The following principles in relation to sources of a contract of employment should be noted:

1. The main sources of an employment contract are express terms and implied terms.
2. Express terms are to be found in the contract itself and/or documents expressly or impliedly incorporated into the contract, such as collective agreements or employers’ handbooks.
3. In cases where there is no employment contract, the existence of a written statement of terms and conditions under section 1 of the Employment Rights Act 1996 will assist the determination of what terms were agreed.
4. An express term may in appropriate cases be qualified by an implied term, such as the term not to behave in a way such as to undermine the relationship of trust and confidence between employer and employee.
5. Implied terms will arise where the court or tribunal regards the implication of a term as necessary to give the contract business efficacy or reflect what the parties would have agreed had they addressed their minds to the issue.

FORMING THE CONTRACT

The main source of contractual obligations is the express terms of the contract. This process is assisted by the provisions of ERA, s. 1, which requires employers to give their employees written particulars of many of
the more important terms of their contracts. Terms may be expressly incorporated by a reference in the contract to another document such as a collective agreement, but not all such terms are appropriate for incorporation; other documents may also be impliedly incorporated.

Statutory written statements

The main statutory requirements are contained in ERA, ss. 1-7. In effect, the main terms of the contract should be set out in the written statement, covering such matters as pay, hours of work, holidays and holiday, sick pay, notice entitlement and the like. It is not necessary to set out details relating to pensions and pension schemes if the employee’s pension rights depend upon the terms of a pension scheme set up under a provision contained in or taking effect under a statute and the provision requires the relevant body or authority to give a new employee information concerning his or her pension rights.

The statement may be given in instalments but the following particulars must all appear in a single document:

1. the names of the employer and employee;
2. the date of the start of employment with the employer;
3. the date of the start of continuous employment;
4. the details relating to pay, hours of work, holiday entitlement, the employee’s job title and the employee’s place of work: see ss. 1(2) and 2(4).

The written statement must be given within eight weeks of the start of the employment.

Changing terms

The Employment Rights Act, s. 4, deals with changes in the terms and conditions covered by section 1. Any such changes must be notified to the employee by means of a written statement within one month. It should be noted, however, that this is a procedural requirement: it does not authorise an employer to change an employee’s contractual terms simply by giving notice of change. There must be a variation which is effective in law. As with the original statement under section 1, the statement of change under section 4 may refer to other reasonably accessible documents for the same
matters as those which may be referred to by the original statement. Similarly, in the case of changes in the notice provisions to which the employee is subject, the statement of change may refer to the law or the provisions of a collective agreement which is reasonably accessible to him or her. The term ‘reasonably accessible’ is defined in section 6.

The effect of written statements

Despite confusions of terminology, particularly in the case law, it is clear that a written statement given by virtue of the requirements set out in ERA, s. 1, is not itself a contract of employment. It is, of course, evidence of the contract of employment and in many cases will probably be the best evidence available. The fact, however, that it is not the contract of employment means that it is open to an employee to argue in subsequent court or tribunal proceedings that the particulars contained in the statement did not represent what was agreed between the parties. In System Floors Ltd v. Daniel [1982], approved by the Court of Appeal in Robertson v. British Gas Corporation [1983], Browne-Wilkinson J said:

[The statutory statement] provides very strong prima facie evidence of what were the terms of the contract between the parties, but does not constitute a written contract between the parties. Nor are the statements of the terms finally conclusive: at most, they place a heavy burden on the employer to show that the actual terms of contract are different from those which he has set out in the statutory statement.

The earlier decision of the Court of Appeal in Gascol Conversions Ltd v. Mercer [1974] appears to suggest that a written statement is conclusive. Subsequent cases have distinguished Gascol, however, on the basis that in that case the employee signed the written particulars as constituting the new terms of his contract of employment, not merely the receipt for new particulars of employment. In such a case, therefore, care needs to be taken, since, if the written statement is converted into a written contract, the parties should make sure that the terms contained in it are correct. Otherwise it will not be possible for them to change it without the agreement of both parties.

