1044} See \textit{Clark v Nomura} [2000] IRLR 766 below
\textsuperscript{1045} See, Para 7.3.2, below for further discussions on the public law influence on private
employment law.
\textsuperscript{1046} \textit{Council of Civil Service Unions v Minister for the Civil Service} [1985] AC 374
important example of injecting a public law principle into employment law. The EAT decision in *Abbey National v Fairbrother*,\(^{1047}\) which was also applied in *Claridge v Daler Rowney Ltd*,\(^{1048}\) provides an example of this approach. In the former case, the court confirmed the view that employers are given measures of discretion to use during their relationship with their employees, including how to conduct disciplinary and grievance procedures. However, they are also bound by an implied term that such discretion means ‘that they must not act irrationally or perversely in the course of such procedures’. Accordingly, employers ‘must not take account of irrelevant material. They must not fail to take account of relevant material. They must not take decisions that no reasonable employer would take’.\(^{1049}\) As Davies noted,\(^{1050}\) while the case has not won universal approval,\(^{1051}\) it does give an indication of the courts’ expectation that some public law principles can be applied to employment disputes.

Thus, in *Buckland v Bournemouth University Higher Education Corporation*,\(^{1052}\) the Court of Appeal was not concerned with whether the test of the ‘range of reasonable responses’ was indistinguishable when compared to that in *Wednesbury*; the issue was rather whether the approach adopted in *Abbey* and

\(^{1047}\) [2007] IRLR 320.

\(^{1048}\) [2008] IRLR 672, EAT

\(^{1049}\) ibid[33]. However, the court then went on to settle on band formulations of reasonableness; ‘[i]n particular, we agree that in the case of constructive dismissal following the operation of a grievance procedure … the band of reasonable responses approach applies.’ Ibid,[33]. But see above discussion on *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 CA.


\(^{1051}\) cf. *Triggs v GAB Robins (UK) Ltd* [2007] 3 All ER 590

\(^{1052}\) [2010] IRLR 445
Claridge provided a standard of expectation of the range based on the test of irrationality. In considering the latter, the Court of Appeal took the view that ‘without retracing the complex path which the EAT was compelled to take, it is an approach which cannot stand when faced with the authority of the Western Excavating case’. However, Sedley LJ concluded that: ‘[i]t is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful.’ This indicates that the adoption of public law principles into employment law was not rejected by Sedley LJ. In other words, he was not departing from the view that the range of the reasonable responses test for unfair dismissal could be construed along public law lines, namely Wednesbury.

The modern position was disused in the more recent decision of the Court of Appeal in Orr v Milton Keynes Council in which Sedley LJ stated that the range of reasonable responses test is a manifestation of the Wednesbury unreasonableness test. Although the issue of Wednesbury unreasonableness was not at the centre of the argument in the Orr case, Sedley LJ felt it would be appropriate to observe its complexity. After stating the governing legislation of unfair dismissal, Sedley LJ drew attention to past practice in which an
employment tribunal was ‘taking its own non-technical approach to the question whether in all the circumstances the dismissal had been fair’.\textsuperscript{1058} Such an approach no longer stands and ‘[t]he shift from this approach to a Wednesbury rationality test has been controversial’.\textsuperscript{1059} Accordingly, the current position is contrary to the early years of the legislation and earlier tribunal decisions when it was thought that the \textit{Wednesbury} test was irrelevant. An example of this modern trend is found in the early EAT decision in \textit{British Home Stores v Burchell},\textsuperscript{1060} in which the court’s decision was endorsed by the Court of Appeal in \textit{Foley v Post Office}\textsuperscript{1061} and followed by other courts.\textsuperscript{1062} Sedley LJ appeared to accept that the range of reasonable responses test is \textit{Wednesbury}-esque, which means that an employer’s decision, to dismiss an employee,\textsuperscript{1063} must be assessed by a standard of rationality which is constrained by the \textit{Wednesbury} test.\textsuperscript{1064}

A clearer example of the court’s trend in applying the irrationality test to private employment law can be found in the case of \textit{Clark v Nomura}.\textsuperscript{1065} In this case the

\textsuperscript{1058} Ibid, [11]
\textsuperscript{1059} Ibid, [11]
\textsuperscript{1060} [1980] ICR 303
\textsuperscript{1061} [2000] ICR 1283.
\textsuperscript{1062} Hadden v Van Den Bergh Foods Ltd [1999] ICR 1150; Weddel and Co v Tepper [1980] ICR 286
\textsuperscript{1063} Under s.98 ERA 1996
\textsuperscript{1064} Orr v Milton Keynes Council [2011] ICR 704, [17]
\textsuperscript{1065} [2000] IRLR 766, approved by the Court of Appeal in \textit{Horkulak v Cantor Fitzgerald International} ([2004] IRLR 942, CA) in which it was held that where the employment contract states that payment of a bonus is discretionary then employers must exercise that discretion genuinely and rationally. An employer’s wrongful dismissal of an employee could prevent the employee from recovering damages in respect of the bonus payments that he could have expected to receive had he remained in employment.
court relied upon public law principles, in particular the *Wednesbury* principle, in order to achieve its conclusion which was based on rationality. In this case a unilateral promise formally made by the employer to provide for a discretionary bonus scheme, which was not guaranteed and was dependent upon an individual’s performance, was held by the High Court to create a reasonable entitlement for the employee to receive a bonus, taking into account his previous performance and the fact that he had achieved maximum bonuses in the past. Burton J, who gave the leading judgment, held that the last words of the clause imposed a ‘contractual straitjacket’ for the exercise of the employer’s discretion, that is, it imposed upon the employer an obligation to pay the bonus with reference to the individual’s ‘contractual performance as a senior trader, with all its responsibilities’.

Furthermore, in public law, a decision maker acting within its jurisdiction or making a decision which is lawful under its managerial discretion could still be acting irrationally, and its action or decision could be quashed if it was so unreasonable or ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’. Thus, on the facts of the case in *Clark*, the court concluded that the employer’s decision to award a nil bonus to an employee who had earned substantial profits for the company was irrational and

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1066 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 234
1067 *Clark v Novacold* [1998] IRLR 420, 36
1068 GCHQ case, 410; *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 234
did not comply with the terms of the employer’s discretion. After considering the bonus payments made to Mr Clark in the years prior to his dismissal, and the payments made to his colleagues both before and after his dismissal, it would have been a capricious decision for the bonus to be assessed at nil.

To achieve this result, Burton J implied terms that made use of a reasonableness test that stated that the employer’s power to award discretionary bonuses must be exercised reasonably. This was stated by Burton J in the following important terms:

My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way.

This formulation mirrors the Wednesbury test that has been expressly converged with the implied duty of mutual trust and confidence and which is rooted in the private law of employment. Moreover, the implied trust and confidence that limits and restricts the employer’s exercise of its discretion in relation to an employee’s bonus, as seen in this case, has been linked with the public law test of unreasonableness as set out by the Wednesbury test. It provides for the position that an employer’s modification or revocation of any contractual right must be viewed under the principle of Wednesbury where the employer’s action is viewed subject to the issue at stake, i.e. the seriousness and effect of the

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1069 Clark v Novacold [1998] IRLR 420, [40] (per Burton J)

1070 E.g. Clark v Novacold [1998] IRLR 420
commitment and ‘according to the gravity of the issue’\textsuperscript{1071} which the employer needs to determine. The employer should not act irrationally by denying the entitlements created from his contractual discretion that the employee has relied upon. Any irrational decision to resile would then be in breach of the implied duty of mutual trust and confidence and may render the contract repudiated.

The operation of the implied duty can similarly be seen in \textit{Horkulak v Cantor Fitzgerald International}\textsuperscript{1072} and \textit{Keen v Commerzbank AG},\textsuperscript{1073} in which the courts imposed restraint, derived from the public law principle, that the exercise of an employer’s discretion in relation to the payment of bonuses is limited to rationality and reasonableness.

More recently the Court of Appeal in \textit{Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA}\textsuperscript{1074} stated that the position correctly taken by both courts in \textit{Horkulak} and \textit{Keen} is that of \textit{Wednesbury} unreasonableness. This is recognition in support of the above argument that the operation of the implied duty in employment law has been construed along public law lines, particularly with regard to \textit{Wednesbury} unreasonableness; any argument to the contrary is simply unconvincing. Furthermore, Jacobe LJ stated that in similar cases where the employer is making a ‘decision whether to pay a bonus, and if so how much, the employer must act in a rational and fair manner’. He concluded that the right

\textsuperscript{1071} Ibid 531
\textsuperscript{1072} [2005] ICR 402
\textsuperscript{1073} [2007] ICR 623
\textsuperscript{1074} [2010] IRLR 715
‘test is essentially one of Wednesbury unreasonableness’. Accordingly, the Court of Appeal’s analysis confirms, in clear and plain terms, the tendency of adopting a matrix principle approach in which public law principles are being implemented and adopted in the private law of employment.

In summary, an employer’s discretion conferred by terms in its policies or under its unilateral managerial prerogative power should generally be interpreted so as to require the employer to exercise its discretion in a manner which is not arbitrary, capricious, or irrational. An application of this principle to voluntary promise, it is argued, prevents the employer from resiling from its promises irrationally due to the implied duty of mutual trust and confidence. However, this leaves the question about rational resiling from promises acquiring legitimate expectation relied upon by the employee. The principle of legitimate expectations derived from public law principles will be able to provide an appropriate balance between protecting the employees’ expectation and the employers’ business efficiency. This is examined later below.

Courts’ decisions, such as in Keen, Horkulak, and more recently by the Court of Appeal in Khatri, support this observation and provide further strength to this argument as they are consistent with public law’s integration into the private law of employment. The vehicle for this public/private law integration, in English

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1075 See further, para 7.10, below.
1076 See earlier discussion on these cases.
employment law, has been accomplished via the implied duty of trust and confidence.

Further examples in support of this trend can be found in *Malone v BPB Industries*,\(^{1077}\) which concerned an exercise of share options. In the EAT decision in *United Bank Ltd v Akhtar*,\(^{1078}\) the court was persuaded that, while courts cannot possibly imply a term that clearly conflicts with an express term of the employment contract, it is, nonetheless, legitimate to imply ‘a term which controls the exercise of a discretion which is expressly conferred in a contract’\(^{1079}\).

Thus, the development of the implied term of mutual trust and confidence appears to impose greater constraints on the employer who acts irrationally.\(^{1080}\) Accordingly, in *United Bank v Akhtar*,\(^{1081}\) the EAT held that a mobility clause expressed in the agreement must be exercised in accordance with the implied term of mutual trust and confidence. In this case the employer was acting in breach of contract by failing to give reasonable notice to the employee before

\(^{1077}\) [2002] ICR 1045
\(^{1078}\) [1989] IRLR 507
\(^{1079}\) Ibid. See also a similar trend in private contract in *Paragon Finance v Nash* [2002] 1 WLR 685, concerning the discretion to vary mortgage interest rates. It was held that the power to vary interest rates at the Claimants’ discretion had to be exercised in a rational and honest way. This implied term was ‘necessary in order to give effect to the reasonable expectations of the parties.’ Ibid [36] and [42].
\(^{1080}\) *French v Barclays Bank* [1998] IRLR 646. See below for discussion on the case. For further discussion on the implied duty of trust and confidence see Chapter Three above
\(^{1081}\) [1989] IRLR 507
requesting his transfer.\textsuperscript{1082} This indicates that, in line with public law principles, the employer’s discretion or prerogative power must be exercised rationally; any alteration to a right already granted must be, in this case, conducted reasonably\textsuperscript{1083}

To conclude, the above argument and the line of supporting cases considered above establish the view that public law principles have been injected into the private law governing contracts of employment. Most notable are the principles of \textit{Wednesbury} unreasonableness and its subsequent principle of irrationality. This provides that rationality principles due to the emergence of the implied duty of mutual trust and confidence provide that an employer’s unilateral promises, made in their formal statements or policies, are subject to the principle of irrationality.\textsuperscript{1084} Under \textit{Wednesbury}, different standards according to the context and the effect of the promise to both the employee and the business must be appropriately balanced before determining the employer’s decision.\textsuperscript{1085} Cases such as \textit{Clark} and \textit{Birmingham} clearly provide strong evidence of this trend.

However, courts must take into consideration that an employer may, rationally and in line with the range of reasonable responses test, need to resile from its commitment, if, for example, it believes that its business is at risk by continuing with its policy. Recognizing such position allows the \textit{Wednesbury} principle,

\begin{footnotesize}
\begin{enumerate}
\item A similar conclusion was also held by the EAT in \textit{White v Reflecting Roadstud} [1991] IRLR 331. See also \textit{Birmingham CC v Wetherill} [2007] IRLR 781
\item See further para 7.11 below
\item \textit{French v Barclays Bank} [1998] IRLR 646, see further, para 7.8-9, below
\item \textit{Bugdaycay v Home Secretary} [1987] AC 514
\end{enumerate}
\end{footnotesize}
where the context of the commitment is appropriately observed, to provide fair and coherent treatment to the employment relationship by not undermining the employee’s expectation or the employer’s business needs. A distinction must, therefore, be made between promises which create contractual rights where there is no scope of rational resiling, and promises which are relied upon by the employee acquiring legitimate expectation. To do so, voluntary promise made in a formal commitment must then be determined by reference to the principle of legitimate expectation derived from public law. In other words, public law principles (including the development of the *Wednesbury* principle) have been increasingly integrated into private employment law to prevent an employer’s discretion to departure from its voluntary promises to be exercised irrationally, and this is due to the emergence of the implied trust as noted above. Could further development under the doctrine of legitimate expectation, which is a more sophisticated principle, provide a solution and coherent approach to voluntary promises where an employer’s rational decisions (where there is no breach of trust and confidence) is lawful but depends upon how the employer justifies its decision to resile? This question and the scope of the doctrine and its possible operation in employment law will be considered next.

### 6.4 The Doctrine of Legitimate Expectation

It was illustrated in Chapter Two and Three that the English contractual approach and the principle of ‘aptness’ has neither been able to provide coherence nor hold a satisfactory balance between both parties’ reasonable
expectations. In other words, the UK’s traditional contract approach has neglected and failed to resolve, in any coherent or satisfactory way, the conflicting issues of an employer’s business efficiency and maintaining managerial prerogative power to meet its business needs on the one hand and, on the other, the protection of an employee’s dignity and expectation which have been legitimately relied upon further to an employer’s commitment. Thus far, English courts have generally been approaching the situation by allowing one or the other, but not both.

In search of a coherent approach that is able to respond appropriately to both parties’ expiations, a study of the US employment law approach, as noted in Chapter Five, showed that Michigan courts adopt the principle of legitimate expectation. The term of legitimate expectation, which has an analogy in English public law, shares similarities, in its principle and the way it can create enforcement, with principles that can be derived from English public law. It was, however, shown that the principle adopted in Michigan still faces some difficulties in providing a fair balance of protection to both parties’ interests since it allows employers to resile, by mere notice, for whatever reasons without taking any account of the impact of the promise and the employees’ hierarchy of interests. This was examined in Chapter Five. This chapter will consider how incorporating the English public law principle into employment law could

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1086 See Para 7.2 above
1087 See Chapter Three above.
resolve the difficulty and obscurity of traditional contract law and yet avoid the problem presented in the approach adopted in Michigan.

Accordingly, the importance of incorporating the legitimate expectation doctrine into employment relationships is not limited to its ability to respond to the unique nature of the relationship and the issue of an employee’s reliance, but extends to providing a coherent legal approach to the issue of voluntary promises where it allows employers to override the legitimate expectation, in certain situations as will be shown below, so that a fair balance between the employer’s interests and those of the employee is attained. It further provides a problem-solving device that is capable of satisfying the aim of both the government, as indicted by both the Gibbons report in 2007 and the Donovan report, to reduce the growing number of employment cases brought before tribunals.

It will be shown how the doctrine of legitimate expectation guarantees a sophisticated approach that responds appropriately to the employer’s hierarchy of interests and expectation when an employer considers any justified departure. In effect, it gives adequate weight to the importance and impact of the expectations that arose upon the employer’s unilateral or voluntary promise, when considering whether a decision to depart from those expectations was legitimate and proportionate.
To do so, an examination and assessment of the public law principle must be considered first in order to evaluate its adoption and emergence in employment law.

6.5 The Public Law Principle

It has been argued above that recent developments in employment law have shown an increased judicial acceptance of the convergence between public law doctrines and employment law. An example of its extension which could provide a sophisticated approach in employment law is the principle of ‘legitimate expectation’ as explored in the next section. The doctrine of legitimate expectation is concerned with legal certainty, which is a core component of the rule of law. To that extent it shares a similar concern to the law of contract which is also concerned with security in transactions.

