PUTTING HUMAN RIGHTS TO WORK

The Protection of the Human Rights of Workers through the Law of Dismissal



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Abstract

The disciplinary powers of employers pose a significant threat to the human rights of their workers. To guard against this risk, workers should receive protection against infringements on their human rights by their employer. It will be suggested that safeguarding the fundamental rights of workers has always been one aspect of labour law's purpose. Consequently, employers are already under an imperfect duty to respect the human rights of their workers, generated by a patchwork of existing legal obligations. Nevertheless, the protections afforded by UK employment law suffer from deficiencies when assessed against human rights standards. This thesis focuses upon the principles of the European Convention on Human Rights, as incorporated into UK law by the Human Rights Act 1998. It discusses the weaknesses and lacunae in the law of unfair dismissal and the common law of wrongful dismissal. The narrow personal scope of employment rights excludes a variety of individuals who benefit from the universality and inclusivity of human rights protection. The statutory law of unfair dismissal has several deficiencies as a mechanism of human rights protection. The three areas that will be examined particularly the manner in which the justification process is applied and the remedies available to successful claimants. There are a number of ways that the common law of wrongful dismissal could provide an alternative route to protection: sympathetic interpretation of the contractual terms, a favourable evolution of the implied obligation of mutual trust and confidence, or a new implied term requiring that employers respect the human rights of their workforce. However, contractual protection could be ousted by the insertion of inconsistent or exclusionary terms. The adequacy of this alternative course is therefore questionable. In response to the many deficiencies exposed in the human rights protection currently granted by UK employment law, a legislative solution will be suggested and outlined. It would provide effective protection to the human rights of workers, safeguarding the workers against the risks that their employers' powers pose to their most fundamental rights.

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Article 14 38, 68, 69, 70, 77, 79, 80, 85, 90, 117, 119, 135, 167, 180, 191, 208
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European Union

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Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L-119/1 73, 74

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L-204/23 262

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L-39/40 69, 242

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L-14/6 262

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L-180/22 69

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L-303/16 69, 262

Introduction

"<Gay church 'marriages' set to get the go-ahead.>[1] *An equality too far"*

"*I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex [couples] then that is up to the state; but the state shouldn't impose rules on places of faith and conscience*."

For these two online comments, Mr Smith was permanently demoted and received a 40% reduction in his salary. Many would find this decision by his employer deeply concerning. He was expressing his personal beliefs, connected to his Christian faith, on an online forum outside of working time and was punished for doing so. A trained eye might think that his employer had violated a number of Mr Smith's fundamental rights. The demotion violated his right to privacy, because it involved his employer reading materials shared by Mr Smith in a personal capacity outside of work; his right to freedom of expression; and his right to hold and manifest his Christian faith. Despite his successful claim against his employers in the High Court,[2] he was awarded only £98 in damages.[3] One might think that this paltry sum was insufficient, in light of the lasting financial consequences for Mr Smith of a 40% reduction in salary and the potential infringement upon his human rights.

[1] Mr Smith's post started with a link to a BBC article regarding the possible introduction of gay marriages in churches.

[2] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2012] All ER (D) 201.

[3] For the decision regarding remedies, see *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch).

Examining Mr Smith's case exposes a myriad of causes for anxiety. Why did the employer feel able to demote Mr Smith for expressing his views? Why was there no rule in place to prevent unsatisfactory treatment of this kind before it occurred? Why was the law's response so meagre? Are there better ways to address the wrongs suffered by Mr Smith? This thesis addresses many of these questions. The overarching theme is the question of how adequate the response of employment law is when an individual's human rights are infringed by an employer's decision. Is employment law, as it currently operates, capable of acting as a mechanism for the vindication of fundamental rights when they are infringed by employers? Cases like Mr Smith's show that this question is an urgent one. In the absence of a direct obligation on employers to respect their employee's human rights, employees are turning to the traditional rules and structures of employment law to protect those fundamental interests. The central argument of this thesis is that, although workers should be able to use employment law to vindicate their fundamental rights, the mechanisms that are available to them are not capable of performing this role adequately. Existing employment rights suffer from a variety of limitations that render them ineffectual as instruments for the enforcement of human rights. In the final chapter, I propose a reform which would better ensure the full protection of the fundamental rights of individuals at work.