The Employment Rights Act, s. 11, provides for enforcement of the employee’s right to be given a written statement. That is in addition to the employee’s right to sue the employer for breach of contract before the ordinary courts or, where appropriate, the Employment Tribunal.
Section 11 enables the employee to make a reference to the tribunal for it to decide what particulars ought to have been included, in cases where either no statement has been given or the statement does not comply with what is required. Where a statement has been given but there is a dispute as to what particulars ought to have been included or referred to in it, the employer or the employee may refer the matter to the tribunal. Section 12 gives the tribunal the power to determine what particulars ought to have been included, or whether any particulars which were included should be confirmed, amended or substituted.

The Employment Act 2002 has introduced a limited penalty which may be imposed on employers who fail to give a statement under ERA, s. 1 or 4. In the case of proceedings to which EA 2002, s. 38, and Sch. 5 apply (for example, sex discrimination claims of complaints of unfair dismissal), where the tribunal finds in favour of the employee, and the employer was in breach of its duty under s. 1 or 4, the tribunal must make a minimum award of compensation in respect of the failure: see s. 38(2) – (4).

EXPRESS TERMS

The following points in relation to express terms should be noted:

1. Express terms are the principal sources of contractual obligations and the starting point for a consideration of the respective rights and obligations of the parties is the contract or written statement of particulars.
2. Express terms may be written or oral or partly written and partly oral.
3. The best evidence of an express term is an express term contained in a written contract of employment, but, in the absence of such a written contract, the statutory written statement given to an employee under the Employment Rights Act 1996, s. 1, is likely to provide the best evidence, though it is not conclusive as to the terms agreed.
4. The express terms of the contract may also be found in documents expressly or impliedly incorporated into the contract, such as collective agreements or employers’ handbooks.
5. If the contract contains an express term covering a particular matter such as mobility, there will be no scope for the implication of a term in relation to that matter.
An express term may in appropriate cases be qualified by an implied term, such as the term not to behave in a way such as to undermine the relationship of trust and confidence between employer and employee.

Where interpretation or construction of the contractual documentation is necessary, the court or tribunal will apply the ordinary rules of construction for contracts, including the contra proferentem rule.

An apparently wide clause, such as a flexibility clause, will not always give the employer as free a hand as its terms suggest.

Clauses which are apparently unreasonable may be subject to the Unfair Contract Terms Act 1977.

The Court of Appeal followed this decision in Marley v. Forward Trust Group Ltd [1986] in which the employee’s contract of employment incorporated the employers’ personnel manual which included the terms of a collective agreement made between the employers and the union. The agreement was expressed to be binding in honour only and included a provision that, if a redundancy situation arose, an employee who accepted redeployment would have six months in which to assess its suitability without prejudicing his right to redundancy compensation. This happened to the employee, who, after two months, informed his employers that his new position was unsuitable and that he wished to exercise his ‘redundancy option’. The employers took the view that the employee had been transferred under a mobility clause in his contract and not because of a redundancy situation. They therefore treated him as having resigned. The Court of Appeal held that the terms of the collective agreement had been incorporated into the individual employee’s contract (even though the agreement itself was unenforceable) and that the employers could not rely upon the mobility clause when redeploying the employee.

**SPECIFIC EXPRESS TERMS**

Express terms relating to the following matters are considered here:

1. mobility
2. working time
3. pay
Mobility

It is advisable for an employer to include an express mobility term in the employment contract; otherwise, a term will fail to be implied. Clearly, employers who want to save argument later will be well advised to include an express clause. If a term is implied, there is the risk that the term will have a disproportionate effect which could have been avoided. In any case, ERA 1996, s. 1(4)(h), requires the written statement to specify the place of work or ‘where the employee is required or permitted to work at various places, an indication of that and of the address of the employer’. The provisions of section 1(4)(k) should also be noted. These come into operation for employees required to work outside the United Kingdom for more than one month. This should not be too difficult for an employer.