The trend of legitimate expectation owes its development to the implied duty of trust and confidence as seen in Chapter Three, in which a breach of the employee’s legitimate expectation would result in a breach of the implied term, that is, a departure from non-contractual promise, which the employees relied upon and thereby acquired legitimate expectation, will result in a breach of the

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1089 Although claims of legitimate expectation remain ‘much in vogue’ (per Lord Scott in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41) the courts have recently recognised that ‘the reach of legitimate expectation in practice is still being explored’ (*R. (on the application of Cheshire East BC) v Secretary of State for the Environment* [2011] EWHC 1975 (Admin); [2011] N.P.C. 92 at para.56)
implied term of trust and confidence.\footnote{See Chapter Three, Para 3.5-3.6, above. See French v Barclays Bank [1998] IRLR 646, and further discussion, Para 7.8-9, below} This development will be returned to below for further analysis.

The term ‘legitimate expectation’ made its first appearance in a public law case in a statement made by Lord Denning MR in the case of Schmidt v Secretary of State for Home Affairs,\footnote{Ibid, at 170 (emphasis added)} which involved a foreign student who was refused an extension of his visa without being granted a hearing. In the context of procedural fairness, Lord Denning MR said, obiter, that the question of a hearing ‘all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say’.\footnote{[1969] 2 Ch. 149.}

Initially, the principle of legitimate expectation found its justification in allowing an individual to rely on assurances given (regarding a benefit or advantage, including the expectation of a hearing) by a decision maker. Hence, a person’s legitimate expectation could not be terminated without employing a fair hearing and giving the person the opportunity to state his case. This was illustrated in the House of Lords’ conclusion in Council of Civil Service Unions v Minister for the Civil Service (‘the GCHQ case’) in which it was stated, per Lord Diplock, that for a legitimate expectation to arise, the decision:\footnote{[1985] AC 374, 408-09}

\footnotetext[1090]{See Chapter Three, Para 3.5-3.6, above. See French v Barclays Bank [1998] IRLR 646, and further discussion, Para 7.8-9, below}
\footnotetext[1091]{Ibid, at 170 (emphasis added)}
\footnotetext[1092]{[1969] 2 Ch. 149.}
\footnotetext[1093]{[1985] AC 374, 408-09}
must affect [the] other person … by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

The GCHQ case, which involved the right to trade union membership, provided the position that expectations that have been based upon a past benefit that will continue, infer legitimate expectation.\textsuperscript{1094} In other words, a legitimate expectation of the right to a hearing may arise in two ways: (i) where a promise or a decision given by a decision maker has created or led an individual or individuals affected by that decision to believe that they will receive or retain a benefit or advantage; and (ii) where an expectation may be based upon a past practice standard.\textsuperscript{1095} Thus, the representations that induce a legitimate expectation can be express or implied. In the GCHQ case, the right to be consulted, given by the employer’s past practice, created the expectation that terms of employment of civil servants would not be altered without consultation. The expectation was also created by the employer’s implied promise that was inherited in the past practice and custom,\textsuperscript{1096} and in the fact that prior

\textsuperscript{1094} Whilst the court found that expectation is found upon on the employer promise, the held that national security overrides any legitimate expectation in this case. This indicates that the principle of legitimate expectation can be overridden in public law when appropriate justification can be presented. See, Para 7.10, below

\textsuperscript{1095} GCHQ case, 401-03, (per Lord Fraser)

\textsuperscript{1096} See Chapter Two, Para 2.3.-2.4, for further discussion on contractual application of implied intention due to custom and practice.
consultation had been the standard practice where alterations of significant conditions of service were made.

In *R (on the Application of BAPIO Action Limited) v Secretary of State for the Home Department*, the court dealt with the question (on whether there was, on the evidence, any practice that can be regarded as a consistent practice) by asserting that ‘[w]hile a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional voluntary act’. This means that a practice must not be interrupted by contradictory practice or be a one-off or short-term practice for any legitimate expectation to arise.

While the above cases provides examples of how procedural legitimate expectation can be assessed, recent developments regarding the principle of legitimate expectation have given a firm rise to protection under both procedural and substantive expectations. The former considers aspects of legitimate expectation on the basis that a person should receive a fair hearing, or the expectation raises the opportunity that the applicant is entitled to all possible components of a fair hearing, such as making representations. The latter, on the other hand, can be considered where a decision maker ‘has distinctly promised to preserve an existing policy for a specific person or group who would be

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1097 [2007] EWCA Civ 1139
1098 Ibid [39]
1099 R. (on the application of Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755. See further below.
substantially affected by the change, then ordinarily it must keep its promise’.

Further, a promise of substantive promise, as will be examined below, constitutes substantive expectations where ‘a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive’. For example, in *R v North and East Devon HA Ex p. Coughlan*, a promise of ‘a home for life’ to a vulnerable patient was held to be a substantive promise. This case is considered in the section below after considering how a promise can create an entitlement under the principles of legitimate expectation.

### 6.6 Identifying Entitlements under Legitimate Expectation

It has already been indicated that there are two ways in which a legitimate expectation may arise, namely, ‘either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue’. The first situation is where an express undertaking by a decision maker is given to a single individual, or a number of individuals, or a class which induces an expectation of a

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1100 Ibid, [50] (per Laws LJ)
1101 *R v North and East Devon HA Ex p. Coughlan* [2001] QB 213, [58]
1102 Ibid
1103 See further discussion on the case below.
1104 GCHQ, [1985] A.C. 374, 401(per Lord Fraser)
1105 E.g. *Preston v Inland Revenue Commissioners* [1985] AC 835, in which the applicant, a taxpayer, proceeded to claim that the Revenue should honour an agreement made directly to him that the Revenue would not pursue certain tax claims.
1106 E.g. *R v North and East Devon HA Ex p. Coughlan* [2001] QB 213, discussed below, (where a group of residents of a home for disabled people had established legitimate expectation from being promised a ‘home for life’).
specific benefit or advantage. However, the number of those affected by the promise made provides an indication as to whether the promise was intended to be permanently enforced or not. Thus, Laws LJ in Niazi stated that ‘the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good’.  

This can be justified in public law since a public body or authority needs to give weight to public interest. However, the concern about public interest has no bearing in employment relations, which only considers the private effect on the individual parties and involves the personal element of employment contract, as noted in Chapter One. This will be discussed further below.

In public law, generally, ‘it is a basic principle of fairness that legitimate expectations ought not to be thwarted’. For representations to qualify as legitimate and therefore enforceable, the expectation must be subject to certain criteria. Most importantly, ‘it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification’. The context, content, and language of the representation is, therefore, an important

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1108 Niazi, R. (on the application of Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755, [46]
1109 See Para 7.8 below
1110 Harry Woolf, De Smith’s Judicial Review, (7th ed, Sweet & Maxwell, 2013) [12-001]. See further discussion below
1111 R v IRC Ex p. MFK Underwriting Agencies Ltd, [1990] 1 WLR 1545, 1570 (Per Bingham LJ). See also The First Secretary of State and another v Sainsbury’s Supermarkets Ltd [2005] EWCA Civ 520, [1] (per Sedley LJ)
element in order to employ the legitimate expectation.\textsuperscript{1112} This strikes a parallel with the unilateral contract approach adopted in the California model, as examined in Chapter Five, in opposition to the English incorporation test where a promise which is apt, even if containing a clear and unambiguous language, must also be objectively intended by both parties to create a binding obligation.\textsuperscript{1113} In public law, an expectation of benefit or advantage cannot be created from representations of ‘mere hope’ or likelihood.\textsuperscript{1114} While the intention of the decision maker and what it could be understood from a promise is relevant, it is not a conclusive factor in the fulfilment of these qualities.\textsuperscript{1115} In this respect, that is, what create a commitment under the public law principle of legitimate expectation, the approach is similar to the approach adopted in

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\item \textsuperscript{1112} R v Secretary of State for the Home Department Ex p. Zeqiri [2002] UKHL 3. See also Niazi, R. (on the application of Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755; R (on the application of Bhatt Murphy (A Firm)) v Independent Assessor [2008] EWCA Civ 755, in which it was held that there was no legitimate expectation entitled as nothing in the representation or promise indicated that the scheme would continue indefinitely.
\item \textsuperscript{1113} See chapter Two and Three above, in particularly discussion on Grant v. SW Trains Ltd [1998] IRLR 188, Kaur v MG Rover Group Limited [2005] IRLR 40, Para 3.3,
\item \textsuperscript{1114} R v Secretary of State for Education and Employment Ex p. Begbie [2000] 1 WLR 1115; R (on the application of Beale) v Camden LBC [2004] EWHC 6; R v Secretary of State for the Home Department Ex p. Sakala [1994] Imm AR 227; and R v DPP Ex p. Kebilene [2000] 2 AC 326. Cf for example R v Secretary of State for the Home Department Ex p. Asif Mahmood Khan [1984] 1 WLR 1377 in which it was stated that a legitimate expectation that a policy will be followed may be induced by a departmental circular letter which provided detailed criteria for the adoption of children from abroad.
\item \textsuperscript{1115} In R v Secretary of State for the Home Department Ex p. Ahmed [1999] Imm AR 22, Hobhouse LJ stated that the principle of legitimate expectation was a ‘wholly objective concept and not based on any actual state of knowledge of individual immigrants’ [40]. See also R (on the application of A) v Coventry City Council [2009] EWHC 34 (Admin); cf Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32. For further argument on this point see J.Watson, ‘Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations’ [2010] LS 633
\end{itemize}
employment relations by the Michigan courts in the US, as noted in Chapter Five, where a promise creating a legitimate expectation ‘gives rise to a situation ‘instinct with obligation’” despite the traditional rules of contract formation not being met.\textsuperscript{1116} Thus, the principle deriving from the English public law and the Michigan employment law approach to legitimate expectation treats similarly the objective commitment made to the employee, which is inherently relied upon by the employee, as the core factor in generating a binding obligation. This reflects a departure from the exchange-to-bargain theory toward reliance theory where creating entitlements mainly rested on the joint negotiation machinery and the question of whether both parties had intended to make a binding commitment.\textsuperscript{1117}

Accordingly, the doctrine of legitimate expectation is concerned with the objective commitment that a voluntary promise generates rather than the mutual objective intention of both parties to create a contractual obligation. Moreover, under the principle of public law, as noted earlier, a promise unilaterally made creates entitlements once it is capable of generating a legitimate expectation. Indeed, an observation of employment case law reveals that the principles underpinning the public law doctrine are already partly echoed in the private law jurisprudence. This means that for legitimate expectation to arise, the employer’s unilateral promise must be a ‘clear and unambiguous’ representation to the effect alleged. For example, an entitlement will not be created if a court

\textsuperscript{1116} \textit{Toussaint v Blue Cross & Blue Shield}, 579, 292 N.W.2d 880 (Mich 1980) 447-448.
\textsuperscript{1117} See Chapter Two and Three above. See e.g. \textit{National Coal Board v National Union of Mineworkers and others} [1986] IRLR 439, per Scot J [94]
has found that the employer’s formal statement or representation, made unilaterally to his employee, was only ‘aspirational’, or only contained words ‘expressing an aspiration’, or the provisions were ‘idealistic’, or the employer only intended it to be ‘binding in honour’. Furthermore, an employer who provides an express disclaimer that entitlement under its unilateral promise can be unilaterally revoked may argue that a legitimate expectation is not reasonably capable of being established due to insufficient commitment. This provides another example of the public law principle being partly reverberated in the private law of employment jurisprudence.

In public law the principle of creating an objective commitment was further explained in National Farmers’ Union and another v Secretary of State for the Environment, Food and Rural Affairs and another. Here, a scheme of payment was introduced by the government to help livestock owners whose livestock suffered from foot and mouth disease. In considering whether the commitment created any legitimate expectation, the court held that the commitment was not an unequivocal representation from ‘the Government to

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1118 Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers [1969] 2 QB 303
1119 Kaur v MG Rover Group Ltd, [2005] IRLR 40, (Keene LJ), p 43
1120 Grant v. SW Trains Ltd [1998] IRLR 188 at p. 189.
1121 National Coal Board v National Union of Mineworkers and others [1986] IRLR 439
1122 A trend of this approach can be understood from the court’s decision in Bateman v Asda Stores [2010] IRLR 370 which dealt with unilateral revocation under express power. See also Wandsworth London Borough Council v D'Silva [1998] IRLR 193. See further Chapter Four which discussed the issue. In US this was accepted in Lytle v. Malady, 579 N.W.2d 906 (Mich. 1998).
1123 [2003] All ER (D) 55
payment of the Scheme rates with, in effect, an absolute guarantee that there would not be any alteration or adjustment in those rates for a minimum period.\textsuperscript{1124}

A direct application of this principle to voluntary promises in employment relationships means that a promise made by an employer could be binding when there is an \textit{absolute} commitment. Accordingly, legitimate expectation could not have been legitimately created in the absence of commitments which have been made by an express promise or the past practice and custom that was a clear and unambiguous representation of the effect alleged. This provides a clear indication of convergence between public law principles and employment law where a commitment, as noted in Chapters Two and Three, in employment law can be created expressly or by virtue of custom and practice.\textsuperscript{1125}

Moreover, the court in \textit{National Farmers’ Union}\textsuperscript{1126} was influenced by the wording of the statement made by the Prime Minister that ‘the rates should not extend beyond two months from the opening of the scheme’.\textsuperscript{1127} Such a representation did not give a clear and unequivocal promise and accordingly ‘that statement cannot possibly be elevated into a promise that the rates would remain unaltered for the entire two-month period’.\textsuperscript{1128} The court was, therefore, not only influenced by the language of the representation when determining

\textsuperscript{1124} Ibid Per Forbes MR at para 38
\textsuperscript{1125} See chapter two and three
\textsuperscript{1126} National Farmers’ Union and another v Secretary of State for the Environment, Food and Rural Affairs and another [2003] All ER (D) 55
\textsuperscript{1127} Ibid, [39]
\textsuperscript{1128} Ibid,[39]
evidence of objective intention to make a commitment, but also by the manner in which such a representation was circulated. Such issue, as noted in Chapter Four, was influential in *Attrill* and accordingly recognized by the Court of Appeal, giving yet another indication of cross-fertilization between the public law principle and employment law.

Furthermore, in identifying commitment, the High Court in *Grant v SW Trains Ltd*, as noted in Chapter Two, adopted an approach that mirrors the requirements of the doctrine of legitimate expectation. For a commitment to be binding, the court was concerned with the language of the provision being certain and clear. Again, weight was also attributed to the manner in which the policy had been circulated and how it has announced.

The US jurisprudence, as discussed in Chapter Five, which has adopted the principle of legitimate expectation into employment law, considers the question of identifying entitlement in similar trend to the English public law. Thus, in *Toussaint v Blue Cross & Blue Shield*, for example, a commitment must be made clear and unambiguous in order to raise legitimate expectation.

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1130 *Attrill & Ors v Dresdner Kleinwort Ltd & Anor (Dresdner Kleinwort Limited & Anor v Attrill & Ors*, [2013] EWCA Civ 394. See also Chapter Four.

1131 *Grant v SW Trains Ltd* [1998] IRLR 188 (HCQB)

1132 *Toussaint v Blue Cross & Blue Shield* 579, 292 N.W.2d 880 (Mich. 1980). See further detailed discussion on the case in Chapter Five, Para 6.8, above. In this case the employer furnished their employees with manuals which contained provisions promising to ‘provide for the administration of fair, consistent and reasonable
Following *Toussaint*, the Supreme Court of Michigan in *Rood v General Dynamics Corp.* confirmed that the rationale for judicial enforcement of an employer’s unilateral promise ‘is simply the intuitive recognition that such policies and procedures tend to enhance the employment relationship ... for the ultimate benefit of the employer’. According to *Rood*, the requirements for creating entitlements are concluded by fulfilling the following two steps: courts must firstly establish that a promise has been made, and secondly, ‘determine whether the promise is reasonably capable of instilling a legitimate expectation of the alleged entitlement. Hence, for a promise to become enforceable, it must be clear and specific. ‘The more indefinite the terms, the less likely it is that a promise has been made. And, if no promise is made, there is nothing to enforce.’ This reflects the principle of public law that ambiguous representations or those of mere hope or ‘likelihood cannot create legitimate expectations.’

Accordingly, the US approach provides for the position that is strikingly similar to the principle that can be derived from English public law in two ways. First, both approaches accept that unilateral statements can create a legitimate

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1135 Ibid 138-139
1136 Ibid
1137 Ibid
1138 Ibid at 139
expectation enhanced by the reliance upon the promise or commitment ‘rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance’. Second, a commitment of legitimate expectation does not require an exchange of mutual objective intention, but is created by consideration of the language of the promise and the manner in which it is circulated.

