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Modern Approach to the Employer's Unilateral Promises: A Comparative Analysis

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The article provides a comparative analysis to modern employment contract formation. It focuses on promises made unilaterally by an employer to its employees in formal statements such as manuals and handbooks, and argues that such promises, once capable of conferring entitlement, must be protected and employers must not treat them as illusory. It further argues that while under English law an employer would be in breach of the implied duty of trust and confidence if a decision to withdraw from discretionary promises was irrational or disproportionate; in the United States, an employer's irrational or disproportionate withdrawal from discretionary promises could be regarded as a breach of the duty of good faith. Either approach can be internationally or globally adopted to ensure a fair balance between protecting business efficiency and respecting employees' dignity.

Keywords
Employment Policies, Unilateral Rights, Good Faith, Trust and Confidence, Contract Formation

1. Introduction

In modern employment relationships it is a common practice of employers to provide their employees with a company manual, work rules, an employee handbook, or employment policies.[1] The range of issues and matters that are potentially covered

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1 Muayad Hattab, *The Doctrine of Legitimate Expectation & Proportionality: A Public Law Principle Adopted into the Private Law of Employment*, 39 Liverpool L. Rev. 239 (2018).

by these documents include, *inter alia*, company rules and regulations regarding grievance and disciplinary procedures, job security, discrimination, harassment, 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, or they may be provided as a substitute to the employee's contract. The search of an appropriate approach to protect the legitimate expectations of both parties to the employment relationship is internationally acknowledged.

Against this backdrop, this article aims to search for an appropriate legal approach to ensure protection for the employee who has relied upon unilateral promises made by an employer in its formal statements, and yet protect the employer's business efficacy. The author will analyse the development of reliance theory by comparing the US and English employment law because they are models for other states and courts to adopt in order to ensure legal stability and coherence.

2. Bilateral Approach to Promises

The established position of the law in some US states is that discretionary promises made in employers' formal statements, such as handbooks, "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."[2] Valuable consideration would not be satisfied without the parties' mutual agreement being established.[3] This approach resembles the traditional way adopted by English courts where any offer phrased in 'aspirational'[4] or 'idealistic'[5] language does not create a binding obligation upon the employer.

In the state of Florida, the longstanding principle of mutual agreement and exchange was declared in the leading case of *Muller v Stromberg Carlson Corp*,[6] where the court held that the policy statements by the employer could not give rise to an enforceable contract unless the orthodox formation rules of bilateral contract (offer, acceptance, consideration, and intention to create legal relations) is satisfied.

2 Quaker Oats Co. v. Jewell, 818 So. 2d 574 (Fla. DCA 2002).

3 *Id. See also* Chatelier v. Robertson, 118 So.2d 241 (Fla. 2d DCA 1960).

4 National Coal Board v. National Union of Mineworkers [1986] IRLR 439 (Eng.); Kaur v MG Rover Group Ltd. [2004] EWCA (Civ) 1507 (Eng.).

5 Grant v South-West Trains Ltd. [1998] IRLR 188 (Eng.).

6 Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. 2d DCA 1983).

Similarly, the Kansas [Kansas] Supreme Court held, in *Johnson v National Beef Packing Co,*[7] that company manuals and policies unilaterally introduced by an employer were not enforceable as their terms were "not bargained for."[8] Also, the Supreme Court of Rhode Island held, in *D'Oliveira v. Rare Hospitality International*,[9] that a formal statement by the employer could not be enforceable without explicit mutual assent.