The early chapters lay the normative foundations for the rest of the thesis. Here, I aim to convince a sceptical reader who might suppose that human rights have little to do with employment law. That reader might think of employment law as a private law discipline based upon freedom of contract and believe that employers should be free to act autonomously in accordance with their own assessment of their interests. The responses to this stance developed in the first three chapters are interlinked. Chapter 1 examines, on a normative level, why individuals deserve protection against infringements upon their human rights by their employers. It reveals that an inherent risk to the human rights of the

workers is generated by the structure of an employment relationship. The risk is produced by a combination of the institutional status and power of employers with the dependence and subordination of the employee. Perhaps in an implicit, and not always conscious response to this risk, labour law has in many guises addressed it in its principles and rules. Chapter 2 advances the proposition that in principle the rules of employment law have always sought to target human rights violations by employers and aimed to protect employees from those harms. On this view, the divide between employment law, as a notionally private law discipline, and human rights norms, as an element of public law, falls away – safeguarding human rights is an organic concern of employment law's own, rather than an imposition from elsewhere. Chapter 3 demonstrates the accuracy of the argument in Chapter 2 by showing the extent to which employers are currently under a duty to respect the human rights of their workers. Employers' human rights duties are a jigsaw of statutory interventions which focus upon fundamental rights. These include rights that are positively conferred on employees but also statutes that have been modified so that they mirror a requirement to respect a particular right. This mix of statutory duties puts employers under extensive obligations, obligations which correspond significantly with an obligation not to interfere with their workforce's human rights.

The mechanisms discussed do, however, have flaws in design and application that generate inconsistencies between employment law and the principles of human rights law. Chapter 4 notes one such serious inconsistency by analysing the personal scope of employment law. Employment rights are available to a narrowly defined group and can be subject to further qualifications, such as a period of continuous service. The entitlement to enjoy human rights, in contrast, is vested in all humans. This chapter will investigate the dissonance that this discrepancy creates between domestic law and human rights law and how it might be remedied. Chapter 5 turns to unfair dismissal law, the route currently most used by claimants who wish to assert their fundamental rights in a dispute with their

employer. The narrowness of its availability is one of the main inadequacies of the right not to be unfairly dismissed, contained in the Employment Rights Act 1996 (ERA 1996). Chapter 5 evaluates the standard of scrutiny used by the judges in unfair dismissal law. Are the judges attentive to human rights concerns? Do they engage thoroughly with questions of infringement and justification? Are human rights integrated into the judicial thinking in a manner that would suggest robust protection for human rights within working relationships? This chapter questions whether the standard of fairness – the 'range of reasonable responses' – is adequate to address human rights complaints. The assessment of fairness performs the role of examining whether an infringement was justified, but in many cases, it is ineffectual. Often the need to examine an infringement upon an individual's rights goes completely unnoticed by the tribunals. The additional injury of having a human right violated by one's employer is not recognised or remedied. Chapter 6 assesses the remedial aspects of unfair dismissal law. It notes severe limitations upon the law's remedial capacity, particularly with regard to non-pecuniary injuries such as hurt feelings and distress. The chapter makes recommendations for reform to correct the deficiencies exposed in unfair dismissal law. However, a drastic transformation in both the mechanics of employment rights, and the judicial approach towards their application in human rights cases, would be necessary to restyle unfair dismissal law into an appropriate vehicle for the enforcement of individual's rights. However, such a radical overhaul of unfair dismissal law seems both unlikely and undesirable.

The thesis moves on to focus upon the common law. As employment relationships are based upon a contract between the employer and the employee, the employee can make a common law claim for breach of contract if wrongdoing has occurred. In some instances, the courts carefully interpret the terms of the contract to allow for the individual's exercise of their fundamental rights. In order to achieve consistent human rights protection, however, a generalisable strategy would be necessary. Scholars have mentioned the

potential of the obligations implied into the contract of employment to offer this type of safeguard.[4] One possibility is to use the "portmanteau" obligation of implied mutual trust and confidence. It is flexibly worded and has been applied to a wide variety of conduct. Could this established implied obligation provide protection for the fundamental rights of workers? Behaviour that violates one party's fundamental rights could certainly be perceived as disrupting the trust and confidence of the relationship. In order to answer this, Chapter 7 undertakes a study of the existing case-law that applies the implied obligation, charting the various broad categories of behaviour that the implied obligation currently covers. How close is the implied obligation to offering employees protection for their human rights? Is its development in that particular direction likely in the near future? The alternative route to protection via the common law is the development of an independent implied obligation.[5] Would the judiciary agree to the creation of a new implied term? What factors would they be likely to consider?

Chapter 8 investigates whether implied contractual obligations are an appropriate vehicle through which to safeguard employees' human rights. I will argue that there are a number of concerns with this route to protection. The implied obligation of mutual trust and confidence has limited remedial applicability to events surrounding a dismissal and non-pecuniary harms are not included in the calculation of damages. Because employers always have the option to terminate a contract of employment by giving a short period of notice, pecuniary damages are limited to the period of employment that the employee would have enjoyed before the employer could have lawfully dismissed them. This restriction can result in the employee receiving as little as £100, as shown by Mr Smith's

[4] In particular, see Bob Hepple, 'Human Rights and Employment Law' [1998] Amicus Curiae 19 and Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 205.