Moreover, the process adopted in English public law appears to be the same as that followed in the US private law regarding what creates entitlements. Thus, ‘an expression of an optimistic hope of a long relationship’ will not create an enforceable commitment in the US and, similarly in the UK, a representation or a statement of policy which was put in general and ‘idealistic’ terms, or expressing an aspiration, could not create an entitlement. Both English public law and US law accepts that a voluntary promise may create a legitimate expectation when a formal commitment is objectively made. Closer attention to the English line of cases in employment law reveals that legitimate expectation is playing a part and could provide such a trend is becoming increasingly firmly adopted.

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1140 Toussaint v Blue Cross & Blue Shield 579, 292 N.W.2d 880 (Mich. 1980), 447-448
1142 Grant v. SW Trains Ltd [1998] IRLR 188
1143 Kaur v MG Rover Group Ltd [2005] IRLR 40. See further discussion on the case below.
1144 See e.g. French v Barclays Bank [1998] IRLR 64, discussed below
6.7 Substantive Legitimate Expectation

It has been argued that recent developments in employment law have shown an increase in judicial acceptance of the trend towards convergence between public law principles and employment law.\textsuperscript{1145} This has been, as noted earlier, via the development of the implied duty of trust and confidence in which an employer’s decision to depart from a promise to the employee acquiring legitimate expectation is a breach of the implied term.\textsuperscript{1146}

This may not be a surprising development as both the private law of employment and public law have a common aim of restraining abuse of power.\textsuperscript{1147} Thus, adopting the public law principle of legitimate expectation in employment relations will only guarantee this result by preventing employers from undermining the implied duty of trust and confidence, and accordingly abusing their power. To achieve this, attention must first be drawn to the circumstances in which a decision to disappoint an employee who has an expectation of a substantive benefit or advantage, may be held to be unjustified.

The starting point is, accordingly, to consider the principles of public law in order to discover whether an employer’s resilement from its promise, which entitles an employee to have a legitimate expectation and which is not defeated by an overriding business interest, can amount to a breach of the implied duty of

\begin{footnotesize}
\textsuperscript{1145} See, Para 7.2, above
\textsuperscript{1146} See discussion on \textit{French v Barclays Bank} [1998] IRLR 646, below. See further Chapter Three, Para 4.4, above
\textsuperscript{1147} See, Para 7.1-2, above
\end{footnotesize}
trust and confidence. The question of what constitutes an overriding business interest, and which permits the employer to lawfully resile from a legitimate expectation, will be examined in more detail later in this chapter.\textsuperscript{1148}

Under public law, the general principle is that a substantive legitimate expectation will protect a person’s interest in a substantive right.\textsuperscript{1149} A substantive legitimate expectation based on a representation will be established if: (i) a public body has made a representation which is clear and unambiguous, is devoid of relevant qualification,\textsuperscript{1150} or has adopted a settled practice which amounts to a representation;\textsuperscript{1151} and (ii) the public body cannot show that there is an overriding public interest that justifies defeating the expectation.\textsuperscript{1152}

\begin{footnotesize}
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\item See Para 7.8 below
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\item See Para 7.8 below
\end{enumerate}
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While the legitimate expectation is in existence, the promise is binding as long as it is in force. Accordingly, the authority may be free to depart from its representation, but it is not, by any means, free to ignore the existence of a legitimate expectation. This was confirmed in the Court of Appeal’s decision in R v North and East Devon HA Ex p. Coughlan, which dealt with an emerging issue regarding the principle of legitimate expectation—namely, the standard by which the courts, on an application for judicial review, should scrutinize the authority’s decision to disappoint a legitimate expectation. In other words, the question, as put by Sedley J, was always whether the ‘discipline of fairness … ought to prevent the public authority from acting as it proposes’.

The case of Coughlan concerned a small group of patients with serious disabilities who agreed to move from a hospital after a promise by the health authority to provide them ‘home for life’ in a residential care home providing specialist care, the ‘Mardon House’. The health authority subsequently changed its policy and sought to close the ‘Mardon House’. The authority argued that notwithstanding its promises to the patients, it was reasonable and rational, in the Wednesbury sense, to withdraw and revise its promises since financial difficulties prevented the authority from affording to keep the house open.

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1153 See above on the test of when a promise is capable of creating legitimate expectation, para 7.6.
1154 R v North and East Devon Health Authority ex p. Coughlan [2001] QB 123, CA
1156 See above for discussion on the principle of Wednesbury, Para 7.1-7.2
Having this argument in the background, the Court of Appeal was asked to decide whether the health authority could renege on its promise to the appellant.

The court was faced with the heavy task of reconciling between the authority’s need to respond to changes, in this case financial affordability, and the legitimate expectations of the patients who have reasonably and justifiably relied upon the authority’s promise or practice.

The standard by which the court is to resolve such conflicts is crucially critical. It was noted above that a decision to depart from a promise is generally subject, (for the court’s intervention under Wednesbury), to the ground of rationality. In the case of Coughlan the authority’s decision appears to easily pass a rationality test. There were financial and logistic difficulties facing the authority to keep the house open, the authority needed to make a choice, and was fully aware of its promised policy and the reasons for changing them. That choice would therefore be hard to challenge for being irrational.

The Court of Appeal held that a promise which induced a legitimate expectation, the benefit of which was substantive rather than procedural, raised the question of whether the disappointment of the expectation was unfair or an abuse of power and should be decided under the above approach. What is defined as unfair or an abuse of power might be ambiguous or elusive but it generally regards, in the context of this research, as improper the use of one’s position of
power or authority in an abusive, irrational, or unjustified way. ‘Abuse of power can be said to be but another name for acting contrary to law.’\textsuperscript{1157}

The court noted that when a court is considering a promise, there are at least three possible outcomes:

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course

(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it’

(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a \textit{benefit which is substantive}, not simply procedural, authority now establishes that here too the court will, in a proper case, decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy.\textsuperscript{1158}

The first is concerned with the irrationality test under \textit{Wednesbury} grounds, as discussed above, where the question is whether the action was not irrational and without ‘given proper weight to the

\textsuperscript{1157} R v North and East Devon Health Authority ex p. Coughlan [2001] QB 123, [76]

\textsuperscript{1158} Ibid at [57], original emphasis.
implications of not fulfilling the promise’. 1159 In the second category where consultation is concerned, ‘the court’s task is the conventional one of determining whether the decision was procedurally fair’. 1160 In these two categories, analogy with employment law would mean that where the employer’s promise do not create a legitimate expectation but mere managerial prerogative or, for example, aims of future objective, then the employer decision is only subject to rationality so not to undermine trust and confidences. 1161

However, the third is concerned with legitimate expectation arising due to a promise, either express or implied, due to continuous practice that has been relied upon by the employee that it will be honoured. In this case ‘the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised’ 1162 The examination of justification, as discussed later below, is weighed by the importance of what was promised and the consequences of honouring that promise. Importantly, ‘the fact that promise was limited to a few individuals’ 1163 is an essential fact to conclude that it comes into the third category.

1160 Ibid [57]. See A-G for Hong Kong v Ng Yuen Shiu [1983] 2 AC 629
1161 See Para 7.2 above.
1162 R v North and East Devon Health Authority ex p. Coughlan [2001] QB 123,[58]
1163 Ibid [60]
This is most relevant to the issue of voluntary promises in employment law which acquires substantive legitimate expectation. Taking the principle in *Coughlan* and public law by analogy to the employment relationship, legitimate expectation can arise due to an employer’s express commitment to his employee or due to a continuous practice that effect. An employer should not abuse its power by unlawfully resiling from its promise. Accordingly, sufficient overriding interest must take into account the importance and impact of the promised benefits or expectations upon the employee to justify the employer’s decision to resile. However, where the expectation is attached to mere guidance or practice that is not capable of creating a commitment, then the decision to override is limited to that, ie an employer will only be prevented from acting irrationally, under the *Wednesbury* test, in such manner that undermines the implied duty of trust and confidence. Further, in *IBM United Kingdom Holdings Ltd v Dalgleish*, as noted above, the changes to the pension plans by Holdings and the manner in which it had consulted on them, gave rise to a breach of its duty of trust notwithstanding that the change had been validly introduced into the main plan and were not for an improper purpose.

If a promise is capable of creating substantive legitimate expectation, then an employer’s rational decision to resile is a breach of the implied duty of

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1164 [2014] EWHC 980 (Ch)
trust and confidence unless there is sufficient overriding interest to justify a departure. This overriding interest must be weighed against the employee’s interest that informs the proportionality principle as explored later below.

Furthermore, the reference in Coughlan to promises being offered to a limited group of individuals rather than a wider class of individual has no bearing on employment relations, as noted above, which only consider the private effect on the individual parties and involve the personal element of the employment contract. Unlike a public authority, an employer’s unilateral promises are addressed to its specific group or individual employees.

In R (on the application of Niazi) v Secretary of State for the Home Department,\textsuperscript{1165} also known as Niazi, Law LJ started by analysing that the term of legitimate expectations and identifying its guiding principle, stating that it can be, broadly, expressed in the following terms:\textsuperscript{1166}

‘The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority.’


\textsuperscript{1166}Ibid, [26-52].
Chapter Six: The Doctrine of Legitimate Expectation: A Public Law ‘Injection’

Laws LJ then confirmed that the law recognizes three categories of legitimate expectation as follows:¹¹⁶⁷

(a) If a public authority has distinctly promised to consult those affected or potentially affected by a change of policy, ‘then ordinarily it must consult (the paradigm case of procedural expectation)’;¹¹⁶⁸

(b) If, without any promise, the public authority ‘has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation)’;¹¹⁶⁹

(c) If a public authority ‘has distinctly promised to preserve an existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (‘substantive’ legitimate expectation)’.¹¹⁷⁰

This distinction in employment cases where voluntary promises are concerned is not the wide classes or specific group but the effect of promise itself. Thus, the third category above applies in employment relations. If a promise creates a legitimate expectation, being clear and unambiguous, then the question is only addressed whether an employer’s decision to resile from its promise is justified. A resilement from a promise, if not justified or permissible, can amount to an abuse of power, especially when such resilement undermined the dignity of the employee.

Accordingly, the principle of legitimate expectation may provide protection when a promise of substitutive benefit is made to an individual or a group of

¹¹⁶⁷ Ibid, [50].
¹¹⁶⁸ Ibid, [50], original emphasis
¹¹⁶⁹ Ibid, [50], original emphasis
¹¹⁷⁰ Ibid, [50], original emphasis
individuals, who have the same interest, such as workers under one employer or company, to have binding effect in order to restrain the abuse of power. This gives the principle of legitimate expectation a distinctive application to the concept of abuse of power, more particularly, in relation to substantive benefits. This distinctive role of the doctrine is also connected to the notion adopted by the Court of Appeal: ‘A decision not to honour it would be equivalent to a breach of contract in private law’. 1171

This provides for the position that legitimate expectation does not create a contractual right under traditional contract law, but an unjustified departure from the legitimate expectation would amount to a breach of the implied duty of trust and confidence in a manner that is equivalent to a breach of contract. In other words, legitimate expectation operates as a freestanding obligation or independent principle for enforcing promises, outside the operation of ordinary contract law principle of binding contractual rights, but the breach of it is equal to a contractual breach. This bears a similarity with the US approach adopted in Michigan and it is precisely what can be understood from the approach in French, which will be discussed further below.

In French, it was noted that the promise that created expectation must be honoured so as not to undermine the implied duty of trust and confidence; the employer’s departure from its voluntary promise which creates legitimate

1171 Ibid, [85] (Per Lord Woolf MR)
expectation was held to be a breach of the implied duty of trust and confidence, in manner that is equivalent to a breach of contract.

However, legitimate expectation may also be overridden by weighing the expectation against any overriding interest relied upon for changing the policy or regarding a competing public interest.\textsuperscript{1172} Thus, Lord Woolf stated that ‘once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy’.\textsuperscript{1173} This, however, can only be assumed when there is an important competing public interest such as protecting national security\textsuperscript{1174} or public health.\textsuperscript{1175} While public interest is not normally a concern in the private law of employment, the dictum provides guidance regarding the problem that may arise in employment relations where employers attempt to override their commitment of substantive legitimate expectations for proportionate reasons based on legitimate business aims. These issues, as indicated earlier, are highly important and relevant to the development of employment law which seeks to achieve a coherent approach and strike a fair balance between the interests of both parties. This issue will accordingly be considered separately later in this chapter.\textsuperscript{1176}

\textsuperscript{1172} R v North and East Devon Health Authority ex p. Coughlan [2001] QB 213, [57].
\textsuperscript{1173} Ibid, [57].
\textsuperscript{1174} Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374.
\textsuperscript{1175} R. v Secretary of State for Health Ex p US Tobacco International Inc [1992] 1 Q.B. 353
\textsuperscript{1176} See Para 7.8 below
6.8 ‘Legitimate Expectation’ as a Problem-Solving Device

It has been shown that as a general principle, under public law, substantive legitimate expectation protects the legitimate interests or expectations of a person who legitimately relied, and has been justified in relying, on a promise expressed or implied due to practice and custom made by the employer.\textsuperscript{1177} As noted in Chapter Three, this approach appears to be adopted in English employment law under the modern development of the implied term of trust and confidence. In the US, as shown in Chapter Five above, the adoption of the principle of legitimate expectation in employment relations was accepted, particularly in the State of Michigan. However, in the US the adoption of the principle of legitimate expectation is more settled and strongly rooted in employment law than English employment law.

Accordingly, in line with the English public law approach, the Michigan courts found that employers who make a unilateral promise that is reasonably capable of creating an expectation cannot treat such a commitment as illusory. This is a mere reflection of what Laws LJ, in \textit{Niazi},\textsuperscript{1178} described in his third category as a ‘substantive’ legitimate expectation, namely, when an employer makes a promise in a formal statement ‘for a specific person or group who would be

\begin{footnotes}
\item[1177] \textit{R v North and East Devon Health Authority ex p. Coughlan} [2001] QB 123.
\item[1178] \textit{R. (on the application of Niazi) v Secretary of State for the Home Department} [2008] EWCA Civ 755[50]
\end{footnotes}
substantially affected by the change, then ordinarily it must keep its promise’.\textsuperscript{1179} This approach resembles the conclusions in the US cases of \textit{Toussaint}\textsuperscript{1180} and \textit{Rood},\textsuperscript{1181} which rejected the long-standing bilateral contract approach adopted by English courts regarding the question of aptness and objective mutuality of intention that makes a provision incorporated into the employment contract.\textsuperscript{1182}

This departure from the formation rules required under the bilateral approach that allows for the position that entitlement is not established by any of the traditional means of contract formation has also meant that the principles governing the employer’s departure from the promise must be different to the general principle under the common law of contract; since legitimate expectation gave raise to enforcement ‘outside the operation of normal contract principles’,\textsuperscript{1183} the rules governing departure from it must also be operated outside the normal contract principle.\textsuperscript{1184}

While it has been the view of the researcher in this research that the Michigan approach appears to regard the enforcement of promises acquiring legitimate

\begin{flushleft}
\textsuperscript{1179} Ibid
\textsuperscript{1180} \textit{Toussaint v. Blue Cross & Blue Shield} 579, 292 N.W.2d 880 (1980).
\textsuperscript{1181} \textit{Rood v. General Dynamics Corp} 444 Mich. 107, 116, 507 N.W.2d 591 (Mich. 1993) 579, 292 N.W.2d 880 (1980). See further detailed discussion on the case in Chapter Five. In this case the employer furnished their employees with manuals which contained provisions promising to ‘provide for the administration of fair, consistent and reasonable corrective discipline’ and ‘to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only’, 893
\textsuperscript{1182} See Chapter Three and Five above.
\textsuperscript{1183} \textit{Toussaint v. Blue Cross & Blue Shield} 579, 292 N.W.2d 880 (Mich 1980), 447-448.
\end{flushleft}
expectation, as no-contractual right, the position is admittedly not straightforward or very clear. The Michigan Supreme Court in *Bankey v. Storer Broad. Co. (In re Certified Question)*, stated that:\textsuperscript{1185}

Without rejecting the applicability of unilateral contract theory in other situations, we find it inadequate as a basis for our answer to the question as worded and certified by the United States Court of Appeals. We look, instead, to the analysis employed in *Toussaint* which focused upon the benefit that accrues to an employer when it establishes desirable personnel policies. Under *Toussaint*, written personnel policies are not enforceable because they have been ‘offered and accepted’ as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies.

This notion appears to say that enforcement of the legitimate expectation is not created through the unilateral contract or the governing orthodox rules of contract formation where offer and acceptance must be established. Rather the enforceability arises by the employer’s mere promise of benefit. Whether this means that legitimate expectation can create a contractual right but its formation is not in an orthodoxy way, or that it is a mere ‘instinct with an obligation’ creating enforcement outside the operation of contract law, ie similar to public law principle, is not hence very clear. Ante J stated that when the question is related to promises creating legitimate expectation then contract theory is not appropriate in this situation\textsuperscript{1186}. This assertion could be understood to support our argument that legitimate expectation does not create a contractual right, ie under the principle of contract law, or operate inside contract law. It could

\begin{footnotesize}
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\item \textsuperscript{1185} Ibid 453-454
\item \textsuperscript{1186} Ibid, 458
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equally mean, however, that legitimate expectation are unusually created contractual rights and consequentially the orthodox contractual theory need not to apply in its operation.