Working time and holidays

The arrangements for working time will depend upon the nature of the employer’s work. For example, the employer may operate a shift system for production staff and flexitime arrangements for administrative staff; field sales staff and managers may have fixed hours. Although theoretically the employer might demand of the employee long working hours, it is possible that this might be subject to an implied restriction, arising from the decision of the Court of Appeal in Johnstone v. Bloomsbury Health Authority [1991]. The effect of the Working Time Regulations 1998 (SI 1998/1833) should be noted. The regulations were introduced to implement Council Directive 93/104/EC, but not before the UK government had brought an (unsuccessful) action against the European Commission, arguing that the legal basis upon which the directive was adopted was incorrect: see United Kingdom v. Commission of the European Union [1997].

Until the advent of the Working Time Regulations there was very limited statutory regulation of holiday rights and in practice an employee’s
entitlement to holiday depended upon the terms of the employment contract. Now regulations 13 and 16 entitle workers to four weeks’ annual paid leave in each leave year (as defined by regulation 13(2)). There are detailed provisions dealing with the dates on which leave may be taken, which entail either party giving notice within prescribed time limits and containing prescribed information. An employer wishing to escape these provisions may do so by having a ‘relevant agreement’, in practice a collective agreement or employment contract: see the definition in regulation 2(1). Leave may not be bought out unless the worker’s employment is terminated: see reg. 13(9).

‘Gardening leave’ clauses

A ‘gardening leave’ clause is a clause found in employment contracts by which the employer reserves the right to require the employee not to perform his or her duties as an employee but agrees that he or she will continue to be paid. Such clauses have so far given rise to relatively little case law and such case law as there is has tended to be concerned with the principles upon which injunctions are granted.

An important case to consider as regards the ‘gardening leave’ clause is *Provident Financial Group plc v. Hayward* [1989]. The employee’s contract as financial director provided that, during the continuance of his employment, he would not ‘undertake any other business or profession or be or become an employee or agent of any other person or persons or assist or have any financial interest in any other business or profession.’ Another clause provided that the company was under no obligation to provide him with work but could suspend from performance of his duties or exclude him from any premises of the company, but his salary was not to cease to be payable by reason only of the suspension or exclusion.

Despite case law recognising the validity of gardening leave clauses, uncertainties do remain, since an excessively long period of notice linked with gardening leave might be held to be in restraint of trade and thus void and unenforceable.

It may be that the method of termination may affect the employer’s chances of enforcing restraints against an ex-employee: see *General Billposting Co. Ltd v. Atkinson* [1909] and *Rex Stewart Jeffries Parker Ginsberg Ltd. v. Parker* [1988]. It is clear from these cases that an employer who dismisses an employee in breach of contract will not be
able to rely upon any restraints in the contract of employment. It is unlikely that in the absence of an express gardening leave provision the court would be prepared to imply such a provision: see *William Hill Ltd v. Tucker*, at p. 301.

**Notice**

At common law the parties are free to choose whatever notice provision they like, though an employer who sought to impose an excessively long period of notice on an employee might be prevented from doing so by the doctrine of restraint of trade. If the contract of employment does not specify a notice period a reasonable period of notice will be implied. In most cases where there are no express notice provisions the situation is likely to be governed by ERA, s. 86, which gives a statutory right to a minimum period of notice. Employees continuously employed for one month or more but less than two years are entitled to at least one week’s notice. After two years’ employment, employees are entitled to one week’s notice for each year of continuous employment, but, if they have been employed for more than twelve years, their statutory entitlement will not exceed twelve weeks. Section 86(2) obliges an employee continuously employed for one month or more to give at least one week’s notice. The notice must be definite and explicit and must specify the date of termination or give sufficient facts from which the date of termination can be ascertained: *Morton Sundour Fabrics Ltd v. Shaw* (1967) and *Walker v. Cotswold Chine Home School* (1977). Once a notice has been given, it cannot be withdrawn unilaterally, but only with the agreement of the other party: see *Riordan v. War Office* [1959] 3 and *Harris and Russell Ltd v. Slingsby* [1973]. Although an attempt to provide for a shorter period will be ineffective, section 86(3) provides that either side may waive his or her right to notice or accept a payment in lieu of notice.