[5] Collins and Mantouvalou (n 4) 205.

case.[6] There are yet greater concerns with using contractual mechanisms to protect human rights. The employer, in most instances, controls the terms of the contract. As a result, the employer could attempt directly to exclude the operation of the implied obligation altogether. The judges' response to a term of this kind is unpredictable. They could apply a straightforward contractual analysis – express terms oust the application of implied terms – or expunge the exclusionary term from the contract on the ground that to enforce it would be contrary to public policy. In addition, the rules, policies and terms surrounding the implied obligation could curb the capacity of the employee to exercise their fundamental rights. Here, the case-law demonstrates that the domestic courts and tribunals do not critically reflect upon the terms of the contract or ask whether they are permissible in human rights terms. In most cases, the domestic courts and tribunals enforce the employer's disciplinary rules without examination of their proportionality. They also accept the employer's judgment regarding the appropriate response to an employee's actions, rather than taking an objective view of the situation. If this trend continues, the protection that could be offered by the common law would be minimal.

The main avenues to the vindication of an individual's rights against their employer are thus flawed and inadequate. Each route would need substantial redirection on a variety of fronts – personal scope, content, judicial attitude and remedial options – in order to offer a suitable vehicle for claimants. Particularly in the case of unfair dismissal law, the restructuring would be so substantial as to transform the cause of action, possibly thereby depriving individuals with claims that are not based upon their human rights of a useful right. The final chapter concludes by making an alternative proposal. I argue that the best way in which to protect the human rights of individuals at work is to introduce a specifically designed cause of action, rendering human rights directly and independently enforceable against employers. The chapter adds detail to the proposal. I recommend features of its

[6] *Smith v Trafford Housing Trust* (n 2).

operation and design that take into account the deficiencies that have been exposed during the course of the thesis with regard to the other employment rights. It draws particularly upon the Equality Act 2010, another statute which provides effective enforcement mechanisms for the right not to be discriminated against, and the Human Rights Act 1998, which implements the European Convention rights within the national legal order. The proposal is innovative. It would ensure that the human rights of workers are properly protected and place crucial constraints upon employers.

Defining the project

This project discusses the rights contained in the European Convention on Human Rights (the ECHR or the Convention). Although there are other human rights documents with relevance to the employment relationship, such as the EU Charter of Fundamental Rights and the UN Declaration, the ECHR was selected for a number of reasons. Firstly, the European Court of Human Rights (the ECtHR or the Court) has taken a large number of cases that arose in the context of the employment relationship. A number of principles have formed as a result, giving guidance as to the form and content of protection that workers' human rights should receive in that setting. This extensive case-law makes the Convention a fuller standard against which to test the domestic system of employment rights. In contrast, the meaning of many of the provisions of the EU Charter – which for the moment would override automatically any inconsistent national provision[7] - remain unexplored in the employment context. In any event, where the Charter rights 'correspond' with the content of a Convention right, the ECHR 'meaning and scope' is determinative, subject to the Charter providing more generous protection.[8] Unless the Charter is going beyond the standards set by the Convention, it has little independent contribution to make in this

[7] See the effect of Article 47 of the Charter upon the operation of the State Immunity Act 1978 in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2017] 3 WLR 957.

[8] The Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Article 52(3).

context. Another difficulty with using the EU Charter would have been the particular context in which the Courts of Justice of the European Union makes their decisions. Whereas the human rights discussion in the EU legal order often takes place in a case in which the main issue is the exercise of market or economic freedoms,[9] the only purpose of the European Convention is ensuring the protection of fundamental rights. In terms of comparative techniques, this feature makes the Convention a much more straightforward standard from which to extrapolate generally applicable principles.

In addition, the Human Rights Act 1998 gave effect to the Convention rights in the domestic legal system, with the overall goal that an individual should be able to receive the same remedy in the UK as they would receive after a complaint to Strasbourg.[10] This incorporation means that the courts are under an obligation to take into account Convention case-law,[11] as well as an obligation to read and give effect to domestic legislation in a manner which is compatible with the Convention.[12] Thus, where an inadequacy in the domestic system is exposed below, we can be sure that the judges have the power and a responsibility to correct it through the means available to them. The combination of readily applicable and well-developed principles regarding the exercise of human rights in the workplace and a strong obligation upon the domestic legal system to give effect to those principles justifies the choice of the ECHR as the system for discussion.

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[9] See C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2008] 1 CMLR 51 and C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* [2008] 2 CMLR 9. The exception to this statement is the EU's efforts in anti-discrimination law, which are more purely focused on the protection of fundamental rights alone.

[10] See for example Lord Bingham's comment in *R. (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 at [19] that 'the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg'.

[11] Human Rights Act 1998, section 2(1).

[12] Ibid section 3(1).