Other authority in this issue does not provide a firm position.\textsuperscript{1187} However, indication form these authorities supports our argument that legitimate expectation does not create contractual right or operates within common law of contract. For example, in \textit{Rood v. General Dynamics Corp}, the Supreme Court stated that\textsuperscript{1188}:

\begin{quote}
[P]rovisions may become part of an employment contract as a result of ‘explicit’ promises..... As recognized in Toussaint, however, employer policies and procedures may also become a legally enforceable part of an employment relationship if such policies and procedures instill ‘legitimate expectations’ of job security... In other words, there are two alternative theories of enforceability that may support a claim of wrongful discharge in Michigan. While the first theory is grounded solely on contract principles..., the second theory is grounded solely on public policy considerations.
\end{quote}

This provides that the court does not regard the principle of legitimate expectation as a promise enforceable under contract principle but as part of public policy which operates outside the law of contract. This is how the Supreme Court of Colorado seems to view the position in Michigan when stated


\textsuperscript{1188} \textit{Rood v. General Dynamics Corp} 444 Mich. 107, 116, 507 N.W.2d 591 (Mich. 1993), 117-118
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in *Crawford Rehab Services v. Weissman*\textsuperscript{1189} ‘legitimate expectations…arise outside the scope of normal contract principles. The theory operates as a viable, independent basis for enforcing promises’.\textsuperscript{1190} The courts view the doctrine as an independent basis for enforcement that is operating outside the rules of contract law which support our argument that the doctrine in Michigan is not viewed to create a contractual right under the operation of the contract law principle and accordingly the rules governing its departure also operated outside the normal contract principle.\textsuperscript{1191} This operation will be considered later in this chapter.

Moreover, the courts’ adoption of the reliance theory as the source of explaining an obligation that can be created from the employer’s representation, outside the ordinary contract law formation, is consistent with the principles derived from public law in the UK.\textsuperscript{1192} The Michigan approach supports the position that unilateral promises made by an employer that confer benefits, legitimately relied on, are binding due to them creating legitimate expectations, outside the traditional means of contract formation. This approach may not be surprising given that in English public law, as Lord Hoffmann stated, legitimate expectation should separate itself from private law estoppel and ‘stand on its

\textsuperscript{1189} 938 P. 2d 540 – (Colo. 1997),
\textsuperscript{1190} Ibid , 29-30
\textsuperscript{1192} See further discussion below
own two feet'. It also strikes a parallel with the Court of Appeal decisions in
French, as noted in Chapter Three, and other recent development in employment
law, as explored next.

6.9 ‘Legitimate Expectation’ as a Further
Development under the Implied Duty of Trust and
Confidence

It was noted in Chapter Three that enforcement of voluntary promises in English
employment law is not merely through the traditional contract law formation but
also due to implied trust and confidence, ie indirect enforcement. The modern
development of the implied duty of trust and confidence allowed for the notion
that an employer’s departure from a promise, which was legitimately relied on
by the employee to acquire legitimate expectation, could result in breach of the
implied duty.

This development, as noted in Chapter One, came as result of the increased
adoption of the reliance theory, which responds more appropriately to the unique
nature of employment relations and voluntary promises, in particular, since it is
unilaterally introduced without the joint negotiation of the parties. Moreover,
there is an increase in judicial tendency, as discussed earlier, to adopt public
law principles, via the implied duty of trust and confidence in particular, in order

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1193 R (on the application of Reprotech Ltd) v East Sussex CC [2002] UKHL 8; [2003] 1
WLR 348, [35]. For further analysis of the doctrine of estoppel in public law see S.

1194 See further, Para 7.8.2, below

1195 See note on irrationality Para 7.2 above
to reject management decision making that is arbitrary or irrational and to prevent any abuse of power.\\footnote{1196}{See, Para 7.2, above} It has alternatively been argued that the implied duty allowed for the development that any departure from promises by acting irrationally (i.e. similar to \textit{Wednesbury}) could consequently be challenged due to the implied term of trust and confidence. This triggers questions regarding the principle and legal approach adopted by English courts when considering the employer’s rational decision to depart from a promise that the employee has relied upon to acquire a legitimate expectation that the promise will be honoured.

It was noted in Chapter Five that the US courts of Michigan adopt the principle of legitimate expectation in employment relations, which shares a similarity with English public law.\\footnote{1197}{E.g. \textit{GCHQ} \textbf{[1985]} A.C. 374 at 401B per Lord Fraser, a legitimate expectation may arise ‘either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue’}. It was also noted earlier that English employment jurisprudence appears to adopt the principle of legitimate expectation in employment relations in the way that reflects clear similarity with public law principles.\\footnote{1198}{See the discussion on mutual trust and confidence Chapter One and Three above} For example, it is argued that the case of \textit{French v Barclays Bank},\\footnote{1199}{\[1998\] IRLR 646} as noted earlier, is an authority on this possibility.\\footnote{1200}{\textit{Malone and others v British Airways plc} \[2011\] IRLR 32; and \textit{Kaur v MG Rover Group Ltd} \[2005\] IRLR 40. See below for further discussion.} A remarkable conception can be drawn from the court’s willingness to accept that a promise made in an employment relationship ‘was in no way intended to be a
This provides a supporting indication to the argument made in Chapters One and Four that promises in employment relations could not be treated within a strict contract formation of contractual rights. Rather, a promise given in an employment relationship, which is unique in its nature, must be considered in light of the uniqueness of the relationship. In this regard, the Court of Appeal held that the employee’s reasonable reliance upon the bank’s provision and the bank’s previous conduct towards other employees had created a legitimate expectation that the employer would be bound by its promise. ‘His expectation would be that the bank would not wish him to suffer financial loss by virtue of the relocation.’ The unjustified departure from the legitimate expectation, therefore, resulted in breach of the implied term of trust and confidence.

The court’s approach mirrored the principle followed in Coughlan by giving sufficient weight to the commitment that was patently made by the employer in its formal statement, what the employer had promised, and that the promise was sufficient to create a legitimate expectation of the entitlement alleged. These tests closely mirror the approach adopted in the US to identify entitlements under an employment policy. In French, the court focused upon the clear commitment made by the employer that had also taken the formal step of declaring its policy. In line with public law principles and those adopted in the

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1201 Ibid, 648
1202 See Chapter One above
1203 French v Barclays Bank [1998] IRLR 646, 651
1204 See above
1205 See Chapter Five
US, the promise was identified by the objective commitment made by the employer. This was based upon the clear and unambiguous declaration that (a) has been applied to other employees over many years and (b) appeared in terms in the manual at the time when the loan was made. The fact that the promise was made in a manual short of exchange did not exclude the term from creating legitimate expectation; hence the employer’s departure from its promise was held to be a breach of the implied duty of trust and confidence.

As noted in Chapter Three, one significant feature of the court’s finding in *French* lies in its departure from the traditional contract law rules governing what constitutes an enforceable commitment. The Court of Appeal, in analogy with the principles and the analysis reached by the US State of Michigan, concluded that the employee’s legitimate expectation is protected, when an employer’s commitment is clear and unambiguous, without relying upon traditional tests, incorporation or detrimental reliance, and without requiring the plaintiff to establish estoppels. However, the court’s finding that the employer’s departure was a breach of the implied term did not discuss whether an employer’s departure from its promises that acquired legitimate expectation can be justified and what constituted a justified overriding objective from the legitimate expectation. The question did not arise at the hearing but it is discussed below.

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1206 *French v Barclays Bank* [1998] IRLR 646
To conclude, the case of *French* simply uses a ground derived from the public law principle, invoking the idea of reliance, that an employer’s promise cannot be revoked once it is reasonably capable of creating a legitimate expectation of the entitlement claimed and the employer could not justify its decision to resile from the promise. In addition, the court was willing to accept the approach that legitimate expectation is necessary to guard against abuse of power, which both public law and private law are aiming to enforce. Accordingly, an employer that chooses to promulgate a voluntary promise or announcement that improves the employment relationship and that provides incentives to its employees and enhanced or additional benefits to its workers, which the employee justifiably and legitimately relied on, may not depart from its promises at whim or treat its promises as illusory. To do so would be a breach of the legitimate expectation that undermined the implied term of trust and confidence, and accordingly entitles the employee to bring a claim against the employer’s breach. To allow otherwise would encourage the abuse of power that both public and private law aim to prevent.

The court’s increased trend to give more emphasis to the employee’s reliance and legitimate expectation, through the influence of implied trust and confidence, is not limited to promises unilaterally expressed by the employer but also due to the employer’s custom and practice. For example, as noted in Chapters Two and Three, this trend can also be understood from a more recent

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Court of Appeal decision in *Birmingham CC v Wetherill*[^1] in which it was accepted that the duty of trust and confidence prevented the employer from breaching the employee’s reliance and expectation. The Court adopted the position that the employee’s reliance can be generated due to an existing practice.[^2] The Court did not depart from the Court of Appeal’s finding in *Paragon Finance plc v Nash and another*,[^3] in which it was accepted that an implied term that the employer’s discretion must be exercised rationally and in an honest way is ‘necessary in order to give effect to the reasonable expectations of the parties’.[^4]

Similarly, the Court of Appeal in *Albion Automotive Ltd v Walker*[^5] held that a policy introduced unilaterally by the employer created a binding obligation as ‘all employees had a reasonable expectation that the enhanced redundancy payments would be made’.[^6]

To summarize, English courts, as noted in *French* and its successors, allowed the development of the implied duty of trust and confidence to arrive at the similar principle as that which was concluded in *Coughlan*, and reached by the Supreme

[^1]: [2007] IRLR 781
[^2]: Ibid, Per Chadwick LJ at Para 34
[^3]: [2002] 1 WLR 685
[^4]: Ibid [37] and [41-42]
[^5]: [2002] EWCA Civ 946, discussed in Chapter 2
Courts of Michigan, where unilaterally announced commitments could create legitimate expectation that the employer cannot revoke without justification. The employer’s unjustified departure from the legitimate expectation amounts to breach the duty of the implied duty of trust and confidence. This, in effect, means that the implied duty of trust and confidence protect the legitimate expectation, and therefore restraining the employer from departing from a promises or practice which acquired legitimate expectation unless this departure was justified in the terms considered below. Accordingly, *French* and its successors have opened the door to an approach which needs to be developed further.

In *Coughlan*, the court gave an indication to what this further development can provide and achieve. It was held that legitimate expectation creates entitlements which cannot be frustrated unless there is an ‘overriding public interest which justified a departure from these entitlements’. Allowing a further development into the principle of legitimate expectation in employment, it will be argued in the subsequent paragraphs that, by giving public law principles closer attention, to aid the courts in shaping the implied duty of trust and confidence in more sophisticated ways, will provide a coherent approach to the issue of voluntary promises and avoid the unsatisfactory contractual solution that appeared to produce an inconsistent result, as noted in Chapter Three.

1216 See Para 7.8 below
1217 *R v North and East Devon HA Ex p. Coughlan* [2001] QB 213, [89]
In *Coughlan*, it was noted that a substantive legitimate expectation cannot be departed from by mere rationality. Limited financial consequences, on the facts of the case, were held not to be sufficient grounds to depart from the promise. This is a very useful principle if adopted in employment law since, as will examined below, an employer will not be able to depart from a promise giving rise to a legitimate expectation on the ground of mere rationality or business aim, for example to prevent future lost profit or to reduce overhead costs, without proportionate justification for its decision. This means that the employer’s decision to override its promises needs not only to show a legitimate aim or real business interest but the employer must also act proportionately accordingly to the impact of the promise and the circumstance of the case. What constitutes a justified ‘overriding interest’ will be discussed further below.

### 6.10 Overriding ‘Legitimate Expectation’

It has been shown that an entitlement can be created in employment law where legitimate expectation is identified in a commitment unilaterally made by an employer. It has also been argued that the possible development of the doctrine of legitimate expectation has already been ingrained in employment law due to the development of the implied duty of trust and confidence. If this approach is firmly adopted in employment law, the legal effect or consequences of enforcement of the legitimate expectation must, accordingly, be considered. In other words, if courts find that an enforceable commitment has been created on the grounds of legitimate expectation; can the employer thereafter modify or
revoke its commitments unilaterally, with or without notice, or subject to certain justification?

The importance of this question is that it addresses the conflicting issues of business efficiency in maintaining managerial prerogative power to meet its needs, on the one hand, and on the other, the protection of the expectation and benefits that have been legitimately relied upon by an employee further to an employer’s commitment. Maintaining a fair balance between ‘business efficiency’ and ‘employees’ dignity’ and expectations must be properly considered so that the former should not undermine the latter.

In public law, the courts’ position is not straightforward and courts have acknowledged the complexity in exercising the appropriate balance. At one end of the scale, the expectation must not be disappointed once it has been created; this is in order to give legal certainty and fairness to the individual’s reliance upon it. However, at the other end of the scale the legitimate expectation may also be overridden by weighing the expectation against any overriding interest where there is a pressing legitimate aim or reasonable

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1218 Provided that the mutual trust and confidence obligation is not undermined. See Para 7.2 above and Chapter Three, Para 4.5.


urgency for the promisor to resile from the promise.\textsuperscript{1221} The doctrine, therefore, takes into account that an employer’s need to change its policy may be paramount as a decision maker ‘cannot preclude any possible need to change it.’\textsuperscript{1222}

In the US the courts were also faced with this complexity and the issue, as discussed in Chapter Five, has received much debate. The approach of Michigan, it has been argued, does not depart from the English law public principles position that reliance upon a voluntary promise, being a clear and unambiguous commitment, creates a legitimate expectation that the promise will be honoured despite the rules of contractual rights formation. While both Michigan and English public law principles allow, in principle, a departure from legitimate expectation, the process as to when and how a legitimate expectation can be overridden, as explained further in the next paragraph, is different. Public law principles, as argued below, provide a more sophisticated approach and avoid the difficulties that the Michigan approach, as noted in Chapter Five, was not able to resolve.

\textbf{6.10.1 Implied Power of Revocation – Deriving from Michigan}

The first possible approach that is open to the English courts is to treat the effect of legitimate expectation, which is created by a unilateral entitlement, in a similar way to the approach followed in \textit{Bankey}, where a legitimate expectation

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1221} Ibid
\item \textsuperscript{1222} \textit{R. v Secretary of State for the Home Department Ex p. Ruddock} [1987] 1 WLR 1482, 1497 (per Taylor LJ).
\end{itemize}
\end{footnotesize}
could be altered or modified in the same manner as it was initially created, ie by a unilateral approach. This is because Michigan courts adopted the position that an employer’s promise acquiring legitimate expectation creates a situation of ‘instinct with an obligation.’\textsuperscript{1223} As explained in Chapter Five, the enforcement of legitimate expectation is created outside the ordinary rules of contract formation. Michigan courts view that any resilement from the doctrine is, consequently, outside the orthodox rules governing contract law.

As noted in Chapter Five, the model followed in Michigan was explained by the Supreme Court in Bankey, which provided that a legitimate expectation, once capable of arising,\textsuperscript{1224} creates an obligation on the employer until it is revoked or modified with reasonable notice. Such a power is implied and would, in effect, allow an employer to revise its promise when emerging economic situations arise or new business needs insist on the reshaping and removing of all or part of its terms.\textsuperscript{1225} The court’s approach suggests that legitimate expectation is a source of obligation that creates enforcement outside the normal orthodox operation of contract law principles governing the formation of contractual rights.\textsuperscript{1226} Accordingly, an individual who relies on legitimate expectation to establish that an employer’s promise is enforceable has generally accepted the

\begin{footnotes}
\item[1223] Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, (Mich. 1980) at 892
\item[1224] See Para 7.8 above
\item[1226] Rood v. General Dynamics Corp 444 Mich. 107, 116, 507 N.W.2d 591 (Mich. 1993)
\end{footnotes}
unilateral modification by the employer on the same basis as they allowed its enforceability.\textsuperscript{1227}

Furthermore, the court in \textit{Bankey} stated that an employer will not be allowed to act in bad faith or to revoke substantive rights created in its formal statements.\textsuperscript{1228} In English employment law an employer acting irrationally could entitle the employee to seek a claim for breach of the implied duty of trust and confidence.\textsuperscript{1229} However, in Michigan if a promise creates legitimate expectation, i.e. not direct contractual rights, then an employee cannot legitimately expect that ‘an employer intended to be permanently bound’ \textsuperscript{1230} by its voluntary promises without any ability ‘to respond flexibly to changing conditions’.\textsuperscript{1231} This situation, however, could be resolved by securing an agreement with the employee or providing an express disclaimer granting the employer the right to revise its promises; alternatively, employers could choose to dismiss their workforce and re-hire their employees on the employer’s preferred terms.