These holdings demonstrate the difficulty of applying the bilateral contract approach to employee handbooks or unilateral promises because the adoption of the bargain theory has led courts to conclude that an employee's reliance or "belief as to the legal import of an employer's policy or contract 'has no bearing' on the issue of interpretation of that policy or contract."[10] Thus, "finding policy statements in an employment manual relating to overtime pay did not constitute the terms of a contract of employment."[11] One must wonder if a court can reasonably justify its presumption that employers who issue a handbook containing polices and rights are merely intending to provide information or are only furnishing their employee with gratuitous promises without 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, an 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).[12]

To resolve the conflict between maintaining the traditional rules for forming a bilateral contract and the requirement for fairness and justice,[13] some courts began to consider discretionary promises in handbooks as a modification to the existing at-will-employment contract, or, following the traditional English trend,[14] adopted the

7 Johnson v. National Beef Packing Co., 220 Kan. 52, 54, 551 P.2d 779, 781 (1976).

8 Bryant v. Shands Technical Hospital, 479 So. 2d 165 (Fla. 1st DCA 1985).

9 D'Oliveira v. Rare Hospitality Int'l, Inc., 840 A.2d 538 (R.I. 2004).

10 Laguerre v. Palm Beach Newspapers, Inc., 20 So. 3d 392 (Fla. DCA 2009); *See also* Quaker Oats Co. v. Jewell, 818 So. 2d 574 (Fla. DCA 2002).

11 Bank of America, NA v. Crawford, Dist. Court, Case No. 2:12-cv-691-Ftm-99DNF. (Fla. 2013).

12 *See* Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Carlill v Carbolic Smoke Ball Co [1893] 1 QBD 256. For more details, *see* Joseph Chitty and H. G. Beale, Chitty on Contracts 2078-85 (6th ed., 2008).

13 *See*, *e.g.,* Falls v. Lawnwood Medical Center, 427 So. 2d 361 (Fla. 4th DCA 1983). Here, it was accepted that personnel policies, which stated termination is only for cause, were contractual and thus part of the employment contract.

14 Enforcement in English employment law has been traditionally considered under the test of 'aptness'; this is considered by reference to the parties' intentions and the incorporation of the provision to constitute a normative effect and form part

test of 'aptness.' In this regard, these courts held that discretionary promises that were appropriate for incorporation into the contract of employment could be binding on an employer.[15] For example, the Supreme Court of Kansas accepted in *Morriss v. Coleman Co.*,[16] that a provision in a handbook could be incorporated, implied, and bind the employer if objective intention and clear language is "ascertained from their written or oral negotiations, the usages of business, the situation and object of the parties, the nature of the employment, and all the circumstances surrounding the transaction."[17]

Conversely, English courts have increasingly departed from a bargain theory and the strict application of orthodox rules to contract formation towards a reliance theory.[18] This development has its support in some recent decisions where it has been determined that "all employees who might potentially benefit from the promise would be deemed to have accepted it"[19] merely by continuing to work. As will be considered below, most US states have moved from the bilateral model and acknowledged that discretionary promises should not be concerned with the question of mutuality of obligation or exchange of consent. Thus, according to one view, the mere performance of services is sufficient consideration to make an employee handbook part of an at-will contract.[20] 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."[21]

3. Unilateral Contract Approach to Handbooks

While the dichotomy between unilateral and bilateral analysis is not important when categorizing the employment-at-will contract,[22] the unilateral approach, by contrast,

of the contract of employment. The question of enforceable commitment should be determined objectively rather than by the subjective intention of the parties. *See* Autoclenz Ltd v Belcher and others [2011] 4 All ER 745.

15 Partylite Gifts, Inc. v. MacMillan, 895 F. Supp. 2d 1213 (Fla. 2012).

16 Morriss v. Coleman Co., 738 P.2d 841, 241 Kan. 501 (1987).

17 *Id.* at 513.

18 For details on reliance theory, *see generally* Gilmore Grant, The Death of Contract (1974).

19 Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394 184 [98].

20 Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Leikvold v. Valley View Comunity Hosp, 141 Ariz., 544, 546, 688 P.2d 170, 173 (1984).