**IMPLIED TERMS**

The following points should be noted:

1. Even if the employer complies with the requirements of ERA, s. 1, and gives a written statement or decides to give an employee a full written contract of employment, there are likely to be areas in the
contract which are not covered by express terms and where the court or tribunal will have to consider resorting to implied terms to fill the apparent gap.

2 A term will be implied only where there is no express term governing the matter in dispute.

3 If a term is implied the term will be no broader than is necessary to give efficacy to the contract.

4 An express term may in some cases be qualified by an implied term.

5 There is a difference between terms such as mobility/flexibility, terms which have to be determined according to the particular contract, and ‘status’ or ‘legal incidents’ terms which, where used, establish rules for contracts of employment as a class.

6 If a term is not implied on the basis of the tests set out below, it may be possible to imply a term based upon custom and practice, if the custom is reasonable, certain and notorious.

At common law a breach by either party of an implied term may give the other party the right to terminate the contract without notice. Thus a breach of an implied term by the employer may give the employee the right to resign and argue that the breach was so significant as to amount to a repudiation and to entitle him or her to treat the contract as at an end. In the context of the statutory right not to be unfairly dismissed this is usually called constructive dismissal. In other contexts it is probably best called wrongful repudiation or simply a breach of contract.

The implication of terms was considered by the House of Lords in Liverpool City Council v. Irwin [1977]. Lord Wilberforce said, at p. 253:

Where there is, on the face of it, a complete bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work – this is the case, if not of The Moorcock … itself on its facts, at least of the doctrine of The Moorcock as usually applied. This is … a strict test.

It is important to note that both parties to the employment relationship have well established implied terms with which they must comply. These will be considered more fully under their respective sub-headings below, but can be summarised as follows:
The employee has the following terms implied into their employment contract:

1. Duty to obey lawful and reasonable instructions given by the employer.
2. That the employee is reasonable competent to do the job.
3. The employee impliedly agrees to take reasonable care in the performance of his or her duties under the contract.
4. The duty of loyalty and fidelity.
5. The duty not to disclose confidential information.
6. Implied term of mutual trust and confidence.

As for the employer, the implied terms include:

1. The duty to pay wages. It must be noted that generally this does not extend to the providing of work.
2. A duty of care in respect of an employee’s health and safety.
3. A duty to take care when producing an employee’s reference.
4. Implied term of mutual trust and confidence.

EMPLOYEES’ OBLIGATIONS

An employee is under an obligation to obey lawful and reasonable instructions given by the employer. This is a fairly wide obligation, which in effect enshrines the employer’s managerial prerogative. It extends beyond the normal situation of obedience to instructions given in the workplace to such issues as mobility and the need to adapt to changes in working practice, as in Cresswell v. Board of Inland Revenue [1984]. There the employees tried to argue that the Inland Revenue was in breach of their terms of service in requiring them to operate the proposed computerisation of the PAYE system. Walton J held that, although the proposed introduction of computerisation changed the way the employees performed their duties, they were still administering the PAYE system and performing the duties of tax officers. He said, however, that this was subject to the proviso that the employer must provide any necessary training or retraining for them. If, however, the nature of the work alters so radically that it is outside their contractual obligations, it will not be reasonable to expect employees to adapt.
It is an implied term in a contract of employment that the employee is reasonably competent to do the job: see Harmer v. Cornelius (1858). Thus a serious act of incompetence may justify the employer in terminating the contract summarily at common law.