As explained in Chapter Five, the courts were much influenced by the economic and practical consequences if an employer was not permitted to change its

\begin{thebibliography}{1231}
\bibitem{BankeyvStorerBroadcastCo} The US court will not allow an employer’s revocation conducted in bad faith or carried out merely to deny some benefits achieved by employees; Bankey v. Storer Broadcast. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989). See further Chapter Five above
\bibitem{FerreravNielsen} Ferrera v. Nielsen, 799 P.2d 458 (Colo. Ct. App. 1990), at 460
\bibitem{Ibid} Ibid
\end{thebibliography}
policies. An employer ‘could find itself obligated in a variety of different ways to any number of different employees. The resulting confusion and uncertainty would not be conducive to harmonious labor management relations’. 1232 However, in maintaining a balance between business efficiency and the rights of individual employees, the Michigan solution appears to weigh the employer’s interests above any expectation the employee legitimately has created and relied upon. Thus, unlike the position that could be derived from the English public principle, as discussed below, Michigan courts have undermined a real prospect of achieving fair balance between both parties’ interests by ignoring that the importance and the impact that some promises may have on the employee and that the employer must bear in mind, when making a decision to resile, the employee’s hierarchy of interests. This will be examined later below.

In English public law, as explained in Coughlan, any promise that acquires legitimate expectation can be defeasible if there is an overriding interest. However, as discussed below, in considering whether there is such an overriding business interest, the courts need to bear in mind the nature of the legitimate expectation relied upon and the impact it may have upon the employee. Conversely, an employer must not act irrationally (ie subject to the Wednesbury rationality test) even if the employee did not establish a legitimate expectation. 1233 This will be discussed further below.

1232 Ibid, 816.
The Michigan approach was criticized in other American states, such as Arizona, for undermining legal certainty by allowing an implied power to an employer to revoke its enforceable promises. As noted in Chapter Five, the reason for the some states refusal to allow unilateral revocation has been due to its adoption of the orthodox contract law principles where promises that create contractual rights cannot be unilaterally revoked or modified. Thus, the Supreme Court of Arizona in *Demasse v ITT Corp* rejected to permit an implied power of the employer to unilaterally modify its promises because it would make any entitlement created by voluntary promises illusory. To maintain constancy with contract law principles and achieve a coherent legal principle, an alteration to a promise which created contractual obligation must be made by mutual agreement and assents.

In English employment law, as noted in Chapters Two and Three, courts would reject any implied power to revoke terms of substantive rights which are incorporated into the contract of employment without obtaining the employees’ consent. It is rather arbitrary to permit an implied term ‘into a contract of employment when that term allows the unilateral variation of the contract’

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1234 See Chapter Five above.
1235 *Demasse v ITT Corp* 984 P.2d 1138 (Ariz. 1999), the court refused to allow an employers’ modification to the terms of a handbook contract without additional consideration and each employee’s assent
1236 *Demasse v. ITT Corp*, 984 P.2d 1138 (Ariz. 1999)
1238 *Lee v. GEC Plessey Telecommunications Ltd* [1993] IRLR 383
1239 *Facilities Division v Hayes* [2001] IRLR 81, CA, per Peter Gibson LJ
without both parties’ mutual agreement.\textsuperscript{1240} However, legitimate expectation, as noted above, is protected though the implied term of trust and confidence. Accordingly, further development under the doctrine of legitimate expectation may be derived from public law principles where an employer’s decision to departure from it could be permissible in similar trend to the public law. Under English public law principles, a departure from legitimate expectation can only be permitted ‘in circumstances where to do so is public body’s legal duty, or is otherwise ... a proportionate response ... having regard to a legitimate aim pursued by the public body in the public interest’.\textsuperscript{1241} The meaning and relevance of this principle to employment law will be discussed later below.

### 6.11 Overriding Rules – Deriving from English Public Law Principles

It was noted above that recent developments, such as the case of *French*, provided the position that legitimate expectations can bind an employer to its promises. The implied term of mutual trust and confidence could, therefore, be developed in such a way as to protect the legitimate expectations of an employee. A voluntary promise made by an employer that is capable of creating a legitimate expectation (i.e. a clear and unambiguous commitment) could be defeated when there is an overriding justification. In those cases where the employee could not establish a legitimate expectation, the employer is still

\textsuperscript{1240} *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193, [31]. See also *Wickman Machine Tools Sales v LG Schuler* [1974] AC 235 which also confirms that these are the normal principles of the construction of contractual terms.

\textsuperscript{1241} *Nadarajah v. Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68]

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subject to the irrationality test, in line with Wednesbury, so as not to undermine
the implied term of mutual trust and confidence.\(^\text{1242}\) In public law any overriding
interest is weighed against the interests and nature of the substantive legitimate
expectation relied upon,\(^\text{1243}\) as the forthcoming section will explore.

This leads to the question about finding an appropriate balance between
protecting business efficiency and respecting the employee’s dignity. In other
words, could closer attention be paid to the English public law jurisprudence in
order to aid the courts in shaping the implied duty of mutual trust and confidence
in more sophisticated ways that allow the courts to override a legitimate
expectation where an employer has a justified legitimate reason?

Public law principles, in general terms, allowed a resilement from a legitimate
expectation where other public interest factors justified a departure from the
legitimate expectation.\(^\text{1244}\) For example, in the GCHQ case, as noted above, the
court provided that a public authority is entitled to resile from a procedural
legitimate expectation for reasons of national security.\(^\text{1245}\) In this case the
considerations of national security were held to entitle the authority to prohibit
GCHQ’s staff from joining trade unions without its prior consultation. In other
cases, public interest was held to ‘outweigh’ the legitimate expectation entitling

\(^{1242}\) Clark v Nomura [2000] IRLR 766
\(^{1243}\) R. (on the application of Niazi) v Secretary of State for the Home Department [2008]
EWCA Civ 755
\(^{1244}\) Ibid, (per Laws LJ) [30]
\(^{1245}\) Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.
the authority to resile from its promises.\footnote{Nadarajah v. Secretary of State for the Home Department [2005] EWCA Civ 1363.} However, public interest and national security do not provide any guidance in employment relationships since they have no application in the private employment law. Nonetheless, guidance can be derived from other cases as to how courts can balance the exercise on what an overriding interest is to be conducted.\footnote{R. (on the application of Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755; Nadarajah v. Secretary of State for the Home Department [2005] EWCA Civ 1363.}

In \textit{Niazi},\footnote{R. (on the application of Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755} Laws LJ spoke of the constraint on public authorities due to the legal duty of fairness that is required when changing a policy. He drew attention to the case of \textit{Nadarajah} to conclude that, while the doctrine of legitimate expectation should be treated as a legal standard, ‘departure from it must therefore be justified by reference, among other things, to the requirement of proportionality’.\footnote{Ibid, [50], Referring to Nadarajah, paragraph 68} A further explanation of the position comes from the dicta of Laws LJ in the case of \textit{R (Nadarajah) v Secretary of State for the Home Department},\footnote{[2005] EWCA Civ 1363 at [68], approved by the majority of the Judicial Committee of the Privy Council in Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32} in which he stated that the ‘principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances’.\footnote{Approved by the majority of the Judicial Committee of the Privy Council in Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32} What is proportionate, as
will be explained further below\textsuperscript{1252}, depends on the interests being balanced on each case. A decision maker must articulate its reasons for breaching an expectation so that they can be tested by the court.\textsuperscript{1253}

Furthermore, in Nadarajah, the question at the heart of the matter was whether the decision maker was correct in its submission that it was entitled to change its mind on the grounds that it was in the public interest. The court concluded that legitimate expectation may be overridden where (a) there was a legitimate aim in the public interest and (b) the conduct of the authority satisfied the principle of proportionality. This decision therefore highlights that proportionality, which necessitates an assessment of the balance between interests and objectives, is a far more stringent test than the Wednesbury irrationality test.\textsuperscript{1254}

The doctrine of proportionality has often been defined in contrast to the recognized ‘irrationality’ principle and the test coined in Wednesbury.\textsuperscript{1255} Lord Steyn argued that although there is an overlap between the principle of irrationality and proportionality and that ‘cases would be decided in the same way whichever approach is adopted’, the intensity of review is ‘greater under the proportionality approach’.\textsuperscript{1256} In \textit{R (Daly) v Secretary of State for the Home}

\begin{itemize}
\item \textsuperscript{1252} See Para 7.12.1 below
\item \textsuperscript{1253} Paponette, at Para. 42; see also \textit{R (Bibi) v Newham London Borough Council} [2001] EWCA Civ 607 [2002] 1 WLR 237 at [59] which was cited in Paponette.
\item \textsuperscript{1254} See Para 7.2-7.3 above. See Tom Hickman, ‘The Substance and Structure of Proportionality’ [2008] PL 694
\item \textsuperscript{1255} A.C.L. Davies ‘Judicial Self-Restraint in Labour Law’ [2009] ILJ 278
\item \textsuperscript{1256} \textit{R v Secretary of State for Home Department ex parte Daly} (2001) UKHL 2623 [27]
\end{itemize}
Department, Lord Steyn referred to the differences from Wednesbury as being:¹²⁵⁷

First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations’

The dicta of Laws LJ and Lord Steyn above provide guidance for the problem that may arise in employment relations where employers attempt to override their commitments of substantive legitimate expectations for proportionate reasons based on a legitimate business aim. If legitimate expectation was firmly adopted in employment relations, this would mean that a decision to depart from commitments unilaterally made by an employer would not be permissible unless the employer could show a lawful legitimate business reason to justify its decision. The test of when a decision to revoke is permissible is considered next. Moreover, legitimate expectations in employment relations may be overridden under the same principle as that used in public law, ie where the employer can show that (a) it acted in response to a legitimate aim of its business, and (b) it satisfies the proportionality test. However, the employer must bear in mind the impact of the expectations and the hierarchy of interest of a promise created and relied upon by the employee when making a decision to resile. This is examined next.

¹²⁵⁷ [2001] 2 AC 532 [27]
6.11.1 Balancing Both Parties’ Expectation and Interests

It was noted above that a substantive legitimate expectation cannot be departed from by mere rationality, i.e. in the *Wednesbury* sense. In *Coughlan*, for example, it was shown that financial difficulties, which may be a reasonable and rational reason for the authority to resile from its promises, were not sufficient grounds to depart from the legitimate expectation that has higher interest. This indicates that a legitimate aim that justifies a departure from a promise must be more serious than the general application of *Wednesbury*. Accordingly, employment courts may choose to develop an appropriate test or set of rules as to what constitutes a justified overriding legitimate business aim. Guidance from previous authorities, however, indicates that such guidance, similar to principles derived from public law, could provide an indication that the principle of legitimate aim and proportionality has already been applied in employment cases as examined further below.

For example, in public law it was held that resilement from a promise that created legitimate expectation was justified due to urgency, or in circumstances where sufficient time to consult, due to urgency, was not

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1258 See Para 7.2-3 for discussion on the principle of *Wednesbury*
available.\textsuperscript{1261} It was also concluded that a lawful resilement from legitimate expectation by the authority will be particularly fact-sensitive where the subject matter to which it relates, the strength of the expectation, and the consequences of giving effect to it are factors which ‘proportionality’ test examine depending upon the fact and circumstance of each case.\textsuperscript{1262}

The test is generally an approach to strike a balance between the parties’ interests. However, the test is yet to develop further, and courts appear to strike ‘such a balance in different ways in different contexts, and in practice often [approach] the matter in a relatively broad-brush way’.\textsuperscript{1263} In discrimination law, for example, in the Equality Act 2010 (EA) ‘proportionate means ‘achieving a legitimate aim’\textsuperscript{1264}

Taking this into consideration, how could the test of legitimate and proportionate response, if firmly adopted in employment relations regarding voluntary promises, assist employment courts in striking a fair balance between the parties’ interests, ie to ensure business efficiency and dignity for employees?

\begin{itemize}
\item \textsuperscript{1261} Ibid, see also discussion on employment law trend below
\item \textsuperscript{1262} \textit{R (BAPIO Action Ltd) v Secretary of State for the Home Department} [2007] EWHC 199, [59] (per Stanley Burnton); \textit{Lloyd v McMahon} [1987] AC 625, 702-703 (per Lord Bridge); \textit{R v Secretary of State for the Home Department, ex parte Doody} [1994] AC 531, 560 (per Lord Mustill).
\item \textsuperscript{1263} \textit{Bank Mellat v HM Treasury No 2} [2013] UKSC 39, [70] (per Lord Reed)
\item \textsuperscript{1264} Equality Act 2010 (s.15 and s.19). See e.g. \textit{Seldon v Clarkson Wright and Jakes (A Partnership)} [2012] UKSC 16
\end{itemize}
6.11.2 Legitimate Aim and Proportionate Response

It was indicated above that to set an appropriate balance on when an employer’s decision to depart from its promise that acquired legitimate expectation is justified (ie when revocation is permissible), the court must weigh the hierarchy of interests. In terms of public law, Lord Bingham stated in *R v Secretary of State for the Home Department, ex parte Daly* that the ‘more substantial the interference with fundamental rights, the more the court would require by way of justification before it could be satisfied that the interference was reasonable in a public law sense’.

This in effect means that attention must first be made to the importance or the significance of the interest/benefits that have been legitimately relied upon by the employee, the degree of expectation they create, and the impact of the infringement of rights upon the employee. This, which can be termed the ‘hierarchy of interests’, would make the test of proportionality in employment law mean that a higher threshold is required to meet those legitimate expectations that are attached to a higher interest; the higher the interest or implicate requires a higher threshold so that a decision to resile can be justified on proportionality.

1265 Proportionality has become one of the general principles of EU law. It is found in article 5(4) of the Treaty on European Union (‘TEU’). See *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* (Case C-331/88)[1990] ECR I-4023.

1266 [2001] 2 AC 532 , [12]
This was confirmed in the Supreme Court judgment in *Bank Mellat v HM Treasury No 2*, 1267 in which Lord Reed viewed the test as an assessment that ‘inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon’.1268

However, the principle does not ‘entitle the courts simply to substitute their own assessment for that of the decision maker’.1269 This confirms the above argument that frustrating a particular kind of promise requires more justification than others. As Elliot noted in his blog comment upon the decision of the Supreme Court in *R (Jones) v First-tier Tribunal*:1270

> It is impossible to ask whether something ‘has gone wrong’ such as to require judicial intervention unless one first has a worked-out conception of the types of ‘wrong’ with which judges can properly be concerned, and of the normative significance that is properly to be ascribed to particular ‘wrongs’ (which might include, but will not be limited to, the infringement of ‘rights’).1271

While this passage refers to Convention right, an adopting analogy of the principle, it is argued, to employment law in relation to voluntary promises

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1267 [2013] UKSC 39, [74] (Per Lord Reed). The position was from a number of cases most importantly: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [80]; *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, [45]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
1268 Ibid [70-71]
1269 Ibid
1270 [2013] UKSC 19
would create a useful guide. It means that the balance of what can be viewed as ‘wrongs’ and ‘infringement of rights’ in the above assertion is synonymous with the ‘hierarchy of interests’ of the employee that the judges would need to be concerned with when considering promises acquiring legitimate expectation in employment law. In other words, if the principle of legitimate expectation was further developed in employment law, courts would have to consider first the type of the employee’s interests, where they fall on the hierarchy and normative significance to the employee before weighing the expectation against the infringement of interests that an employer’s decision may cause and its proportionality.\(^{1272}\)

The test of proportionality has recently been considered by the Supreme Court in *Bank*, in which was held that the approach can be summarized by saying that:

> it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.’ The fourth step appears to support the above assertions that an examination of the employee’s hierarchy of interests must inform the test of proportionality. This can be clearly observed by the following assertions of Lord Reed in relation to step four: ‘In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.’\(^{1273}\)

\(^{1272}\) 2 [2013] UKSC 39, [74] (Per Lord Reed)

\(^{1273}\) Ibid, [75]
Chapter Six: The Doctrine of Legitimate Expectation: A Public Law ‘Injection’

The distinction between steps one and four is drawn by considering whether the decision to resile was made due to an objective which is in principle sufficiently important (step 1),\(^{1274}\) and whether ‘having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four)’.\(^ {1275}\)

The second and third steps are connected by the question of rationality.

In employment law, an analogy of this test when a question of voluntary promise is concerned could ultimately mean that a decision by the employer to resile from a promise to his employee which has create legitimate expectation is justified when (step 1) the reason for justification of its departure (i.e. the employer’s aim) was sufficiently important to justify the infringement of the employee’s interests, (step 2) the importance to resile was rationally connected to the decision so that the employer’s frustration of the particular expectation the employee has acquired is the only means of addressing the important business aim, and (step 3) the employer could not have any less intrusive measure or any less damaging solution. The remaining question (step 4) is whether having regard to the employee’s hierarchy of interest and the severity of its effect and impact on the employee, the decision to resile was still justified due to the importance of that decision. This means that some promises could have a greater effect on the individual employee than others and, subsequently, some commitments may require a greater deference than others.

