1. The judges and the values of the employment contract

INTRODUCTION

In determining how the employment contract might develop, it is important to be able to identify the values that are relevant and act as drivers and justification for change. The case law reveals what is in the mind of the judges, and the significant number of changes to the law of the contract in recent decades give us a better understanding of the contemporary judicial position. Oliver has highlighted ‘dignity, autonomy, respect, status or security’ as being key values in both public and private law.¹ I have argued before that her analysis can be seen as highly pertinent given present-day judicial attitudes to the employment relationship.² I would further argue that ongoing developments provide continued support for this assertion. The obligation of mutual trust and confidence has been, and continues to be, concerned with questions of dignity and respect. The open-textured construction of the obligation allows it to continue to extend and embrace a wider range of workplace issues. In *Rawlinson v Brightside* the employer misled the employee about the reason for termination of his employment, which was, in truth, about performance.³ To ‘soften the blow’ for the employee, who the employer wanted to work through his notice period to ensure a smooth handover of work, the employer did not tell him the real reason for its decision but told him there was to be a re-organisation

¹ D. Oliver, *Common Values and the Public–Private Divide* (London: Butterworths, 1999).

² D. Brodie, ‘Mutual Trust and the Values of the Employment Contract’ (2001) 30 ILJ 84.

³ *Rawlinson v Brightside* [2018] IRLR 180. *Johnson v Unisys* [2003] 1 AC 518 was distinguished: ‘This was a case where the complaint was in respect of financial loss suffered as a result of the Respondent’s breach of the implied term that preceded and stood apart from the dismissal; indeed, it arose at a time when the employment relationship was intended to continue.’

of his work, which would be carried out by an external service provider. Such behaviour is disrespectful and breaches the implied obligation:

In all but the most unusual of cases, the implied term must import an obligation not to deliberately mislead – after all, how can there be trust and confidence between employer and employee if one party has positively determined to mislead the other? That does not mean an employer is necessarily placed under some broader obligation to volunteer information, but where a choice has been made to do so, the implied term must require that it is done in good faith. And, even if I allow that there may be particular cases in which the operation of the implied term would permit some element of deceit (the white lie that serves some more benign purpose), I cannot see how that was so in this instance.⁴

This conclusion mandates respect for the employee but also requires greater transparency in decision-making, which is very much an expectation of the modern workplace. Over 10 years ago, the Court of Appeal indicated that:

an employer ought to supply an employee with an explanation of the reasons for the exercise of a discretion in respect of additional pay: Unless there is a good reason to the contrary the explanation ought to be given by the person(s) responsible for the decision affecting additional pay.⁵

It is also worth reminding ourselves that mutual trust may offer protection in situations where other avenues may place technical restrictions in the way. The claimant in *Rawlinson* was not required, for example, to meet the requirements of an action for negligent misrepresentation.

Orders made by the courts continue to protect the worker's status as an employee. In *Harrison v Barking* the claimant, who had been suspended from work, obtained an interim mandatory injunction, permitting her to perform autonomously the majority of her normal duties.⁶ An order of this sort is positive in substance and requires, in effect, reinstatement in the role.⁷ Respect for the employee's dignity is also promoted by the weight given to natural justice. In *Alexander-Wight v Barts NHS Trust* the court granted an interim injunction

⁴ Ibid at para 38.

⁵ *Keen v Commerzbank* [2007] ICR 623, para 44.

⁶ *Harrison v Barking* [2019] EWHC 3507. As is common in cases of this sort, the claimant gave an undertaking not to perform certain aspects of the job.

⁷ It was also submitted at para 44 (ibid) 'that resuming her normal duties will enable her to regain her health. He further submitted that being deprived of the opportunity to practice her profession is personally upsetting and is likely to damage the Claimant professionally. He contended that these adverse consequences are not capable of being compensated by damages. Ms Slark did not attempt to persuade the Court that damages would be an adequate remedy.'

to prevent an NHS trust from continuing to suspend a midwife.⁸ The decision to suspend had been the outcome of a process that had gone ‘wholly off the rails’:

It was wholly unfair...for the defendant...to have conducted itself in the way in which the meeting of 16 October was conducted, when the claimant was invited to a meeting without being given any real indication of what the purpose of the meeting was for, where it might lead, who was to be present, and without being given an opportunity to consider allegations in advance of misconduct, or to be accompanied or represented.⁹

Concern with process also extends to situations where someone other than the employer such as an accrediting body is involved. In *Rashid v Oil Companies International* the question was whether the disciplinary process ending in removal of the claimant’s accreditation was conducted unfairly and in breach of the rules of natural justice such that the defendant was in breach of contract.¹⁰ It was held that a breach had occurred given that the principles of fairness and natural justice had not been observed:

when it comes to the question of sanction, a court is very reluctant to interfere with the discretion of a panel comprised of men from within the industry who understand what is required of inspectors, I am not convinced that deference of the same kind is appropriate in determining whether the panel has complied with the rules of natural justice as previously defined.¹¹

Job security continues to be enhanced through the procedural protection required by the courts and judicial concern with procedural fairness is more and more evident. In *SMO v Hywel*, the claimant’s case was that the commissioning and continuance of an investigation into working relationships constituted a breach of the contract of employment; an interim injunction was granted.¹² The decisions discussed in Chapter 7 offer further examples. There continues, though, to be a considerable degree of caution where the effect of an order would be to require reinstatement. As recently as 1971, in *Malloch v Aberdeen Corporation*, Lord Reid said that:

At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid.

⁸ [2017] EWHC 3870. *Jahangiri v St George’s University Hospitals* [2018] EWHC 2278 provides a further example.

⁹ Ibid at para 26.

¹⁰ [2019] EWHC 2239.

¹¹ Ibid at para 81.

¹² *SMO v Hywel* [2019] EWHC 1973.

The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.¹³

This was undoubtedly the orthodox view at that time, but the law of the employment contract has moved on very considerably since then.

THE VALUES OF THE PARTIES

The case law discussed in the preceding section confirms that the law of the employment contract continues to be more protective of the employee's position than has been the case historically. The extent to which a consensus exists around the values identified as underpinning those developments is an entirely different matter. In particular, it is not axiomatic that they reflect the values of the parties. At this juncture, it is worth reflecting on the fact that relational contract scholars emphasise the importance of norms generated by the parties to a relationship. Those norms are said to reflect the values shared by the parties and their existence is inextricably linked to the quality and successful functioning of the parties' relationship. Relational contract theory places central importance on the values the parties to a relationship profess to hold and the extent to which they adhere to them in practice:

within any social grouping, there exist views and practices concerning standards of conduct in contract relations that are both widely shared and generally adhered to. These views and practices express in a day-to-day and practical sense the manner in which contracts are or are not to be negotiated and performed.¹⁴

A key element of relational theory is the emphasis placed on the linkage between how people actually behave in practice and how they ought to.

If we assume for the moment that those norms can be identified, how might they and should they be given legal effect? For at least some relational contract scholars this was not a particular concern, as they saw their role as one of explaining why conventional legal accounts were incomplete. This work takes a very different stance and one of its sub-themes is to show the extent to which contractual doctrine is consistent with relational contract theory. Chapter 6 looks very closely at this issue in the context of variation of contract. The work is also concerned with the ways in which contract law might develop in line with relational contract theory. One view might be that contract law should serve to promote the 'internal' norms espoused by the parties and allow for translation into legal obligations. This would have the benefit of ensuring that

¹³ 1971 SC (HL) 85.

¹⁴ B. J. Reiter, 'Good Faith in Contracts' (1983) 17 Valparaiso LR 705, 706.

the contract expressed the actual intentions of the parties. Legal effect would then be given to what the parties actually wanted and not what the courts say they should want.