21 Toussaint v. Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880, 408 Mich. 579, 408 Michigan 529 (1980).

22 *See* Johnson v. National Beef Packing Co., 220 Kan. 52, 54, 551 P.2d 779, 781 (1976); DeGiuseppe Joseph, '*The Effect of the Employment-At- Will Rule on Employee Rights to Job Security and Fringe Benefits*' 10 Fordham Urb. L. J. 1 (1981).

provides an appropriate and transparent legal analysis to the question of employment handbooks.[23] This is because, as illustrated above, the nature of discretionary promises suggest that one party is making the offer without negotiating or bargaining with the other party in order to receive a benefit; the employer is instead waiting for an act to be done by the employee, i.e. continuing to work. Additionally, the discussion below will illustrate that the unilateral contract analysis provides both a fair result and a coherent and developed legal approach, whilst also satisfying the traditional contract law principles. This provides more security to the employee and their reliance on the employer's promise; it also prevents the employer from treating their promises as illusory by relying on the tools of formation, notwithstanding their clear and unambiguous commitment.

Laws in many states in the US, such as California, Minnesota and Arizona, provide that where a unilateral promise is made by an employer to its employee, the focus is on the clear and unambiguous language of the promise since legal intention and valuable consideration is already presumed.[24] Also, the language of commitment in a unilateral contract is the key determining factor in creating a binding obligation. In this case, a statement which does not constitute an offer for a 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.[25] Thus, the unilateral approach considers the employer's objective commitment made to the employee as the essential ingredient of creating a binding obligation. An offer constituting a mere "optimistic hope of a long relationship"[26] or that an employer will be 'generally'[27] 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 requirements for an offer."[28] The language of the provisions in the handbook must therefore be "sufficiently clear and definite"[29] in order to create rights or benefits to the employee: "If contractual language is clear and explicit, it governs."[30]

This position appears to show a striking similarity to the recent English approach

23 Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112, 432 Mich. 438 (1989).

24 Asmus v Pacific Bell, 999 P. 2d 71-Cal: Supreme Court (2000).

25 *Id.*

26 Rowe v Montgomery Ward and Co, Inc., 437 Mich. 627 (1991) 640.

27 Coursolle v. EMC Insurance Group, Inc., No. A10-1036 (Minn. 2011).

28 Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

29 Bank of the West v. Superior Court, 2 Cal.4th 1254, 1264 (Cal.1992).

30 Forecast Homes, Inc. v. Steadfast Ins. Co., 181 Cal. App. 4th 1466, 1476 (Cal App. 4th Dist. 2010).

in *Attrill v Dresdner Kleinwort Ltd*,[31] in which the question of discretionary promises was analysed under the principle of unilateral contract formation. In seeking to identify contractually binding promises, *Attrill* appears, to a significant extent, to follow similar principles to the US unilateral approach, where creating binding obligations is examined by the objective commitment made by the employer, rather than identifying the exchange of promises and mutual intention of the parties. Equally, the requirement of an intention to create legal relations in employment relationships is generally presumed where the statements of the employer provide an objective commitment to employees. Furthermore, courts in some states[32] have been willing to find that objective commitments made by the employer can also be implied. 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."[33]

Furthermore, developments have been implemented in the state of Michigan where the courts, integrating the reliance theory approach instead of the exchange theory in employment relationships, have departed from the traditional contract law formation approach and adopted the principle of "legitimate expectation." 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."[34] Accordingly, the employer who makes a discretionary promise in a formal statement that is reasonably capable of creating a legitimate expectation to the employee "may not treat its promise as illusory."[35]

The Michigan State's approach resembles the recent development of the implied duty of mutual trust and confidence in English courts, which have held that a commitment unilaterally announced by the employer creating a legitimate expectation, could not be treated as illusory. Rather, employers who undermine their employee's legitimate expectation would be in breach of their duty of mutual trust

31 Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394 184 [98].

32 *See*, *e.g.*, in the state of California and Minnesota, Cleary v. U.S. Airlines, Inc., 111 Cal. App. 3d. 455-6 (1980); Pine River, 333 N.W.2d.

33 Caterpillar Inc. v. Williams, 1987 482 US 386 - Supreme Court (Cal. 1987).

34 *Id. See also* Pucci v. Nineteenth, Dist. Court, 565 F. Supp. 2d 792, 808 (E.D. Mich. 2008). The rules were also adopted by Alabama Supreme Court in Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987).