Similarly, the employee impliedly agrees to take reasonable care in the performance of his or her duties under the contract. Although the employer will usually be vicariously liable for the employee’s act of negligence, theoretically the employer may sue the employee for an indemnity for breach of the duty of care, as in Lister v. Romford Ice & Cold Storage Co. Ltd [1957]. In appropriate circumstances, carelessness may justify summary dismissal at common law, though clearly it would have to satisfy the general principle that it was so serious as to amount to a repudiation on the employee’s part of his or her contractual obligations: see Power v. British India Steam Navigation Co. Ltd (1930) and Jupiter General Insurance Co. Ltd v. Shroff [1937]. In this last case, an act of negligence by a manager was held to amount to serious misconduct justifying summary dismissal. So too in Baster v. London and Country Printing Works [1899] a single act of forgetfulness by an employee which caused damage to a valuable machine used in the employer’s printing business was held to justify summary dismissal.

The following points should be noted:

1. An employer may rely upon the implied duty of loyalty and fidelity as an alternative to an express restrictive covenant or in the absence of such a covenant.
2. The implied term may be used against an employee during the currency of the employment or after it has ended.
3. Enforcement is likely to be means of an injunction.

It is well established that there is a duty lying on the employee not to disclose confidential information, but the courts have had difficulty in establishing what amounts to confidential information in any particular case. A distinction must be made between an individual employee’s general knowledge or individual skill, which he or she may legitimately put to use in the future, and a trade secret which the employer is entitled to protect. In Printers and Finishers Ltd v. Holloway [1964], at pp. 735–6, Cross J said:

The mere fact that the confidential information is not embodied in a document but is carried away by the employee in his head is not of itself a reason against the granting of an injunction to prevent its use or disclosure by him. If the
information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with, then the court, if it thinks that there is a danger of the information being used to the detriment of the old employer, will do what it can to prevent that result by granting an injunction. Thus an ex-employee will be restrained from using or disclosing a chemical formula or a list of customers which he has committed to memory.

EMPLOYER’S OBLIGATIONS

The general rule at common law is that an employer is not obliged to provide work for the employee to do but only to pay the wages due under the contract. The classic statement of this rule is that of Asquith J in Collier v. Sunday Referee Publishing Co. Ltd, at p. 650:

It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages, she cannot complain if I choose to take any or all of my meals out.

There are, however, exceptions to the general rule which have arisen in cases where the law has recognised that in certain types of contract it is essential to the contract that the employee is given the opportunity to work. So, for example, it will be a breach of contract to fail to provide work for an employee paid on a piecework or commission basis, as in Devonald v. Rosser & Sons [1906] and Turner v. Goldsmith [1891]. In this last case, the Court of Appeal said that an agent paid on a commission basis was entitled to be sent a reasonable amount of work to enable him to earn his commission. See also Bauman v. Hulton Press Ltd [1952].

Another group of exceptions arises in cases where the nature of the work is such that the opportunity for publicity is as important as the remuneration paid to the employee. This applies to actors, signers and the like. Thus, for example, in Marbé v. George Edwardes (Daly’s Theatre) Ltd [1928], a well known actress was engaged by the managers of a theatre to play a particular part in a play. There was also a collateral agreement by which the managers undertook to advertise her name in a prominent position. On the day of the dress rehearsal they refused to allow her to appear in the part. The Court of Appeal held that the contract imposed an express obligation upon the managers to allow her to appear in the part as agreed. They also held that damages for breach of
that obligation might include compensation for loss of reputation. A similar decision was reached by the House of Lords in *Clayton and Waller Ltd v. Oliver* [1930], which expressly approved Marbé’s case.

These cases concern the loss of opportunity for an actor or actress to enhance his or her reputation and arise in circumstances where the contract specifically contemplated such an enhancement of reputation. They show also that the obligation may be to provide work of a particular kind or standard (for example, a particular role or part), rather than any work. This exception was extended to authors in *Tolnay v. Criterion Film Productions Ltd.* [1936], but the Court of Appeal refused to extend it to a company director: see *Re Golomb* (1931).