Any consideration of how and when the parties' view of the 'ought' might be placed on a legal footing gives rise to a number of difficulties. One challenge for contract law would be finding a way to respond to the plurality of values across a range of different types of contract. Forming or modifying doctrine on the basis of the values (actual or perceived) of the parties may look very different depending on the nature of the contract under consideration. The parties to a commercial contract are likely to have a very particular and distinctive set of expectations compared with those in an employment relationship. There is room for scepticism as to how homogeneous a category as wide as commercial contracts actually is. There is also the additional issue of identifying shared values in an unequal relationship.¹⁵

It would be a mistake to claim that the existence of broad equality of bargaining power renders the matter straightforward. It can be argued that the creation of the Uniform Commercial Code is an instance of the application of relational principles as it directs courts to decide disputes between merchants by looking to usages of trade and other commercial standards and practices.¹⁶ The extent to which it achieves this is a separate question. There are, though, a limited number of instruments of this sort and in the absence of such a codification the position is even more challenging. The extent to which, even in a specific domain such as commerce, a homogenous outlook can be found is clearly contestable. Such thinking prompted Lambert JA to observe that 'Canadian cases are more relevant than those from other lands where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were, in some respects, rougher and, in other respects, more fastidious.'¹⁷

The translation question is far from straightforward in the employment context. Much of the thinking of key scholars has taken place against a backdrop of commercial contracting. The parties may see their contract as constituting their own 'private legal system' and be reluctant to countenance judicial activism: 'It is all too easy to assume that the non-use of contract law is explained by the divergence between legal doctrine...and commercial prac-

¹⁵ 122 of the Uniform Commercial Code creates a presumption that usages that are commercially accepted are reasonable. Such a presumption may be inappropriate where there is a disparity in bargaining power.

¹⁶ L. Bernstein, 'Trade Usage in the Courts: The flawed conceptual and evidentiary basis of Article Two's incorporation strategy' (Chicago: University of Chicago Law School, 2014).

¹⁷ *Harry v Kreutziger* (1978) 95 DLR (3d) 231.

tice...'¹⁸ This may be perfectly acceptable in the commercial domain. Looking to the parties as a source of norms generates a number of difficulties in the employment context given disparity in bargaining power and judicial protection of the weaker party may be essential. This is a hugely important factor in determining what the law ought to be. The way in which the relationship is operated may be very much an expression of the employer's will rather than providing any form of indicator of shared values. In the commercial world bargaining disparity is thought to be much less of an issue as, for instance, 'the availability of alternative arrangements...tends to bring about evenness in the division of exchange-surplus.'¹⁹ The vulnerability of the employee brings very different considerations into play. Employers dominate and control the relationship in all sorts of ways. The practice of the parties may simply reflect the employer's wishes and not approach anything in the realm of shared values. Rather than seeking to set out the bargain in full, the employer may seek to exclude some dimensions of employment relationship from the legal framework so that regulation takes place outside the eyes of the law. It may be very appealing, for example, to operate elements of the reward package on a basis that is purely discretionary.

It is the case that collective bargains are not directly legally enforceable between the collective parties in the UK.²⁰ This indicates a belief that legal mechanisms are not the appropriate way to resolve disputes. It should be said that, viewed historically, this position is controversial.²¹ Prior to the decision in *Ford Motor Co v AUEFW*, the authorities, such as they were, tended to assume that collective agreements were directly enforceable in law.²² It has, however, acquired the status of orthodoxy. The legal concept of 'intention to enter legal relations' was deployed to deny collective agreements legal effect. This was thought to be consistent with the practice of industrial relations (e.g. styles of bargaining such as dynamic) and the enactment of a statutory presumption to this effect could be said to be reflective of a relational approach. What does it tell us about the role of law where the individual relationship is concerned? The element of collective negotiation might be thought to compensate for the lack of bargaining power held by an individual worker. Both the procedural and substantive outcomes contained in any collective agreement would be

¹⁸ J. Morgan, *Contract Law Minimalism* (Cambridge: Cambridge University Press, 2013). And see L. Bernstein, 'Private Commercial Law in the Cotton Industry' (2001) 99 Mich LR 1724.

¹⁹ I. R. Macneil, *The New Social Contract* (New Haven, CT: Yale University Press, 1980), 64.

²⁰ A statutory presumption to this effect is contained in s.179 TULRCA 1992.

²¹ J. L. Gayler, *Industrial Law* (London, 1955), 173–4.

²² [1969] 2 QB 303.

unlikely to be achievable through individual negotiation. The common law accords normative effect to those outcomes through the process of incorporation, though the judiciary tends to attract criticism for a restrictive approach.²³ It is, though, the case that a better sense of shared values might be gained through this collective prism notwithstanding the statutory presumption. Relational contracting would point towards a more inclusive approach to the question of incorporation.