35 Toussaint v Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880, 408 Mich. 579, 408 Michigan 529, 619 (1980). *See also* Damrow v. Thumb Cooperative Terminal, Inc., Mich. 126 App 335, 337 N.W.2d 338. (Mich.1983); and Rood v. General Dynamics Corp., 507 N.W.2d 591, 444 Mich. 107 (1993).

and confidence.[36] It is argued that the English case of *French v Barclays Bank*[37] is an authority on this trend. In *French*, the fact that the promise was made in a manual short of exchange did not exclude the term from inferring entitlement and therefore create an enforceable obligation.[38]

Similarly, the Michigan Supreme Court in *Toussaint v Blue Cross and Blue Shield of Michigan*,[39] placed considerable importance on the fact that where an employer unilaterally provides his employee with provisions in the handbook, he then allows for the employee's legitimate expectation to arise and accordingly "had then created a situation 'instinct with an obligation.'"[40] This clearly indicates that where a commitment by the employer is made, all that is required to form an obligation is the employee's continuing to work. "Having announced the policy, presumably with a view to obtaining the benefit..., the employer may not treat its promise as illusory."[41] This also strikes a parallel with the English court decision in *Attrill,*[42] where it was accepted that continuing to work can furnish the requirement of consideration due to the employer obtaining a "practical benefit."

A further development of this approach in the US is found in the Michigan Supreme Court decision in *Bankey v Storer Broadcasting Co (In re Certified Question),*[43] where the court adopted the view that consideration can be found in the "practical benefit" that employers obtain from issuing handbook policies containing promises of benefits and rights for their employees.[44] This position has equally been reached in the development of consideration adopted by English courts in *French* and other cases, as discussed above. The importance of the approach adopted by the Michigan Supreme Court in *Bankey*[45] and the English court in *French* clearly shows that a unilateral promise contained in a formal statement can be binding without relying upon traditional tests of exchange or mutual assent. If a promise is capable of creating a legitimate expectation and thereafter relied upon by the employee, then such an

36 This is illustrated by the English courts in the case of *Attrill,* EWCA Civ 394; Hameed v Central Manchester University Hospitals NHS Foundation [2010] EWHC 2009; and IBM United Kingdom Holdings Ltd v Dalgleish. [2017] EWCA Civ 1212. *See also Hattab*, *supra* note 1.

37 French v Barclays Bank [1998] IRLR 646.

38 *Id*.

39 Toussaint, 292 N.W.2d.

40 *Id.* at 613.

41 *Id.* at 619.

42 Attrill v. Dresdner Kleinwort Ltd [2013] EWCA Civ 394 184 [98].

43 Bankey v. Storer Broadcasting Co (In re Certified Question), 443 N.W.2d 112, 432 Mich.438 (1989).

44 Hough Barry &Ann Spowart-Taylor, *Employment policies: a lesson from America*, 30 Common L. World Rev. 304 (2001).

45 Bankey, *supra* note 43.

expectation must not be ignored.[46]

Notwithstanding these benefits, the unilateral contract approach may face similar problems to that found in English law; namely, once a contractual right is created, an employer will be in breach if s/he unilaterally departs from it, even if the employer behaved rationally and reasonably. This may cause significant problems for employers since business circumstances are normally subject to many changes.[47]

4. Modification of Discretionary Promises

Under the general English contract law principle, a contract is binding once it is formed and created, regardless of whether it was created under a bilateral or unilateral contract approach.[48] Thus, English courts are hesitant to permit an implied term into a contract of employment that allows the unilateral variation of the contract without both parties' mutual agreement.[49] An employer attempting to withdraw or modify a discretionary binding promise, such as incremental pay increases,[50] discretionary bonuses,[51] or an interest-free bridging loan,[52] would be in breach of contract and the act could alternatively amount to a breach of the implied duty of mutual trust and confidence.[53] This approach has equally been adopted by some US states, such as Oregon, Arizona, and *Illinois, where the courts based their* legal analyses upon the general principles of contract law. Under this approach, a unilateral alteration or modification of a binding commitment, whether it was created under unilateral or bilateral rules of formation, is not permitted unless there is an exchange of consent and consideration. Support for this can be found in contract law, under the Second Restatement of Contracts,[54] which provides that an offer or cannot revoke a unilateral offer once an offeree has commenced performance.[55]