\(^ {1274}\) McLachlin CJ in Alberta v Hutterian Brethren of Wilson Colony [2009] 2 SCR 567, [76]

\(^ {1275}\) Ibid; Bank Mellat v HM Treasury No 2, [2013] UKSC 39, (per Lord Reed), [76]
In employment relations it was shown above that principles derived from public law have been integrated into the general approach on the range of reasonable responses test. A reasonableness test continues to play a role in unfair dismissal claims, whereas further development introduces the proportionality test in cases brought under the HRA 1998 and in discrimination claims where there are ‘proportionate means of achieving a legitimate aim’. Generally, when a proportionality formula is adopted, the court’s approach is likely to be less restrained than if a reasonableness test is applied. However, both tests ‘can be expressed in a variety of ways and applied more or less intensively to the facts of the case, making it difficult to generalize’.

Where the matter concerns indirect discrimination in employment relationships, the courts’ attention turns to whether the employer can justify its decision on objective grounds. The formulation and application of the proportionality test

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1276 See
1277 [1983] ICR 17
1278 See further discussion at para 7.3 above
1281 Equality Act 2010 (s.15 and s.19). See e.g. Seldon v Clarkson Wright and Jakes (A Partnership) [2012] UKSC 16
1283 Ibid, 280
was set out in *Hampson v Department of Education and Science*,\(^{1285}\) in which Balcombe LJ laid down the test to be used in discrimination cases: ‘In my judgment ‘justifiable’ requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.’\(^{1286}\)

The judgment of the European Court of Justice (ECJ) in *Bilka-Kaufhaus GmbH v Weber von Hartz*\(^{1287}\) adopted the elements of the three-stage test noted above, by stating that: \(^{1288}\)

> If the national court finds that the means chosen by Bilka meet a genuine need of the enterprise, that they are suitable for attaining the objective pursued by the enterprise and are necessary for that purpose, the fact that the measures in question affect a much greater number of women than men is not sufficient to conclude that they involve a breach of Article 119.

However, in *Barry v Midland Bank plc*,\(^{1289}\) Lord Nicholls appears to give more focus to the fact that the ‘more serious the disparate impact on women or men as the case may be, the more cogent must be the objective justification’.\(^{1290}\) Thus, Lord Nicholls appears to focus on the appropriate element (ie step 4) to justify departure from the promise. This provides another indication to the above

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\(^{1285}\) [1989] ICR 179

\(^{1286}\) Ibid, 191


\(^{1288}\) Ibid [36]

\(^{1289}\) [1999] 1 WLR 1465

argument that where the voluntary promise creates an expectation, an employer cannot resile from its obligation without first paying attention to the ‘disparate impact’ its decision may have on the individual employee.

This balancing test, in effect, supports the earlier assertions that courts must bear in mind the nature of the expectation and develop a hierarchy of interests that the employee may have when considering any justified departure. Hence, the law needs to develop an approach of the hierarchy since proportionality can only work in employment law if we understand the weight to be given to the various interests employees before examining the employer proportionate response; examination must show that the employer has a legitimate aim or business interest and also that it is necessary. The employer’s business interest is a model where an employer’s decision to resile rests on a specified legitimate business objective. An employer could equally argue that a business legitimate aim means a general interest that would make any decision to resile, such as increasing the profit to satisfy the interest of shareholders, a legitimate aim and part of business interests.

However, an employer’s decision to resile from its promises must not constitute an abuse of power unless it can justify the proportionality test, which will be explained shortly. Conversely, legitimate expectations create a different standard of interests and expectation dependent on the nature of the interest promised, the hierarchy of interests and rights it protects, and the manner in which they were created. This means that some legitimate expectations may be sufficiently weak
or weaker as to be overridden by the employer’s business interest. Conversely, some promises could have a greater effect on the individual employee than others and, subsequently, some commitments may require a greater deference than others.

For example, an employer wanting to resile from a bonus scheme would need more cogent grounds to justify its decision than resiling from a promise to investigate harassment allegations or to investigate medical negligence using a committee of investigation comprising three independent persons but where only two were used. The employer’s objective justification, with regard to the committee of investigation, that its resilement was due to urgency or public safety in this particular case are weighed against the expectation of the employee. Moreover, sufficient weight should be given to the employee’s expectation upon the hierarchy of interest it creates. Thus, each promise in relation to a bonus scheme or the committee of investigation, as noted above, creates a different impact upon the employee and the hierarchy of interests that must be considered or weighed against the employer’s decision to resile from the promise. Again, a resilement from a promise to have three independent persons but where only two were used is different than a resilement from a promise to investigate the allegation of harassment. To elaborate, a consideration must go to the degree of expectation it creates and the impact the infringement of interest/benefit would have on the employee. Consider an employer wanting to resile from a commitment not to suspended unless an investigation to a
harassment allegation is conducted by a committee of at least three independent chairs, since due to urgency only two were available and offered. The employer’s promise to investigate the allegation would have a greater effect and implication on the individual employee than resiling from a promise to carry out the investigation by a committee of three when only two were available. Thus, the promise of the investigation would need more cogent grounds to justify the employer’s decision to resile from its expectation than the committee of three. Urgency in situations where other individual employees or public safety may be affected can justify a resile from providing a committee of three rather than suspending the employee without investigation.

Authorities in public law have shown that courts have allowed different categories or levels of expectation to be identified where different standards of reliance and degrees of protection are weighed against the degree of interests that can defeat it.\textsuperscript{1291} Paying closer attention to the line of authorities regarding employment relationships arguably provides examples of similar principles and situations when there is a need for legitimate expectations to be overridden. Business interest, where an employer’s decision to resile may have a legitimate aim, can be established in cases such as avoiding serious or disastrous consequences,\textsuperscript{1292} protecting patients’ safety,\textsuperscript{1293} or the employer’s urgency to


\textsuperscript{1292} Malone and others v British Airways [2010] EWCA Civ 1225
suspend an NHS doctor\textsuperscript{1294} are just some of the examples of the results of such developments.

Moreover, in the case of \textit{Hameed v Central Manchester University Hospitals NHS Foundation,}\textsuperscript{1295} the court accepted that the employer had satisfied the issue of proportionality when it had decided to exclude the employee from work pending the disciplinary hearing. The court was influenced by the issue of urgency and the need to suspend an NHS doctor so as to protect public safety and accordingly found a legitimate aim to override the commitment made in NHS policy despite the expectation of the employee.

Similarly, in the recent Court of Appeal decision in \textit{Malone,} it was noted in Chapter Three that the Court was highly influenced by the consequence of enforcing or giving effect to the employees’ expectation. Taking into account ‘the disastrous commercial effect’ of enforcing a legitimate expectation, (although the term was not used and the case decided on other grounds), and the disastrous business consequence if the employer was not able to depart from its promises, the court refused to prevent the employer from revoking its promises.

Conversely, in the case of \textit{French,} as noted above, the employer’s decision to resile from the legitimate expectation was not justified. The employer’s business aim to increase profit or reduce its cost did not constitute an overriding interest

\textsuperscript{1293} \textit{Hameed v Central Manchester University Hospitals NHS Foundation} [2010] EWHC 2009
\textsuperscript{1294} Ibid
\textsuperscript{1295} Ibid [2010] EWHC 2009
to change the substitutive benefit of the bridging loan the employee legitimately relied upon.

The balancing test must therefore be applied to the facts of the case, the context and impact of the promise made by the employer, and the degree of business efficiency or business need when considering an employer’s decision to revoke its obligation. Commentators\(^\text{1296}\) have pointed out that there is a tendency for the courts to respect the employer’s decision where there is a genuine market force, especially when an economic argument is made or when the future of the business and its survival is at stake.\(^\text{1297}\)

An analogy of this can be found in the cases of *Malone* and *Hameed*, as noted above. But as stated earlier, the employee’s interest must be weighed against the necessity of the employer’s decision to resile. Thus, the Court of Appeal’s decision in *Allonby v Accrington and Rossendale College*\(^\text{1298}\) went beyond a test of legitimate aim by examining the impact of the decision on the employee. The position was expressed in the following terms:\(^\text{1299}\)

> Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a


\(^{1297}\) See e.g. Rainey v Greater Glasgow Health Board [1987] AC 224; Case C-127/92 Enderby v Frenchay HA [1993] ECR I-5535; and Allonby v Accrington and Rossendale College [2001] EWCA Civ 529

\(^{1298}\) [2001] EWCA Civ 529.

\(^{1299}\) Ibid [29]
critical evaluation of whether the College’s reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women, including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

In *Paponette v Attorney General of Trinidad and Tobago*,\(^{1300}\) the court took the view that, where proportionality is concerned, an important distinction needs to be drawn between whether the reasoning process of the authority was defective in material respects or whether the resulting decision to resile from the claimant’s legitimate expectation satisfied the principle of proportionality. To determine the latter question, the court concluded that, in this case, it was also relevant that an appeal would be held by an independent judicial body. More importantly, the interests of protecting children, in particular ensuring protection from sexual abuse by people who were in positions of trust, for example, teachers, overrides the interests of parties involved. The reasons given for a public body’s decision to change its policy will sometimes give the court enough material to decide how to strike an appropriate balance.\(^{1301}\)

The court’s analysis resembles the approach taken in the case of *Hameed v Central Manchester University Hospitals NHS Foundation*,\(^{1302}\) in which the court accepted that the employer had satisfied the issue of proportionality when

\(^{1300}\) [2010] UKPC 32

\(^{1301}\) Ibid [43]

\(^{1302}\) [2010] EWHC 2009
it had overridden the commitment made in its policy despite the expectation of the employee. The court was influenced by the issue of public safety and the urgency of the need to suspend an NHS doctor.

In *Malone* as noted above, an employer could have argued, if the principle of legitimate expectation was firmly adopted, that it had a business legitimate aim to resile from the promise which was capable (being a clear and unambiguous commitment) of creating a legitimate expectation. Applying the test of proportionality, as noted above, would mean that the court could find that the employer had a business aim, ie avoiding disastrous consequences, in breaking the promise and that this was sufficiently important to justify its frustration of the expectation the employee had acquired (step 1).

Finding that the employer measure and decision is rationally connected to the objective and no less intrusive measure could have been used (step 2 and 3), the court would then balance both parties’ interests by considering weighing the employee’s hierarchy of interests acquired upon the employee legitimate expectation against the employer’s legitimate business aim and its proportionate decision to resile from the employee’s expectation (step 4). Therefore, it is argued that the court in *Malone* could have come to the same result by using a sophisticated and coherent approach without undermining principles of contract law.
However, staying loyal to the traditional contract law approach at the cost of legal consistency appeared to undermine both. Accordingly, adopting the principle of legitimate expectation, which balances the employee’s hierarchy of interests and the employer’s business needs of efficiency and flexibility based on proportionality, prevent further incoherent outcomes similar to Malone.

6.12 Conclusion

It has been argued in this chapter that the line of authorities in employment law have shown that principles derived from public law have been injected into the private law governing contracts of employment. This is arguably noted in the doctrine of legitimate expectation, the principle of Wednesbury unreasonableness, and the subsequent principle of irrationality.

This trend of development in employment law, as seen for example in Clark and French, provides for the notion that an employer’s voluntary promise, which does not obtain contractual status by fulfilling the requirement set out in Chapter Two, creates a legitimate expectation when clear and unambiguous commitment is made expressly or through a policy and practice.

The principle of legitimate expectation, as noted in French, provides an indirect enforcement of promises that create legitimate expectation, because an employer’s subsequent resilement from its promises will be in breach of the implied duty of mutual trust and confidence. To allow otherwise would permit
such promises to undermine the legitimate reliance and reasonable expectation of the employee.

Accordingly, modern development in employment law appears to accept an increased adoption of principles derived from public law. The principle which ties the two together, as noted earlier, is to prevent an abuse of power. In employment relations the implied duty of trust and confidence, as noted above, works in this fashion to protect the parties’ legitimate expectation. The key question is when would it be an abuse of power, ie a breach of the implied duty, to allow the employer to resile from the substantive legitimate expectation relied upon by the employee?\textsuperscript{1303}

However, the concept of abuse of power, under public and employment law, while it provides the theoretical underpinning for courts’ intervention to prevent breach of legitimate expectations by a public authority, under public law, or an employer under employment law, it does not provide a comprehensive guide as to how to approach individual cases.\textsuperscript{1304} Thus, public law cases developed their approach to allow a lawful resilement from a substantive legitimate expectation where a sufficient overriding interest can justify a departure from the promise relied upon by the parties. This justification, as noted above, must be applied differently or with high-standard requirements as to irrationality under an


\textsuperscript{1304} \textit{ex parte Begbie}, pp 1129F-H \textit{per} Laws LJ; \textit{Bibi}, para 34; \textit{Nadarajah}, para 67 \textit{per} Laws LJ; \textit{S}, para 40 \textit{per} Carnwath LJ.
ordinary *Wednesbury* test. This is because substantive legitimate expectation, as noted in *Coughlan*, would have permitted a lawful resilement from a promise under an ordinary *Wednesbury* test. The test of legitimate aim and proportionate response, which was examined above, provides an appropriate balance to when an individual interest can be overridden by taking account of the hierarchy of interests which the law needs to rank. A firm adoption of this principle in employment law provides a coherent legal approach to voluntary promises.

As examined above, further development of the implied term of mutual trust and confidence provides a more sophisticated legal coherence whereby an employer’s voluntary promise creates a legitimate expectation which cannot be disregarded unless the employer has a legitimate aim and acts proportionately. Notwithstanding this argument, English courts may still choose to develop the doctrine of legitimate expectation in line with the public law approach in a similar way to the model developed in *Bankey* and adopted by the State of Michigan discussed above. However, it was shown above that Michigan’s approach does not provide an appropriate fair balance to both parties’ interests and failed to acknowledge appropriately the hierarchy of interests that employees may have. Allowing the English public law principle of legitimate expectation to be incorporated into the private employment law must take into account the rank of the interests of the employee firmed in proportionality, as argued above, provides an adequate approach and strikes a fair balance between parties’ interests in a more sophisticated way.
Moreover, the development of the implied term of mutual trust and confidence, as illustrated in Chapter Three, has been judged to cover numerous situations in order to prevent employers mistreating employees by ‘harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term’.¹³⁰⁵ As noted by Lord Steyn, its role has been viewed as preventing the employer’s exploitation of its workers. Lord Steyn came close to suggesting that the implied duty should operate under the principle of proportionality when he asserted that ‘the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited’.¹³⁰⁶ This can be viewed to have opened the door to developments in line with the above argument that voluntary promises granting legitimate expectations cannot be ignored unless the employer has a legitimate aim and proportional response. These would be considered in line with the above public law principles by paying attention to the content of the formal statement and the facts of each case, ie the employee’s hierarchy of interests, where courts needs to bear in mind the nature of the legitimate expectation relied upon and the impact it may have upon the employee.

The line of authorities regarding employment relationships provides examples of situations when there is a need for a proportionate response and a legitimate aim

¹³⁰⁵ *Malik v BCCI* [1998] AC 20, at 38. (per Lord Nicholls)
¹³⁰⁶ ibid, Lord Steyn at 65
for a business to lawfully resile from its promises when avoiding serious or disastrous consequences, protecting patients’ safety, or in the event of the employer’s urgency to suspend an NHS doctor, representing just some of the examples of the results of such developments.\footnote{1307 Malone and others v British Airways [2010] EWCA Civ 1225; Hameed v Central Manchester University Hospitals NHS Foundation [2010] EWHC 2009}

Furthermore, the tendency to insist on a traditional approach rather than firmly adopting the principle of legitimate expectation, as seen in cases such as Malone, is likely to bring a confusing and rather incoherent approach to the legal position. This inconsistency would render a reading of the court’s determination in Malone as facilitating the exercise of managerial prerogative over an employee’s legitimate and reasonable expectation and yet be at the expense of both coherence and the principles of traditional contract law. Instead of desperately trying to pursue a traditional approach, courts could provide an alternative, coherent approach to the legal principle by adopting a further development in the area of mutual trust and confidence, ie that an employer’s voluntary promise which creates a legitimate expectation cannot be frustrated unless the employer has a legitimate aim and acts proportionately.