EXTERNAL NORMS

In his writings, Macneil acknowledges the importance of external norms to the parties' relationship and takes a wide view of what is encompassed: 'the positive law of the sovereign, ...from many other sources [including] private law, such as that imposed on...businesses by trade associations.'²⁴ For the avoidance of doubt, judicial decisions would also be included. It is probably reasonable to conclude that this dimension of his theory is not as fully elaborated as might have been. Nevertheless, the role allocated to external norms is seen by him as hugely important, as not only are they a source of obligations, but they have the capacity on occasion to override the norms generated by the parties themselves. The notion of 'trumping' is helpful given the challenges in identifying internal values in the employment context which are shared. This is particularly so in relationships which are not governed by or connected to collective negotiation. It should be said that the internal and external norms of a relationship may be in conflict. This would be far from surprising in the context of employment should an alleged internal norm be derived from a practice initiated and maintained by the employer. It is also the case, though, that the existence of genuine consensus between employee and employer may still lead to a lack of acceptability in judicial eyes. A social practice may offend by, for example, being incompatible with the values underpinning equality legislation. Recourse to such legislation as a source of inspiration for judicial norms may undermine the validity of contractual norms because the latter do not comply with fundamental values. Where employment is concerned, the stance adopted by both the courts and the legislature is crucial if the obligations placed on the parties are to be brought into greater equilibrium. The requirement of good faith and fair dealing in contracts can be depicted as reflecting the imposition of external social norms in contractual relation-

²³ See G. Anderson et al., *The Common Law Employment Relationship* (Cheltenham: Edward Elgar, 2017), Ch 5.

²⁴ I. Macneil, *The New Social Contract*, n 19 above, 37.

ships.²⁵ Through the medium of mutual trust and confidence, good faith can be seen as the central norm in the modern contract of employment.²⁶ By way of implication of terms and construction of the bargain, the judges are able to set out the appropriate content of the employment relationship. The norms of the employment relationship are, in reality, driven by the judicial vision of how the relationship should be conducted. The long-standing centrality of mutual trust and confidence may even be intensified through the growing significance of good faith throughout the law of contract as a whole.²⁷

The discussion indicates that the challenges around the identification of internal norms in the employment context mean that we must look elsewhere when it comes to articulating and embedding key values. The notion of external norms is of much greater interest. However, it is likely that this will continue to correspond to the values articulated by the judges through devices such as the implication of terms. The wider range of external norms that a theoretical perspective would point to is unlikely to be particularly relevant. Having said that, through the conduit of judicial intervention, values expressed by the legislature may be incorporated. A focus on judicial values does not negate the need to be sensitive to evolution of view and the flexibility of terms such as mutual trust will be put to the test in that regard.

Over 20 years ago, Hepple pointed out that the term of mutual trust and confidence might serve as a conduit to allow human rights to be enforceable at the level of the employment contract.²⁸ Such an outcome would be an acknowledgement of growing societal expectations.²⁹ It would also be very much consistent with relational contract theory, which would classify the ECHR as an external norm. As we shall see in the next section, the US courts give force to such fundamental values by embedding them on the basis of public policy. It must be said that so far at least the courts in the UK have not seen fit to adopt Hepple's suggestion. Judicial caution in advancing a human rights agenda through the medium of the individual employment relationship is also to be found where the law of unfair dismissal is concerned.³⁰ The position may

²⁵ (1985) 73 Cal LR 1292.

²⁶ D. Brodie, 'The Heart of the Matter: Mutual trust and confidence' (1996) 25 ILJ 121.

²⁷ It is also not surprising to find that, in systems where collective agreements may be the subject of litigation, any discretion conferred on the employer is similarly constrained by requirements of good faith: *Bell Canada v Unifor, Local 34-0* (2016) CANLII 11573.

²⁸ B. Hepple, 'Human Rights and Employment Law' (1998) 19 *Amicus Curiae* 19.

²⁹ J. Atkinson, 'Implied Terms and Human Rights in the Employment Contract' (2019) 48 ILJ 515.