46 *See* Bradbury *v* British Broadcasting Corporation [2015] EWHC 1368 (Ch); IBM United Kingdom Holdings Ltd v Dalgleish [2017] EWCA Civ 1212; French v Barclays Bank [1998] IRLR 646.

47 Richard Pratt, *Comment, Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment At-Will Doctrine*, 139 U. Pa. L. Rev. 223 (1990).

48 Facilities Division v Hayes [2001] IRLR 81.

49 Wandsworth London Borough Council v D'Silva [1998] IRLR 193, ¶ 31.

50 Abrahall and others v Nottingham City Council and another [2018] EWCA Civ 796.

51 French v Barclays Bank [1998] IRLR 646.

52 *Id.*

53 Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394 184 [98].

54 Restatement (SECOND) of Contracts (1981), § 45.

55 Under U.S. common law of contract, the question is not straightforward. For details on this point, *see* Maurice Wormser,

Notwithstanding the above, the traditional approach adopted in some US and English courts, while appearing to follow a contractual analysis rooted in the traditional common law of contract, ignores an employer's business efficiency when business or market circumstances alter; employers have good and reasonable cause to modify or withdraw discretionary promises; or a business is facing serious risk if revocation is not permitted.[56] While English courts have generally declined to give a positive automatic or implied right for employers to unilaterally vary a binding commitment without an employee's consent,[57] such approach has not always been consistent when, for example, English courts are faced with a situation where orthodox formation principles would seriously undermine the legitimate interest of an employer's business[58] or cause a "disastrous consequence,"[59] nor has it been clear what the correct test courts must apply under these circumstances. As the US courts were also faced with this complexity, the issue has received much debate.[60]

English law has developed another trend through the development of the implied term of mutual trust and confidence which can be regarded as imposing greater constraints on the employer acting irrationally or disproportionately. To elaborate, an employer's modification or revocation of its unilateral promises must be conducted in a manner that is not arbitrary, capricious, or irrational.[61] Conversely, withdrawal from a legitimate expectation, or revoking it, can be a breach of the implied duty of trust and confidence when withdrawal is determined to be unjustified, i.e., disproportionate, and irrational.[62] This trend follows the principle of rationality, also known as the "Wednesbury test," following the English court's decision in *Associated Provincial Picture Houses v Wednesbury Corporation*.[63] In this decision, Lord Greene MR established the well-known formulation that a lawful decision made by a decision-maker could still be quashed by a court review if it was 'irrational.'[64]

The True Conception of *Unilateral Contracts,* 26 Yale L. J. 136-42 (1916).

56 Malone & Ors v British Airways plc [2011] IRLR 32.

57 *Id.*

58 *See*, *e.g*., Fisher v Dresdner bank [2009] IRLR 1035; Malone, *supra* note 56. Here, the English court acknowledged the difficulties of maintaining a fair balance between protecting the dignity and expectations of employees while also protecting business efficiency.

59 Malone, *supra* note 56, ¶ 62.

60 Bryce Yoder, *Note: How Reasonable Is 'Reasonable'? The Search for a Satisfactory Approach to Employment Handbooks*,' 57 Duke L.J. 1517 (2008); K.M. Apps, *Good Faith Performance in Employment Contracts: A 'Comparative Conversation' between the U.S. and England,* 8 U. Pa. J. Lab. & Emp. L. 883 (2006).

61 Clark v Nomura [2000] IRLR 766. *See also* French v Barclays Bank [1998] IRLR 646.

62 *Id.*

63 Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.

64 *Id*. 234.