The line of authorities in English law has shown that possible developments under the former approach, ie under trust and confidence, already exist within employment law jurisprudence. Thus, it is argued that developments of the legitimate expectation doctrine under the implied term of mutual trust and
confidence (where a court allows the employer to override a promise if it can show a legitimate aim and a proportionate response) provides a better approach to the unsatisfactory contractual solution and maintains an appropriate balance between ‘business efficiency’ and ‘employees’ expectation’. In other words, the legitimate expectation approach gives courts and tribunals the opportunity to strike a fair balance between the employer’s interests and those of the employee. Accordingly, adopting the legitimate expectation principle, as a principle derived from public law, in employment relations and, particularly, in the issue of voluntary promise, brings a problem-solving device into employment law and would work better if we understood what to borrow from Elliot assertion that one must first worked-out ‘conception of the types of ‘wrong’ with which judges can properly be concerned, and of the normative significance that is properly to be ascribed to particular ‘wrongs’’, which might include, beside other factors, ‘the infringement of ‘rights’’.  

Hence proportionality can only work in employment law if we understand the weight to be given to the various interests employees have, if we take a more systematic approach to the judicial treatment of promises made to protect those interest and develop a more coherent approach to the circumstances in which departing from promises in ways that overrides those interest is permitted.

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CHAPTER SEVEN

CONCLUSION TO THE THESIS
7.1 Introduction

This thesis examined an appropriate and cohesive legal approach to voluntary promises that are normally found in the ostensibly non-contractual documents which exist alongside the formal contract of employment, and that can either be issued at the time of the contract or as post-formation statements. These documents can be described by the employer in various ways, which include: the company manual, work rules, and employment policies (an example of which might be an equal opportunities policy). This thesis focused on instances in which promises, representations and undertakings are ‘unilaterally’ or ‘voluntarily’ introduced by the employer. The aim of the thesis has been to provide a coherent legal approach to voluntary promises where both parties’ interests and expectations are appropriately balanced.

To achieve this aim, the key question with which this research has been concerned was whether promises, representations and undertakings unilaterally introduced by the employer outside the original contract of employment, could create legal entitlements and therefore become enforceable; and if so, under what circumstances could an employer lawfully reneging on its promises be permissible - i.e. when could the revocation of a promise be lawful. Moreover, when searching for a coherent approach, the thesis examined an appropriate principle or approach that would allow the courts to strike a fair balance between protecting an employee's reliance upon a voluntary promise and an employer’s business efficiency in order that an employer could depart from its promises when business circumstances required.
While the thesis provides a full examination of the legal approach to voluntary promises, on which there has been limited academic literature, it provides a further contribution to academic literature, not only by exploring three representative jurisdictions in the United States, namely Florida, California and Michigan, but also by examining the possibility of a unilateral contract approach to voluntary promises and the adoption of public law principles that can be injected into the private law of employment. Both possibilities, i.e. the unilateral contract model and the incorporation of public law principles, have had limited, if any, academic treatment; this thesis therefore fills such a gap in the academic literature and provides an extensive treatment of these approaches.

In order to do this, the thesis was divided into six main chapters as follows:

7.2 Chapter One

In Chapter One the thesis provided a background to the issue of employment contract, the nature of employment relationship, the role of the implied duty of trust and confidence and contract theory. It was noted in this chapter that the modern development of employment law provides that the employment relationship is not an ordinary contractual relationship but is, instead, rather unique in nature, and includes a personal element where the implied trust and confidence must not be undermined. This supported our argument that the employment relationship should be considered with a distinctive vision that is capable of reflecting its uniqueness and taking into account the fact that the social
reality of an employment relationship is ‘that a person's employment is usually one of the most important things in his or her life’.

In the leading case of Malik v BCCI, the House of Lords was prepared to accept that ‘[a]n employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable.’ This, as demonstrated in Chapter One, indicates that the strict orthodoxy rules of contract formation have failed to respond appropriately to the development of the employment relationship, in particular with regard to voluntary promises. Neither have they provided an adequate explanation to modern views that insist on finding a fair balance between protecting business efficiency and respecting employees’ dignity.

This judicial recognition of the parties’ unequal power in employment relations, as noted by the Supreme Court in Autoclenz Ltd v Belcher, and the need for contractual protection for the vulnerable party as indicted by the House of Lords in Malik, provides a safety net bridging the gap between public law principles and the private law of employment in order to restrain any abuse of power in employment law. The case of Clark v Nomura is a telling example of public law principles (i.e. the Wednesbury rationality test) being incorporated into private employment law. The case provides a clear example of the trend in employment law of implied limitations on an employer’s exercise of discretionary

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1311 Ibid, 37, (per Lord Nicholls).
1314 [2000] IRLR 766
1315 The public law principle of the Wednesbury test has been examined in Chapter Six.
power and yet allowed further recognition of an employee's reliance on their genuine expectation. Such a development has been increasingly broadened by the development of the implied duty of trust and confidence, which itself has been shaped by public law influences.\textsuperscript{1316}

Thus, in \textit{French v Barclays Bank},\textsuperscript{1317} it was concluded that an employee who does not have a contractual right to demand the performance of a promise may, nonetheless, have acquired a legitimate expectation that the promise will be honoured. The juridical basis for this outcome is the doctrine of mutual trust and confidence which has been developed in order to allow for the position that, with regard to a voluntary promise, even if it may not be an \textit{express} contractual term, there may be circumstances in which any departure from it will result in a breach of the implied term.\textsuperscript{1318} This has formed the basis of the argument in Chapter Six that the public law principle of legitimate expectation could be shaped, through the development of the implied duty of trust and confidence, to provide a sophisticated treatment of voluntary promises where both parties' interests are equally considered.\textsuperscript{1319}

Furthermore, it was argued in Chapter One that the contract theory adopted in explaining what constitutes binding obligations in relation to employment should be able to respond to the modern development of employment relationships, including legislative and judicial interventions. The most notable of these is the development of the implied duty of trust and confidence in employment

\textsuperscript{1316} \textit{French v Barclays Bank} [1998] IRLR 646; \textit{Fisher v Dresdner Bank} [2009] IRLR 103
\textsuperscript{1317} [1998] IRLR 646.
\textsuperscript{1318} See Bob Hepple, 'Human Rights and Employment Law', Amicus Curiae (8 June 1998) 19.
\textsuperscript{1319} \textit{Malik v BCCI} [1998] AC 20
relations,\textsuperscript{1320} which has undermined the classical contract-bargaining theory. This, in effect, means that the modern development of employment law, whether through private contract law developments, as explored in Chapter Four, or the influence of public law principles,\textsuperscript{1321} as examined in Chapter Six, has allowed, when appropriate circumstances permit, the legal recognition of an employee’s reliance upon voluntary promises which have acquired a genuine expectation.\textsuperscript{1322}

Thus, the reliance theory of contract, rather than the bargaining theory, is capable of offering a better explanation to the enforcement of binding obligations in employment relationships. Conversely, employment relationships have been uniquely influenced by public law principles with the aim of restraining the abuse of power. The fairness theory appears to invite ideas similar to public law, and therefore based on reasonableness and fairness, in order to protect employees against the abuse of power. This suggests that courts should not be limited to a single theory when concerned with employment relationships, and more particularly, the question of voluntary promises.

This opens the question regarding whether employment relationships should be governed by a separate set of formation rules in order to explain the enforceability of binding obligations in modern employment law. This question has been explored in Chapter Two which also provided a clear groundwork that allows the argument to build on it in the next chapter, i.e. Chapter Three, when we

\textsuperscript{1320} See the discussion in Chapter One on the theoretical analysis and the developed approach to contract theory.

\textsuperscript{1321} See further Chapters Four and Five.

\textsuperscript{1322} \textit{French v Barclays Bank} [1998] IRLR 646; \textit{Fisher v Dresdner Bank} [2009] IRLR 103; \textit{Attrill v Dresdner Kleinwort Ltd} [2013] EWCA Civ 394
considered the lack of coherence approach to the issue of binding voluntary promises.

### 7.3 Chapter Two

Chapter Two examines the standard requirements for contract formation in employment relations, namely: offer and acceptance, consideration, and the intention to create legal relations. These elements that constitute the orthodox formation rules, or the “building blocks” to creating contractually binding terms, provide the starting point before considering the subsequent chapter which considers the issue of voluntary promises. Thus, in Chapter Two it was shown that the law behind the formation of contracts of employment is still, to a great extent, based upon the orthodox principles of contract law which means that the general position at common law is that a simple undertaking to confer a benefit on another is not enforceable unless all these formation requirements are met. \(^{1323}\)

However, this does not easily conclude the legal position regarding promises introduced by employers outside of the contractual framework as employers who make a unilateral announcement of a voluntary promise do not generally need or require an employee's returned acceptance or exchange of promises. There is also the absence of an explicit request by the employer when announcing a voluntary promise to his employees, beyond continuing to perform their pre-existing duties.

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\(^{1323}\) *Western Excavating (ECC) Ltd. v. Sharp* [1978] QB 761. But see the discussion on the unique nature of the employment relationship above. See further Alan L. Bogg ‘Sham Self-Employment in the Supreme Court’ [2012] ILJ 328
This is directly linked to the central issue of contract formation, namely the requirement of consideration, where voluntary promises are concerned, due to the absence of negotiation and an express agreement. Thus, where the question of creating contractual obligations concerns voluntary promises, the orthodox theory of bargaining or exchange that insists on valuable consideration being given in order to satisfy the test that a bargain is concluded, has become increasingly doubtful in employment law.\textsuperscript{1324} This, as argued in Chapter Two, can be recognised in modern developments in employment law which has witnessed a readiness by the courts to step away from the strict application of the orthodox rules on formation in favour of a broader concept of consideration.

The Court of Appeal's decisions in \textit{Edmonds v Lawson}\textsuperscript{1325} and more recently in \textit{Attrill v Dresdner Kleinwort Ltd}\textsuperscript{1326} provides a good example of the current position concerning the issue of voluntary promises. It was argued in this chapter that this was due to the development of a \textit{practical benefit} approach to the doctrine of consideration which is now adopted and settled in employment law. This means that when an employer introduces a voluntary promise in a formal statement, consideration is presumed to be furnished.

This, in practice, means that consideration is no longer the dominant test in employment law since it cannot add any test of value to formation nor add any further element to the creation of contractual obligations. Due to this development, it has been argued that the question of intention, namely objective intention, has become the dominant test when identifying an enforceable

\textsuperscript{1324} \textit{Cf Thomas v Thomas} [1842] 2 QB 851, and \textit{French v Barclays Bank} [1998] IRLR 646
\textsuperscript{1325} [2000] IRLR 319 CA
\textsuperscript{1326} \textit{Attrill v Dresdner Kleinwort Ltd} [2013] EWCA Civ 394.
commitment by the parties. The intention of the parties to create a binding obligation, as noted in Attrill, remains the core focus of the English court when looking to find an enforceable voluntary promise in Employment law.

However, the line of case law provides that objective intention must be asserted when examining enforceability; the application of such a test, as revealed in Chapter Three, has not always guaranteed a coherent outcome.1327

7.4 Chapter Three

Chapter Three analysed the use of the rules of formation, as outlined in Chapter two, in the voluntary promises situation. In this chapter, it was shown that English courts have viewed the correct test of entitlement as one that falls under the analysis of aptness and upon the intention of the parties, which must be viewed objectively.1328 This means that only voluntary promises which are 'apt' and intended for incorporation can create entitlements.1329 The test of aptness is addressed by asking whether the provision in question is one capable of and suitable for treatment as part of a contract.1330

However, as was demonstrated in this chapter, where intention and aptness appear to point to different outcomes, English courts appear to attach more weight to intention than aptness. Thus in the example cases of National Coal Board v

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1327 See e.g. National Coal Board v National Union of Mineworkers [1986] IRLR 439; Grant v South-West Trains Ltd [1998] IRLR 188; Malone and others v British Airways [2010] EWCA Civ 1225
1328 Cf, Malone and others v British Airways [2010] EWCA Civ 1225, with National Coal Board v National Union of Mineworkers [1986] IRLR 439. Discussed at Para 4.3 below
1329 National Coal Board v National Union of Mineworkers [1986] IRLR 439
1330 Alexander v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286
National Union of Mineworkers\textsuperscript{1331} and Kaur v MG Rover Group Limited\textsuperscript{1332} the test involved considering whether the provision, on the basis of its general nature, was collective or individualistic. In Grant v South-West Trains Ltd\textsuperscript{1333} it was held that the question of enforceable commitments should be determined objectively, rather than by the subjective intention of the parties.\textsuperscript{1334} However, the court's recent decision in Malone and Ors v British Airways plc,\textsuperscript{1335} the emphasis on the 'objective intention' approach in order to assert a binding commitment, found in the example cases of Kaur and Grant, has been undermined. In Malone the Court of Appeal concluded that a commitment to minimum staffing levels was not enforceable since the employer could not have intended the term to be binding because of its dangerous consequences upon the business. The test of intention in Malone appears to be subjective, whereas in the other cases previously mentioned, the test of intention was objectively asserted. This supports the argument that the application of the test that intention should be objectively assessed in English law, has not been without controversy when courts have been faced with the need to reach commercially sensible outcomes at the cost of distorting the principles of contract law. This may also be due to the courts' desire to avoid the harsh results that may be caused if promises by the employer were held to be enforceable. In Kaur, for example, it was observed that business urgency was highly relevant and influential in the court's ruling not to enforce promises that would prevent the employer from terminating its employees on the grounds of redundancy; however, in Malone business survival was at stake if the court had enforced the employer's

\textsuperscript{1331}National Coal Board v National Union of Mineworkers [1986] IRLR 439
\textsuperscript{1332}Kaur v MG Rover Group Limited [2005] IRLR 40
\textsuperscript{1333}Grant v South-West Trains Ltd [1998] IRLR 188
\textsuperscript{1334}[2011] IRLR 32
\textsuperscript{1335}[2011] IRLR 32
voluntary promises. This opens the central question about providing a coherent legal approach to voluntary promises where both parties’ interests and expectations are appropriately balanced.

The search for an appropriate balance or solution to these matters rests upon the analysis of: whether any of the legal entitlements can be created from unilateral or voluntary promises; their legal effect; and whether and to what extent an employer can unilaterally, with or without notice, revise or revoke these provisions. This has been considered in Chapter Four and Six. The complexity is not limited to the UK as the US, which shares fundamental common law principles with the UK, has also come face to face with these important questions which have been considered in Chapter Five.

7.5 Chapter Four

Chapter Four considered a unilateral approach to the issue of voluntary promises. The decision of the Court of Appeal in Attrill illustrates the modern position regarding the rules governing the creation of contractual obligations in employment law: ‘in any event there was consideration given ... by remaining in employment, and either not seeking employment elsewhere or not taking up employment elsewhere, and in all cases not exercising their right to resign’.\(^\text{1336}\)

Moreover, the employer's offer of an enhanced provision is made with the aim of achieving lower staff turnover, higher morale, better performance, less disputes

\(^{1336}\) Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394 at [184], upholding the findings of Mr Justice Owen at the High Court Attrill and Ors: Anar and Ors v Dresdner Kleinwort Limited and Anor [2012] EWHC 1189 (QB).
amongst staff and an attractive working environment. Employees satisfy the rules of consideration by their mere performance and their continuing to work.\textsuperscript{1337}

This view regarding employment relationships is more practical as it takes into account the unique dynamics of employment relations noted earlier and discussed in Chapter One above. This development in employment law is highly relevant to the question of voluntary promises since \textit{practical benefit} is automatically presumed and an employer who makes a promise to an employee satisfies the rules of consideration upon the employee's performance or continuance of work and their reliance upon it. It was noted in this chapter and Chapter Three that the issue is more complex when the employee relies upon a clear promise unilaterally introduced by the employer, but the implied intention may point in a different direction.\textsuperscript{1338} This is because, where voluntary promises are concerned, a mere statement of intention may not conclude the matter; consideration must be paid to the "purpose of the agreement and its factual background and surrounding circumstances" since it may be shown that such promises were only "intended to have a more limited effect than would be suggested by its literal words."\textsuperscript{1339} This, in practice, may leave employees in a state of limbo as to the status and enforceability of the agreement that has been unilaterally introduced by the employer. Furthermore, employment relationships, it was argued in Chapter Four, cannot be confused with social ones, and promises made under the former relationship ought to be viewed differently to those made in under commercial

\textsuperscript{1337} This approach is adopted by most of the United States jurisprudence, as explored in Chapter Five.

\textsuperscript{1338} See Chapter Three and the full discussion on \textit{Kaur v MG Rover Group Limited} [2005] IRLR 40; \textit{Malone and others v British Airways} [2010] EWCA Civ 1225

\textsuperscript{1339} \textit{Bank of Credit and Commerce International SA v Ali and others} [2002] 1 AC 251, 253
contracts. Employees may also acquire a legitimate expectation that voluntary promises announced by an employer are, in effect, enforceable. Employees who rely upon these expressed voluntary promises, notwithstanding the absence of objective intention, have surely expected that their employers will honour their promises and respect their employees' dignity.