³⁰ P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 ILJ 504 at 504, argues that 'there are several major obstacles to the vindication of a worker's human rights through unfair dismissal law'.

change in the future, though the cause of incorporation might benefit from the creation of a more bespoke implied term in law. Atkinson has called on the courts to imply 'a new human rights term into contracts of employment as a default rule'.³¹

EMBEDDING PUBLIC POLICY

A comparative excursus suggests that the position adopted by the courts in the UK very much errs on the side of caution when it comes to aligning the content of the contract to the demands of public policy. Courts in other jurisdictions may well be less inhibited and positions such as those advocated by Hepple would have a far greater chance of flourishing elsewhere. The US courts, for instance, accept that norms derived from public policy may well attract a strong degree of consensus and that it is both appropriate and sensible to embody them in law. There is extensive treatment of this point where termination of contract is in issue and the employment-at-will doctrine is under discussion. The doctrine is hugely supportive of managerial prerogative but is held subject to exception where its unconstrained operation would otherwise undermine the aims of the legislature: '[T]he employment-at-will doctrine was not intended to serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity.'³² More generally, it is impermissible to dismiss an employee because they have refused to contravene a requirement imposed by statute.³³ In *Mitchem v Counts* the Supreme Court of Virginia upheld the claim of an employee whose employment had been terminated for refusing to submit to her supervisor's sexual advances on the ground that her termination violated the public policies expressed in criminal legislation.³⁴ The plaintiff in *Mitchem* was found to be within the class of persons the statutes were designed to protect. Claims of this sort may reflect and further core societal values which are as applicable in the employment context as elsewhere. It cannot be assumed that any individual employee or employer does in fact subscribe, but the judicial approach is justified because it is reasonable to conclude that they should.

One judicial technique which is used on occasion to indicate that key social norms are at stake is to regulate the position through the law of tort, and some courts will express what they see as appropriate standards through

³¹ Atkinson, n 29 above, 547.

³² *Anderson v ITT Indus. Corp.*, 92 F. Supp. 2d. 516, 522 (E.D. Va. 2000).

³³ *Peterman v International Brotherhood* (1959) 174. Cal. App. 2d 184.

³⁴ *Mitchem v Counts* 523 S.E. 2d 246, 252.

that medium.³⁵ By so doing, it is made absolutely clear that the norms do not arise from the parties' agreement but reflect broader community standards. The US decision in *Tameny v Atlantic* provides a clear example of this technique.³⁶ Porter points out that the most frequently used exception to the employment-at-will presumption³⁷ is when an employee sues for wrongful discharge under tort law, alleging that the termination violated public policy.³⁸ In some states there may also be consequences in terms of remedies, as basing an action in tort may be more favourable to the claimant.³⁹ The importance of the norm in question is thereby expressed in terms of both primary and secondary obligations. It is also striking just how little attention is paid, in some decisions at least, to doctrinal considerations. Instead, the focus is very much on ensuring that an award of damages gives effect to the underlying policy considerations: 'the law of torts is concerned chiefly with public policy goals and achieving a desirable social climate.'⁴⁰ Damages in tort are made available given that the relationship is inherently unequal and a conventional award of damages would be inadequate.⁴¹ The key, though, is that there is a public interest in ensuring

³⁵ S. Chutorian, 'Tort Remedies for Breach of Contract: The expansion of tortious breach of the implied covenant of good faith and fair dealing into the commercial realm' (1986) 86 Colum L Rev 377, points out at 377 that 'The imposition of tort liability enables courts to award damages far in excess of those available under traditional contract law, including damages for all proximately caused injury and punitive damages.' In *Tameny v Atlantic* 27 Cal. 3d 167, it was said that 'an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied "promises..." but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action.'

³⁶ *Tameny*, n 35 above.

³⁷ N. B. Porter, 'The Perfect Compromise: Bridging the gap between at-will employment and just cause' (2008/9) 87 Neb L R 62, 68.