The obligation lying upon the employer to pay the employee the wages which are due is at the heart of the employment contract. Normally, the contract will contain express provisions dealing with the remuneration due, and it is a statutory requirement that details of the scale, rate or method of calculation of the remuneration should be given to the employee in writing: see ERA, s. 1(4)(a) and (b). Employees also have a statutory right, under ERA, s. 8, to receive an itemised pay statement upon payment of wages or salary.

In the event of there being no express term governing pay, the court on tribunal would imply a term, no doubt to the effect that the employee should receive ‘the going rate for the job’. Alternatively, the employee would be able to recover on the basis of *quantum meruit*, as in *Way v. Latilla* [1937], where there was an understanding that the employer would look after the employee’s interests. See also *Powell v. Braun* [1954].

The employment relationship between employer and employee includes the important common law duty to care for the employee’s health and safety and the duty to take care in the compilation of references for the employee.

The decision of the House of Lords in *Wilson’s & Clyde Coal Co. Ltd v. English* [1938] establishes that the employer owes a duty to an employee to provide competent and safe fellow employees, to provide adequate materials and to provide a safe system of working. It may be a corollary of the first aspect of this duty that an employer is under a duty to take steps to terminate the employment of a potentially dangerous employee.

Although the duty is generally regarded as arising in the law of tort, it gives rise to a contractual obligation on the part of the employer to act reasonably in matters of safety. This means that an employee who resigns
because of the employer’s failure in this respect may claim to have been constructively dismissed. So, for example, in British Aircraft Corporation Ltd v. Austin [1978] the employer’s failure to investigate the employee’s complaint about the protective eyewear provided was held by the EAT to amount to conduct entitling him to resign without notice. In such a case, however, the breach by the employer must be sufficiently serious as to amount to a repudiation of the contract: see Graham Oxley Tool Steels Ltd v. Firth [1980].

There are suggestions in Johnstone v. Bloomsbury Health Authority [1991] that the express terms in an employee’s contract may be qualified by the implied duty of care owed by the employer. In the case in question, the employee’s contract stipulated that his hours of duty should consist of a standard forty-hour week and an additional availability on call up to an average of forty eight hours a week over a specified period. A majority of the Court of Appeal said that the employers were not entitled to require the employee to work so many hours in excess of his standard working week as would foreseeably injure his health. Stuart-Smith LJ suggested that the employers’ power under this contractual provision had to be exercised in the light of their implied duty of care, but Sir Nicolas Browne-Wilkinson V-C merely said that they had the right, subject to their ordinary duty not to injure the employee, to call upon him to work those hours up to the stipulated maximum.

Even where an express term is being considered, constraints of this term may be implied where it is reasonable to do so. The case of United Bank v. Akhtar suggests that an express term may indeed be qualified by an implied term. In this case United Bank wished to transfer Mr Akhtar to an alternative branch. In his contract of employment a mobility clause in extremely broad terms was expressly included. However, Mr Akhtar, owing to certain personal circumstances, requested that the transfer be postponed, a request which was dismissed. As a result Mr Akhtar applied for twenty four days’ paid leave in order to put his personal affairs in order, a request which received no response. Mr Akhtar’s pay was subsequently stopped, resulting in a claim of constructive dismissal.

In considering the construction and nature of the express mobility clause the Employment Appeals Tribunal implied a term to control the discretion the employer had with regards such an express term. In other words, despite the wide-ranging effects the mobility clause was expressed to include, the employer could only utilise their contractual right to the point of reasonableness.
MUTUAL TRUST AND CONFIDENCE

In *Wilson v. Racher* [1974] Edmund-Davies LJ observed that ‘a contract of service imposes upon the parties a duty of mutual respect’. This case was decided when the law relating to unfair dismissal was in its infancy. Since the decision of the Court of Appeal in *Western Excavating (ECC) Ltd v. Sharp* [1978], however, which emphasised that constructive dismissal will take place only where the employer is in breach of an express or implied term in the contract and the breach is so serious as to amount to repudiation of the contract, this implied duty has been considerably refined and developed, particularly as far as the employer’s behaviour is concerned. Subsequent case law has shown that the duty is flexible and will tend to vary with the circumstances of any particular case.