However, further developments and different applications of the Wednesbury test have been shown, in practice, to be more contemporary and suitable, where the test is not restricted to a single standard but is instead applied flexibly according to the particular context of the individual case.[65] The link with Wednesbury has been expressly integrated and converged with the implied duty of mutual trust and confidence that is rooted in the private English law of employment. A clearer example of this trend can be found in the case of *Clark v Nomura,*[66] where the court reached its conclusion, based on rationality, that the employer's decision to award a nil bonus 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. This decision provides for the argument that discretionary promises made by an employer in a formal statement ought to be governed by irrationality principles. Any irrational or disproportionate decision to withdraw would then be in breach of the implied duty of mutual trust and confidence.[67]

In a leading English case of *Malik v BCCI,*[68] Lord Steyn came close to suggesting that the implied duty should operate under the test of rationality when he asserted that: "[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."[69] Hence, extra care must be given to the test that the courts apply when considering what constitutes a legitimate aim for business needs that can override the interest of an employee, so that the duty of trust and confidence is maintained. Some commitments may, naturally, entail a greater deference than others, so that 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 less pressing needs. This means that an employer cannot ignore its discretionary promises granting legitimate expectations unless the employer has a legitimate business need and its response is proportional to that need.[70]

65 This new position was confirmed by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service (GCHQ case) [1985] AC 374, were he stated that irrationality can "stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review," at 411.

66 *Supra* note 61.

67 The operation of the implied duty, with regard to *Wednesbury's* unreasonableness, can similarly be seen in Keen v Commerzbank AG [2006] EWCA Civ 1536*;* and Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] IRLR 715.

68 Malik v BCCI [1998] AC 20. For details on the role of implied term of trust and confidence, *see* Douglas Brodie, *The Heart of the Matter: Mutual Trust and Confidence*, 25 Indus. L. J. 121-36 (1996).

69 Malik, *supra* note 68, per Lord Steyn at 65.

70 Other jurisdictions appear to already adopt this principle (explicitly, or implicitly) in the private employment law,

Employers not acting proportionally or rationally, it is submitted, will be in breach of the implied term of mutual trust and confidence. Recent English authorities regarding employment relationships provide examples of similar situations where there is a need for legitimate expectations to be overridden due to pressing business needs and where the decision to override has been deemed to be proportional.[71] For example, the employer's urgency to suspend an NHS doctor,[72] protecting patients' safety,[73] and avoiding serious or disastrous consequences,[74] are just some situations where it can be regarded as a legitimate business aim. Conversely, an employer's business aim of increasing profit or reducing cost did not constitute an overriding interest to change the substantive benefit of the bridging loan the employee legitimately relied upon.[75]

In Michigan and other US states that have followed in its footsteps,[76] it has been accepted that a promise conferring a legitimate expectation to the employee must be protected from any unlawful withdrawal by the employer. These states have also permitted an implied right for the employer to override its commitment upon reasonable notice.[77] Furthermore, the Michigan Supreme Court in *Bankey* held that the employer's unilateral binding commitment can "only be revocable for legitimate business reasons."[78] It is argued that the assertion regarding "legitimate business reasons" resembles the English approach where justified withdrawal is permitted by weighing the employer's interests against any legitimate business need of the employer.[79]

The legal approach adopted by the Michigan Supreme Court in *Bankey* and its successors, provides for the position that lawful modification of unilateral promises made in handbooks by employers are subject to: (a) there being legitimate business reasons for such modifications; and (b) the employer not acting in any way to

e.g., Canada. *See* Alon-Shenker Pnina & Guy Davidov, *Applying the Principle of Proportionality in Employment and Labour Law Contexts,* 59 McGill L. J. 375-423 (2013).

71 *See*, *e.g.*, Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32*;* Allonby v Accrington and Rossendale College [2001] EWCA Civ 529; Bankey v. Storer Broadcasting Co (In re Certified Question), 443 N.W.2d 112, 432 Mich. 438 (1989). *See also* the below example provided in *infra* note 70-74.