³⁸ Porter, n 37 above, notes at 68 that: 'These causes of action vary widely by state, but there are three primary protections created by the public policy exceptions. First, courts have protected an employee's right against termination if he refuses to break the law. Second, courts have carved out an exception when an employee is performing a public obligation, such as "performing jury duty, attending depositions, honoring subpoenas, and engaging in similar public obligations." Finally, an employee may be protected from termination when she is exercising a legal right. This exception includes "filing workers compensation claims, suing employers, engaging in union or political activities, protesting unsafe working conditions [and] refusing to take a polygraph test."'

³⁹ H. A. Miller and R. W. Estes, 'Recent Judicial Limitations on the Right to Discharge: A California trilogy' (1982/3) 16 UC Davis L Rev 65.

⁴⁰ *Wallis v Superior* 160 Cal. App. 3d 1109.

⁴¹ *Ibid.*

that the employer's behaviour is not at odds with public policy. In *Foley v Interactive Data Corp* the Californian Supreme Court explained the position in the following terms:

the employer's right to discharge an 'at will' employee is still subject to limits imposed by public policy, since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal. In *Tameny*, we explained that the cause of action was not dependent on an express or implied promise in the employment contract, 'but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes'.⁴²

The approach taken in the decisions discussed above varies a great deal from that taken in the UK. At the same time, I would be surprised if there was any less respect, on the part of judges in the UK, for the values at stake in those decisions. Differences between the jurisdictions lie much more in the realm of the appropriate means of enforcement and it is the case that the constitutional matrix is not the same. Courts in the UK are concerned to guard against exploitation, but equally are mindful of the tendentious nature of that task and that they should not usurp the role of the legislature. Whistleblowing is an area that is subject to regulation through statute in the UK, and the extent to which the common law would provide additional support is open to doubt. The courts in the US are more likely to develop the common law so that it provides additional support to a legislative measure.⁴³ It must be doubted whether judges in the UK will be as willing as their US colleagues to further public policy, but that is less about judicial bravery and more about the constitutional proprieties.

PROCEDURAL JUSTICE⁴⁴

Any invocation of external norms is likely to confirm the importance of procedural justice which has, at the hands of the judges, been assuming much greater importance in the law of the employment contract.⁴⁵ Courts, across a wide range of jurisdictions, are concerned to impose requirements of fair

⁴² 47 Cal. 3d 654.

⁴³ See the discussion in Chapter 12.

⁴⁴ Legal values may well correspond to more widely based community standards. N. Brand, *Discipline and Discharge in Arbitration* (Chicago: Bloomberg BNA, 1998), 46, observes that 'The requirement that no one shall be found guilty and sentenced without a hearing and opportunity to defend is drawn from the law, but its basis is common fairness.'

⁴⁵ And see the discussion in Chapter 7.

process on employers.⁴⁶ The focus on procedural justice is attractive for a variety of reasons. The employee's position is improved at a time when they are most vulnerable. At the same time, the employer's prerogative is infringed to a limited extent, and judicial concern that their intervention is inappropriate is thereby diminished. The judiciary are, in a variety of contexts such as judicial review, accustomed to imposing controls of this sort and such familiarity means that they tend to act with a measure of assurance. The requirements imposed by the courts may look little different from those that would be demanded by the legislature had they elected to intervene. The Canadian case of *Reininger v Unique Personnel Canada Inc.* provides a good example of the extent of detailed requirements that may be imposed at common law.⁴⁷ The decision dealt with suspension and found that the onus was on the employer to demonstrate to the court, on a civil standard of proof, that a reasonably serious and immediate risk to the employer's legitimate interests exists before suspension could take place.⁴⁸

It seems likely that the importance of procedural justice is also recognised by the parties. The ACAS Code of Practice on Disciplinary and Grievance Procedures, for example, emphasises the importance of fair procedure.⁴⁹ The creation of an ACAS code reflects a tripartite approach. The position arrived at through collective bargaining again allows the conclusion that the values are genuinely shared. A comparative excursus supports that conclusion. Good faith provisions in collective bargains in North America may limit the power of dismissal, and it is clear that procedural standards are fundamental. Arbitration cases in the US stress the significance of 'industrial due process'.⁵⁰ Notions of

⁴⁶ See D. Brodie, 'The Dynamics of Common Law Evolution' (2016) 32 IJCLIR 45.