The scope of the term was examined by Lord Steyn in *Mahmud v. Bank of Credit and Commerce International SA* [1997], at pp. 621–2. He approved the formulation of the term as set out by Browne-Wilkinson J above. Subsequently the Court of Appeal made it clear that tribunals should follow that formulation and not use language which might detract from the correct test or suggest that a different test has been applied; see *Transco plc v. O’Brien* [2002]. In this last case the Court of Appeal held that the employer had been in breach of the implied term in failing to offer an employee a new contract when offering one to all other permanent employees, despite the employer’s mistaken belief (arrived at in good faith) that he was not a permanent employee. As Hart J observed in *University of Nottingham v. Eyett* [1999], the terms in which the duty have been expressed have been ‘in the negative form of prohibiting conduct calculated or likely to produce destructive or damaging consequences, rather than as positively enjoining conduct which will avoid such consequences’. This analysis may be said to underpin the cases considered in this section.

Once such a breach of the implied term has been established, the next question concerns the extent of the damages that is available. The case law has left this area rather uncertain and confused, at times being considered not to include non-pecuniary losses (see *Addis v. Gramaphone* [1909]), and at other times to compensate for non-pecuniary ‘stigma’ damages, such as damage to reputation (see *Malik v. BCCI* [1998]). Two House of Lords cases sought to clarify this issue: *Johnson v. Unisys Ltd* [2001] and *Dunnachie v. Kingston upon Hull City Council* [2004]. These two cases appear to put a halt to the trend witnessed in the *Malik*
case towards allowing compensation for damages of a non-economic nature, and returned to the traditional position of Addis.

In Johnson v. Unisys [2001] Mr Johnson, following a successful unfair dismissal claim against Unisys in 1994, commenced an action in the county court for damages, claiming that there had been various breaches of the implied terms of his employment contract, including the implied term of mutual trust and confidence. These breaches were alleged to have arisen owing to the lack of a hearing prior to his dismissal, and also because the company did not follow its own disciplinary procedure. Mr Johnson alleged that the manner and fact of his dismissal caused him to suffer a mental breakdown, and also made it impossible for him to find subsequent work.

On appeal to the House of Lords, Mr Johnson’s claim was dismissed. The House of Lords affirmed the principle, as previously held in Addis v. Gramophone, that the scope and extent of damages were not such as to include any distress caused by the unfair manner of the dismissal or any harm caused to the employee’s reputation. Their lordships also dismissed the idea that a claim for breach of mutual trust and confidence could be constructed by merely recycling the same facts used for a wrongful dismissal claim.

In Dunnachie [2004] there was further examination as to whether a breach of the implied term of mutual trust and confidence would extend to include compensation for non-economic loss. This issue was answered in the affirmative before an employment tribunal. The tribunal interpreted section 123 of the Employment Rights Act 1996 (that the compensatory award for unfair dismissal was to be ‘such amount as the tribunal considers just and equitable in all the circumstances’ having regard to the ‘loss’ sustained by the complainant in consequence of the dismissal in so far as that loss was attributable to action taken by the employer) as including a sum for injury to feelings.

The House of Lords, allowing the appeal, held that ‘loss’ in section 123(1) of the Act did not allow the recovery of anything other than economic loss. First, their lordships considered the origin of the provision in question, which goes back to section 116(1) of the Industrial Relations Act 1971. It was held that section 116(1) excluded non-economic loss and that nothing in the re-enactment suggested that this position had altered. Furthermore, their lordships read the phrase ‘just and equitable’ as a tool of flexibility available for the tribunal to utilise when making an appropriate award, rather than defining the scope of the ‘loss’.
INTERACTIVE LEARNING

1. List the express and implied terms, giving examples for each.
2. ‘The obligation to maintain mutual trust and confidence ensures fair dealing between the employer and employee in respect of disciplinary proceedings, suspension of an employee and dismissal.’ Consider this statement, using case law to illustrate your answer.