72 Hameed v Central Manchester University Hospitals NHS Foundation [2010] EWHC 2009; IBM United Kingdom Holdings Ltd v Dalgleish. [2017] EWCA Civ 1212.

73 *Id.*

74 Malone & Ors v British Airways plc [2011] IRLR 32.

75 French v Barclays Bank [1998] IRLR 646.

76 *E.g.*, Gaglidari v. Denny's Restaurants, Inc., 815 P.2d 1362, 117 Wash. 2d 426 (1991); Chipman v. Northwest Healthcare Corp., 317 P.3d 182, 2014 M.T. 15, 373 Mont. 360 (2014).

77 Bankey v. Storer Broadcasting Co (In re Certified Question), 443 N.W.2d 112, 432 Mich. 438 (1989).

78 *Id.* at 452.

79 Malone, *supra* note 74.

undermine the duty of good faith.[80] This assertion mirrors the argument adopted by English courts, as explored above, where the courts took the view that the lawfulness of the employer's actions to revoke or override its discretionary promises depended upon the nature and gravity of both the employee's reliance on the commitment and the employer's legitimate aim and proportionate action.[81]

As a result, it is argued that modern development in the US employment law support the trend that an employer's decision to override an employee's legitimate expectation, irrationally or disproportionately, may constitute a breach of the employer's duty of good faith. In English employment law, this model has been achieved through the development of the implied duty of trust and confidence. To conclude, an employer's lawful modification or withdrawal from its discretionary promises depends upon how the employer can legitimately justify its departure. In English law, an employer would be in breach of the implied duty of trust and confidence if a decision to withdraw from discretionary promises was irrational or disproportionate. In the US law, meanwhile, it is argued that an employer's irrational or disproportionate withdrawal from discretionary promises could be regarded as a breach of the duty of good faith.[82]

5. Conclusion

This article has examined a cohesive legal approach to promises, representations and undertakings unilaterally or 'discretionarily' introduced by the employer to its employees in the ostensibly non-contractual statements that exist alongside the formal contract of employment. It has been noted that English and the US courts that have responded to the unique dynamics of employment relations, have accepted that promises made under this relationship ought to be viewed differently to those made under commercial contracts.[83] This development has led to more recognition of the reliance theory and, consequently, courts in England and the US have increasingly enforced discretionary promises under the unilateral contract approach.

80 *See e.g.*, Woolley v. Hoffmann-La Roche 491 A.2d 1257 (N.J. 1985); Baldwin v. Sisters of Providence in Wash., Inc.,112 Wn.2d 127, 139, 769 P.2d 298 (1989). *See also* Katherine Apps, *Good Faith Performance in Employment Contracts: A Comparative Conversation between the US and England*, 8 U. Pa. J. Lab. & Emp. L. 883-935 (2005).

81 Hattab, *supra* note 1.

82 Clark v Nomura [2000] IRLR 766; Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394 184 [98]; French v Barclays Bank [1998] IRLR 646.

83 Attrill, *supra* note *82;* and Malik v BCCI, [1998] AC 20.

Despite the importance of this development, the enforcement of a discretionary promise may nonetheless result in an unfair result, especially if the employer needs to modify or revoke its discretionary promises in order to respond to its legitimate business aims, for example, due to urgency or to avoid harsh and disastrous consequences. Reflecting on recent decisions regarding the question of the employer's right to modify or revoke its discretionary promises in both English and the US jurisdictions, it has been shown that there have been different approaches and analytical arguments in the issue.

The line of supporting cases considered above establish the view that an employer's modification or revocation of its unilateral promises should be conducted in a manner that is not irrational. Conversely, withdrawal from a legitimate expectation, or revoking it, can be a breach of the implied duty of trust and confidence, or that of good faith, when withdrawal is determined to be unjustified, i.e., disproportionate, and irrational. This development is open to develop further in order to provide a coherent approach to the issue of discretionary promises where both parties' interests and expectations are appropriately balanced.

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