⁴⁷ (2002) 21 CCEL (3d) 278 (Ont. SCJ) and applied by the Supreme Court in *Potter v New Brunswick* [2015] 1 SCR 500.

⁴⁸ In *Reininger*, *ibid* at 91, the court went to say that 'The employer must establish that the nature of the charge is such as to be potentially harmful to the employer's reputation or product, or that it will render the employee unable properly to perform his duties, or that it will have a harmful effect on its employees or customers. 2) The employer must show that it made a genuine attempt to assess the risk of continuing employment, including making its own investigation or inquiry... 3) The employer must also show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position. 4) There is a continuing onus on the employer during a period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facts or circumstances that may come to its attention.'

⁴⁹ Code of Practice 1 (2015).

⁵⁰ N. Brand, *Discipline and Discharge in Arbitration* (Chicago: Bloomberg BNA, 1998), 29.

natural justice permeate industrial justice and not just the common law. The idea that you should know the charges against you and have the opportunity to defend is fundamental. Again, the employer is expected to proceed on the basis of a fair investigation: 'There is an inherent unfairness in discharging employees first, then determining whether they deserve it.'⁵¹ Consistency of treatment is also important.⁵² Whilst the disciplinary process will often involve the exercise of the employer's prerogative, the employer will be expected to behave in a manner that is not unreasonable, arbitrary, capricious or discriminatory.⁵³ It is also worth noting that in *Reininger* arbitral jurisprudence was also persuasive.⁵⁴

CONCLUSIONS

It is perfectly possible and indeed sensible to hold the position that categorisation of an employment contract as relational should not mean that all aspects of relational contractual scholarship are equally relevant or appropriate. It is my contention that drawing upon the way that the employment relationship is conducted as a means of identifying core values is unlikely to be fruitful. The element of inequality of bargaining power renders the search for shared values impossible; relational contract theory is not helpful in this context. It is worth noting that the various legal tests that lead to conduct forming the basis of an obligation in law tend to have safeguards built in. The officious bystander test, for example, prevents implication unless insertion of the mooted term would be obvious. A course of dealing will not become binding unless there has been consistency in previous dealings.⁵⁵ The employment contract is dependent upon judicial shaping to ensure that the parties subscribe to the values that they ought to hold. The judges are increasingly aware of and concerned by the consequences of an employer's capacity to determine the terms of the bargain. Endowing the employer's practices with legal effect is unlikely to be made easier.

The foregoing does not mean that judicial intervention will be without controversy. Employees and their representatives have a deep-seated suspicion of the common law, and for very good reason. It may be said, though, that the case law referred to above is probably unlikely to be viewed as antithetical to employees' interests. The nub of any criticism is more likely to be directed to

⁵¹ Ibid at 40.

⁵² Ibid at 32.

⁵³ Ibid at 37.

⁵⁴ *Re Ontario Jockey Club and Mutuel Employees' Association, Service Employees' International Union, Local 528* (1977) 17 LAC (2d) 176 (Ont.).

⁵⁵ *McCutcheon v MacBrayne* [1964] 1 WLR 25.

a lack of radicalism. Some judicial norms may reflect fundamental societal values and, as we have seen, any opposition to embedding norms promoting equality would not be entertained. Intervention on other grounds may help redress the balance of power and/or reflect shared values. The courts now acknowledge that greater care needs to be taken to ensure that a relational contract respects the interests of both sides. An Australian judge, writing extra-judicially, has said that the role of the contemporary commercial judge is to

understand the limits of legitimate self-interest and the relationship between self-interest, in its inherently selfish character, and honesty, reasonableness, decency and trust, being the qualities that make it possible for commercial people to be self-interested, but to deal with each other peacefully and with mutual benefit.⁵⁶

It is not surprising that there has been little in the way of movement in the UK where incorporation of fundamental values such as human rights are concerned. After all, the courts undoubtedly tend to be cautious about developing the common law on the basis of public policy. This position might change if there was greater clarity on when common law intervention was legitimate in an area dominated by legislation. It is also the case that public policy considerations tend to be applied in a limited number of areas that are relatively well defined and have been so for a long time. Comparative jurisprudence does point to public policy having the potential to play a greater role.