Accordingly, where there is no objective intention in the clear promise offered by an employer, and yet its employees have relied upon the promise, the orthodox contract law governing the rules of creating binding obligations appears unequipped to recognise the employees' expectation of the promise, and the employer's need to protect their business efficiency. Thus, as argued in Chapter Six, where contract law rules cannot be accommodated the principle of legitimate expectation, derived from public law principles, can provide an adequate solution to balance the parties' expectations and interests.

7.6 Chapter Five

Chapter Five examined the US approach to the question of voluntary promises. The US, which shares similar contract law to the UK, provides a valid ground for comparative analysis in order to see how it has managed to develop a principle that appears to depart from the orthodox contract law rules of formation and variation. As noted earlier, the models of three states were selected for this research. The model of the state of Florida was chosen because it adopts a bilateral contract approach which reflects a similarity with current English law.

1340 Attrill and Ors v Dresdner Kleinwort Ltd and Anor, [2013] EWCA Civ 394
1341 See discussion in Chapter Six, Para 7.8-7.9, on French v Barclays Bank [1998] IRLR 646 and other cases.
The model of the state of California was chosen because it adopted a unilateral contract approach which could be developed in the UK. The state of Michigan was the first state to rely upon the principles akin to those recognised in English public law, and introduced in private law, for the first time, the doctrine of legitimate expectation. It is therefore important for the purpose of this research to see whether these developments can provide an example of how English law could develop similar principles in order to achieve the desired coherent approach to voluntary promises.

Unlike previous literature that divided the courts’ analysis of voluntary promises into either unilateral contracts or public policy exceptions, Chapter Five has taken a new model approach by dividing the courts’ analysis into three categories, namely: the bilateral approach, the unilateral approach and the public law principle. This new model approach provides a better understanding of the legal principles surrounding the courts’ findings and the legal grounds upon which it makes those findings, and yet makes it easier to pinpoint any possible development that could be adopted into English law. While the aforementioned three states represent the legal analysis adopted by the US courts on the issue of voluntary promises, the research has not been limited to their courts but has also considered other US states that have followed their trends to provide a better understanding of the model and its approach.

It was argued in Chapter Five that the state of Florida, which adopts the model of bilateral contract analysis, has not departed from the orthodox contract law used in the UK with regard to the formation of contracts of employment.\(^\text{1342}\) Thus, courts

\(^{1342}\) See Chapter Two for detailed analysis on formation of contract
in Florida insist on the exchange of promises and take the view that, in order to create a binding contractual term, there must be an ‘explicit mutual promise’.\textsuperscript{1343}

It was also argued that this approach, as is the case in the English orthodox contract law approach, has resulted in uncertainty and has not always been consistent, leading some academics and judges to call for a departure from the long settled bargain theory used in the state of Florida.\textsuperscript{1344}

The complexity that the Florida model appears to show has led some other states, such as California, to adopt a unilateral contract model in order to determine what can give rise to enforceable contract rights in employment law. In California the Supreme Court in \textit{Pine River}\textsuperscript{1345} concluded that a handbook could be an enforceable unilateral contract whether it was introduced at the time of the original hiring or later. It was held that courts should only be concerned with the requirement of unilateral contract formation in order to determine whether it creates a binding obligation. Under this analysis the Court found that the requirement of additional consideration is satisfied if the employee, upon receiving the unilateral offer, carried out a specific act, i.e., continued to work and carry out her existing employment duties. This clearly supports the argument made in Chapters Three and Four regarding the issue of \textit{practical benefit} and appears to be in line with the modern development of consideration in English law, as noted in the case of \textit{Attrill}. The Supreme Court in California went further to suggest that where parties are under a pre-existing duty the mere reliance on the promise that provides the substantive term or creates the additional rights and

\textsuperscript{1343} Bryant v. Shands Teaching Hospital and Clinics, 479 So. 2d 165 (Fla. 1st DCA 1985), at 168.
\textsuperscript{1345} Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)
benefits is sufficient to create an entitlement. The emphasis on reliance is echoed in the legitimate expectation approach adopted by the state of Michigan and is in similar trend to that adopted in the English public law doctrine of legitimate expectation, as examined in Chapter Six.

However, while the California model of unilateral contract may attract those favouring a traditional approach, the Michigan approach provides a more developed approach under the reliance theory and allows for the modification of unilateral promises. However, it was argued that the courts in California appear to conflict with standard contract law principles because they allow the employer to depart from a legitimate expectation by mere notice.

Thus, in Michigan the court treated voluntary promises that can create a legitimate expectation as enforceable obligations outside the orthodox rules of contract law formation. Accordingly, an employer may withdraw from its promises by giving notice, since the promises were created outside the orthodox rules of contract formation. The difficulty with the Michigan approach, as explored in Chapter Five, is that it allows the employer to resile from its promises by mere notice. This makes every promise that creates a legitimate expectation subject to withdrawal without taking into account the impact upon the employee and without insisting on the employer justifying its actions.

\[^{1346} This has been examined in Chapters Four and Six.\]
7.7 Chapter Six

In English public law the legitimate expectation principle, as demonstrated in Chapter Six, is applied differently from Michigan. A promise protected by legitimate expectation can only be lawfully withdrawn when there is a permissible justification. In Chapter Six it was argued that the English principle of legitimate expectation offers a more satisfactory solution to voluntary promises as the promise creating legitimate expectation cannot be revoked without considering the impact of that promise and the importance of the interest to the employee. In English law, we have argued that a promise that acquires legitimate expectation need not become contractual. However, the employer revoking or resiling from the promise can be in breach of the implied duty to maintain trust and confidence where these actions are unjustified. Thus, it was argued that English courts must evolve a hierarchy of interests possessed by the employee and the employer in order to determine how much justification is necessary before revocation can be justified. This provides a more sophisticated approach constructed around a fair balance between the employer’s interests and business efficiency on the one hand, and the employee’s dignity and interests on the other.

7.8 Summary and Discussion of Findings

To achieve a coherent legal approach to voluntary promises, this thesis offers an examination of these two approaches which English courts may choose to adopt and develop. Both approaches can be seen to already exist in a line of English cases, but with limited focus on its jurisprudence. The first approach is under a contractual analysis and ultimately attracts those with a more traditional view.
This approach suggests that English courts could, in line with the Californian model, adopt a unilateral, as opposed to bilateral, contract analysis regarding voluntary promises. The approach in California means that instead of placing too much emphasis on whether the parties’ terms are ‘apt’ and intended to be incorporated into the employment contract, the unilateral analysis focuses on the commitment made and the promise itself. A clear, certain and unambiguous promise creates a commitment under a unilateral contract which the employee thereafter accepts; the employee furnishes valid consideration by continuing to work for the employer. The commitment under a unilateral contract is made once the promise that has been offered to the employee is clear and unambiguous. Any promises that are mere aspirations or future aims are not clear offers that are capable of creating binding commitments.\footnote{Grant v South-West Trains Ltd [1998] IRLR 188; Kaur v MG Rover Group Limited [2005] IRLR 40; Malone and others v British Airways [2010] EWCA Civ 1225, [2011] IRLR 32} This approach, as explained in Chapter Four, suggests that the intention to create legal relations is already implied in employment relationships. All that is needed to be shown is that, viewed objectively, an employee’s reliance upon a clear promise made by the employer, creates a binding commitment. This approach, if firmly adopted, resembles the Unilateral Contract model adopted in California, as noted in Chapter Five.

However, this would result in many voluntary promises becoming contractual, and in California courts recognise that businesses need to respond to changing circumstances and potentially harsh challenges to an employer’s business efficiency. As a result, the courts have developed revised rules to allow the employer to resile from its unilateral promise by mere reasonable notice.
However, what constitutes reasonable notice can be vague and difficult to evaluate. As noted in Chapters Three and Four, current English law prevents a unilateral revocation of a contractual right once it has been created.

Thus the unilateral contract approach appears to be useful in contract formation regarding voluntary promises, but is unable to respond appropriately to the issue of when a departure from the promise can be permissible; this undermines its ability to provide a coherent approach. Where the formation of a contractual right is concerned, it can be argued that the unilateral contract model provides a better explanation regarding what creates a binding entitlement under a voluntary promise, than the bilateral model. As explained in Chapter One, this is consistent with the reliance theory and the modern development of employment relationships, both of which acknowledge the unique nature of the employment contract. Its formation remains loyal to contract law principles and may be preferred by courts which favour a traditional contract approach. It further provides increased certainty regarding entitlements created from voluntary promises and can, if the further development of revocation is adopted, effectively balance the competing interests of employer and employee.

However, as noted in Chapters Five and Six, developments in the English courts must be able to overcome the difficulties examined in the Californian model where resiling must be examined against an employee's interests and consideration given to the larger impact that some promises may have upon employees than others. While these possibilities are open for the English courts to develop, it was noted in Chapter Four that the current position in respect of voluntary promises in English employment law does not permit a unilateral
revocation once a promise fulfils the formation requirements of the law of contract. These requirements were examined in Chapter Two.

An employer is, therefore, bound to its contractual promises and a departure from a contractual right entitles the employee, under the ordinary contract law rules, to seek a remedy and bring an action for breach of contract; this is notwithstanding that the employer behaved rationally and reasonably in departing from its promises.\textsuperscript{1348} As noted in Chapter Six, this would put a great strain on the employer’s business efficiency since business circumstances may alter. Thus, courts are sympathetic to what was termed in Chapter Six as ‘business interests’ or a ‘legitimate aim’, such as those presented in the cases of \textit{Malone},\textsuperscript{1349} and \textit{Hameed}\textsuperscript{1350} and which allowed the employers to escape liability that might otherwise have arisen under the orthodox formation principles. This has shown that courts, constrained by orthodox contract law principles, have been undermining legal consistency when circumstances like \textit{Malone} are at issue.

To avoid the unsophisticated approach of orthodox contract law, this thesis offered a second, alternative approach which courts may choose to follow under the principle of legitimate expectation. This principle, which is derived from English public law, can be used, via the implied duty of trust and confidence, in employment private law, and is already emerging in modern case law, as noted in Chapter Six. The principle of legitimate expectation offers a cohesive approach with greater potential for further development, i.e. by allowing an employer to

\textsuperscript{1348} See in particular Chapters Two and Three.
\textsuperscript{1349} \textit{Malone and others v British Airways} [2010] EWCA Civ 1225, [2011] IRLR 32
\textsuperscript{1350} \textit{Hameed v Central Manchester University Hospitals NHS Foundation} [2010] EWHC 2009
lawfully resile from its promises when certain business interests can justify the employer’s decision (as explained below).

Moreover, the doctrine of legitimate expectation provides a more sophisticated treatment of the issue of voluntary promises where respect for the employee’s reliance and dignity, on the one hand, and the employer's business efficiency on the other, are equally weighed and appropriately balanced.

The judicial basis for this outcome is the doctrine of mutual trust and confidence, which holds that whilst the promise itself may not be an express contractual term, there may be circumstances in which any departure from it will result in a breach of the implied term. An example of this was provided in the case of French, in which a promise was made to the employee which, while not constituting a contractual right, was capable of creating a legitimate expectation that the employer would not, without lawful or permissible justification, depart from the promise. This has been considered in Chapters Three and Six.

The development of legitimate expectation, as noted in Chapter Six, is derived from the public law principle which, unlike unilateral approach, allows an employer to lawfully resile from a promise -that acquires legitimate expectation- when the decision to resile can be permissible and justified. As noted in Chapter Five, in the US state of Michigan, courts have adopted the principle of legitimate expectation, but revocation has been permitted as an automatically implied power without the need for the employer to justify its decision to depart from the promise, provided that the employer is acting bona fide when making its decision.

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This approach, as discussed in Chapters Five and Six, while open to the English courts to develop, can result in the undermining of the employee’s expectation and dignity, and does not take into account the reliance that the employee may have placed on the promises made, some promises resulting in a higher expectation and impact than others. Hence the law needs to develop a hierarchy of interests possessed by the employee and the employer.

However, it is argued that the principle of legitimate expectation derived from the English public law principle, provides a better line of development and a more coherent approach. The principle has emerged through the development of the implied term of mutual trust and confidence which could be further developed to allow the employer lawfully to resile from its promises when its decision can be justified. This approach provides a more sophisticated legal coherence, whereby an employer’s voluntary promise creates a legitimate expectation which cannot be disregarded unless the employer has a legitimate aim and acts proportionately, as examined in Chapter Six.

The test is incorporated from public law in which a substantive legitimate expectation cannot be departed from by mere rationality, i.e. in the *Wednesbury* sense. Where, for example, in the case of *Coughlan*, a decision to resile was due to financial difficulties, this was not regarded as a sufficient ground to justify a departure from the legitimate expectation. This indicates that a legitimate aim which justifies a departure from a promise must be more serious than the general application in the *Wednesbury* sense. Accordingly, ‘departure from it must

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1352 See Para 7.2-3, above for discussion on the principle of *Wednesbury*
1353 *R v North and East Devon Health Authority ex p. Coughlan* [2001] QB 213
therefore be justified by reference, among other things, to the requirement of proportionality.\textsuperscript{1354}

It has been argued that incorporation of this public law principle into employment law, through the further development of the implied duty of trust and confidence, could mean that an employer’s decision to depart from its promises, which have been relied upon by an employee in order to acquire legitimate expectation, would be permissible when the employer’s decision is based upon a legitimate aim, is required by a pressing need and is proportional. The test can ultimately be borrowed from other lines of employment cases, for example in discrimination law: ‘proportionate means of achieving a legitimate aim.’\textsuperscript{1355}

In Chapter Six it was noted that an employer’s legitimate aim must correspond with a justified legitimate need. For example, economic factors where there is a real need to protect the survival and efficiency of the employer's business; the health and safety of the individual employee or the public; and job requirements such as specific training are all regarded as legitimate aims of the business.\textsuperscript{1356}

However, having a legitimate aim cannot justify a decision to depart from promises made unless the employer satisfies the test of proportionality; this test not only concerns the act and objective of achieving the aim or business interest but also requires a balancing exercise of the employer's decision against the employee’s hierarchy of interests. Thus, it was argued that the law must develop

\textsuperscript{1354}\textit{R. (on the application of Niazi) v Secretary of State for the Home Department} [2008] EWCA Civ 755, [50] (per Laws LJ)

\textsuperscript{1355} Equality Act 2010 (s.15 and s.19). See e.g. \textit{Seldon v Clarkson Wright and Jakes (A Partnership)} [2012] UKSC 16

a hierarchy of interests that the employee may possess, where consideration must be given to the degree of expectation a promise creates and the impact that any infringement of the interest/benefit would have on the employee. This, in effect, means that the employer must first consider and understand the importance and significance of the interest or benefit that has been legitimately relied upon by the employee.

Thus, the test of proportionality derived from public law, and the recent Supreme Court decision in *Bank Mellat v HM Treasury No 2*,[1357] (as noted in Chapter Six), can provide an adequate and appropriate balance regarding the issue of when overriding a legitimate expectation is lawful, i.e. when revocation of the promise is permissible, and when a decision to resile from it is unlawful or impermissible. As noted in Chapter Six, the test requires four stages or elements that must be satisfied.

An analogy of this test in employment law, concerning legitimate expectations arising from voluntary promises, means that a decision by the employer to revoke its promise is justified when: (1) the employer’s reason for departure was sufficiently important, i.e. the legitimate aim corresponded with a justified legitimate need of the employer; (2) the employer’s decision to frustrate the particular expectation was the only means of addressing the important business aim; (3) the employer could not implement any less intrusive measure; and (4) after having regard to the employee’s hierarchy of interest and the severity of the

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[1357] [2013] UKSC 39, [74] (Per Lord Reed). The position was from a number of cases, most importantly: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69,[ 80]; *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, [45]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
revocation's effect and impact on the employee, the decision to resile was still justified due to the importance of that decision.

It has been argued that adopting this approach is capable of providing a coherent approach which allows courts to strike a fair balance between both parties’ interests. This is because, where legitimate business interests or efficiency arise, it will allow the employer to reflect its business objective needs by acknowledging the hierarchy of interest of the employee, so that the employer will give full attention to the fact that some promises could have a greater effect upon the individual employee than others. As a result, some commitments may require a greater deference than others. For example, an actor would have more of an interest and need to work, due to the need to maintain publicity or avoid harming his/her reputation, than would an ordinary worker. Accordingly, this approach avoids the difficulty and incoherence that the Michigan approach appears to embrace. It further avoids the unsophisticated approach of orthodox contract law and may assist courts, when faced with a ‘Malone’ type problem, to avoid distorting the principles of contract law in order to reach commercially sensible outcomes.

Therefore, adopting the principle of legitimate expectation in employment relations, as a principle derived from public law, and particularly regarding the issue of voluntary promises, provides a better approach to the unsatisfactory contractual solution, and allows courts the opportunity to achieve a fair balance in protecting both parties’ interests. It provides an adequate balance, based on a test

of proportionality, between the employee’s hierarchy of interests and the employer’s business need for efficiency and flexibility, whilst preventing further incoherent outcomes similar to *Malone*. 

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