The issue of contracting-out throws up a number of questions that remain to be answered in the UK. Judges are clearer as to what the fundamental norms of the employment relationship are and the expectations of the employer have changed so that a greater degree of adhesion is expected. The Canadian courts have since *Bhasin v Hrynew* taken the view that ‘good faith’ is an ‘organising norm’.⁵⁷ This would point away from contracting-out of a key term such as mutual trust being possible, but the position in the UK has yet to be settled.⁵⁸ This is to some extent surprising because it might have been thought that cases dealing with trade union membership provided a solution.⁵⁹

The issue of contracting-out arose in *Johnstone v Bloomsbury HA*, which concerned the employer’s implied obligation to take reasonable care for the health and safety of the employees.⁶⁰ The express term as to working hours was

⁵⁶ Allsop, Justice James, ‘Conscience, Fair-dealing and Commerce: Parliaments and the courts’ (FCA) [2015] FedJSchol 15, para 9.

⁵⁷ (2014) 3 SCR 494.

⁵⁸ The Canadian position is discussed more fully in Chapter 12.

⁵⁹ See D. Brodie, ‘Beyond Exchange: The new contract of employment’ (1998) 27 ILJ 79.

⁶⁰ [1992] 1 QB 333, 346–7.

construed as an attempt to restrict the employer's liability for personal injury. The Court of Appeal took the view that the Unfair Contract Terms Act 1977 (UCTA) prevented the employer relying on the express term to exclude a claim based on the implied obligation. It is interesting to note that in *Johnstone* it was indicated that the same result would not have been arrived at on the basis of public policy:

The courts should be wary of extending the scope of the doctrine beyond the well recognised categories. They should be even more reluctant to embark upon a wide ranging enquiry into matters of public debate where it is plain that there are two views bona fide and firmly held, and where complex considerations of the NHS and public funding are involved.⁶¹

It is, of course, open to the courts to render an implied term mandatory on grounds of public policy, and this has occurred in cases such as *Lee v Showmen's Guild*.⁶² *Lee* was followed in a number of trade union membership cases and I would suggest that the reasoning in this line of case law could be extended to prevent contracting-out of mutual trust and confidence. In *Johnstone* the court was able to take a very cautious line on public policy, safe in the knowledge that they could find for the plaintiff on the basis of UCTA. When it comes to the obligation of mutual trust and confidence, one could not be absolutely sure what approach would be taken.

Writing extra-judicially, Lord Bingham said that attempts may 'be made to relax the obligations by express terms set out in a contract of employment, but I would not expect such terms to be sympathetically interpreted'.⁶³ The Australian case of *Russell v Trustees of the Roman Catholic Church* flags up an interesting approach. The question of contracting-out was addressed from the premise that the implied obligation is an incident of the employment relationship: 'As a consequence, the duty not to destroy that relationship is a duty that cannot be excluded contractually, without changing the relationship to something other than employment.'⁶⁴ The soundness of this highly creative solution was never tested before the demise of the term in *Barker v Commonwealth Bank of Australia*,⁶⁵ though the Supreme Court decision in *Autoclenz v Belcher* might be thought to lend support.⁶⁶ It may be contended that a clause which

⁶¹ *Johnson*, n 60 above, 347.

⁶² [1952] 2 QB 329.

⁶³ T. Bingham, 'From Servant to Employee: A study of the common law in action' (2001) 13 SAclJ 253, 266.

⁶⁴ (2008) 72 NSWLR 559, [127]–[128].

⁶⁵ [2014] HCA 32.

⁶⁶ [2011] ICR 1157. And see A. Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328.

purports to exclude mutual trust in a contract which would otherwise be classified as one of employment should be set aside, as it is incompatible with the nature of the contract: ‘the written contract does not represent the actual terms agreed.’⁶⁷ Mutual trust and confidence is an obligation which is fundamental to the modern employment relationship and expresses the essence of the bargain, and an attempt to set up an employment relationship without the term should be held to be a sham.

⁶⁷ *Autoclenz v Belcher* [2011] ICR 1157, [34], quoting Aikens LJ in the Court of Appeal: *Autoclenz v Belcher* [2009] EWCA Civ 1046, [91].