Of the ECHR rights, several have been proved to be particularly under threat within the employment relationship. Chapter 1 will examine this proposition in more detail but the cases that reach the ECtHR and the domestic courts and tribunals demonstrate that Article 8 (the right to respect for private life), Article 9 (the right to freedom of belief), Article 10 (the right to freedom of expression) and Article 11 (the right to freedom of association) are infringed by employers on a regular basis. In contrast, the individual's right to a fair trial, which in the employment setting translates to requirements regarding the fairness of the employer's investigations and decision-making procedures, appears to be less at risk. This difference is possibly because employment law has laid down strong and clear principles regarding the procedure that employers should follow when disciplining an employee,[13] backed by financial incentives in the form of adjustments to the damages if the claimant is successful.[14] The comparative success of employment law in monitoring the procedural aspects of employer's decision-making may be explained by Patrick Elias' (as he then was) observation that the tribunals are more confident in reviewing the procedure by which a decision was reached, than the substance of the decision.[15] Tribunals are willing to ensure that employers put all the necessary factors into their scales, but reluctant to tell employers how the balance should have been struck. Overall, the tribunals have maintained more demanding procedural standards of employers and the principles of the ACAS Code for Disciplinary and Grievance Procedures have been adopted in many workplaces. Procedural fairness therefore seems more securely available to employees. For this reason, the focus of this thesis will be upon the substantive rights relating to private life, belief, expression and association.

[13] Advisory, Conciliation and Arbitration Service, *Code of Practice on Disciplinary and Grievance Procedures* (TSO, 2015).

[14] Trade Union and Labour Relations (Consolidation) Act 1992, section 207A(2).

[15] Patrick Elias, 'Fairness in Unfair Dismissal: Trends and Tensions' (1981) 10 ILJ 201, 211.

There is one final issue to clarify. What do I mean when I say 'worker' or an 'individual at work'? As will become clear in Chapter 4, I am not referring to any technical legal category as these will be the subject of severe criticism for their narrowness and the artificiality of the distinctions drawn between groups of individuals who share vulnerabilities. Chapter 4 emphasises the universality of human rights protection and demonstrates that, where an entitlement is related specifically to one's working life, the Court draws the boundaries widely. This approach results in the broadest possible protection being available to all individuals who are in an employment-like relationship, whether that is how their national law classifies them or not.[16] On this inclusive approach, which I also adopt, it is easier to state which groups are outside my category of 'worker' than list those that are within it. The only category that is excluded from the term 'worker' here will be genuinely independent contractors, who are able to negotiate on a mostly even footing with other businesses or individuals to provide their services. But this is a very small group that are excluded from the scope of this thesis. Those who retain independence from other businesses or individuals may well be entitled to forms of human rights protection, however, this would be a separate matter regarding the influence of human rights norms upon commercial law.

Within this thesis, the focus will be on the contextual reality of the relationship at hand. Attempts by a business to artificially create a sense of entrepreneurship in the working life of an individual would be not sufficient to remove the safeguards I consider here. For example, some employers attempt to fabricate entrepreneurship by offering only performance-related pay or requiring each of the workers to make a large investment in the equipment that they need to perform the role. As the essence of subordination and dependence remains, any worker under this kind of arrangement would be entitled to protection of their human rights at work. This wide personal scope of protection challenges

[16] See *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10.

a key feature of most employment law regimes. It is arguably so different from the norms of employment law that adherence to human rights principles requires a specially designed form of protection that breaks from employment law traditions quite sharply. This prospect is considered in detail in Chapter 9. In reading the chapters of this thesis, references to 'workers' should therefore be interpreted as broadly as possible, beyond what labour law scholars would consider to be their usual subject. This interpretation, as shown in Chapter 4, is imperative to achieve consistency with the principles of human rights law.

Positioning the project

This thesis connects to a group of wider debates regarding the intersection of employment law and human rights. Its focus is broadly on the practical side of implementing human rights protection at work. However, this section outlines a number of debates upon which it draws. The first is whether it is beneficial for the wider agenda of employment law for individuals to be granted strong protection of their fundamental rights. Secondly, we might consider how human rights protection fits within the collection of employment law's normative goals. The divide between public law and private law and, more specifically, the relationship between human rights norms and the rules of private law disciplines provides important background to this project. Finally, the shape and meaning of human rights when they are applied in the context of an employment relationship is crucial in determining whether the rights are given adequate protection in practice.

An assumption underlying the whole project is that it is beneficial for workers to be able to exercise and enforce their fundamental rights in their relationship with their employer. This assumption, I believe, is now uncontroversial.[17] As the discourse of human

[17] See, for example, Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford University Press, 1992) 183; Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence & Wishart, 1995) 350; K. D. Ewing, 'Rights at the Workplace: An Agenda for Labour Law' in Aileen McColgan (ed), *The Future of Labour Law* (Cassell, 1996) 9-10; Hazel Oliver, 'Employment Law' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 344; Manfred Weiss, 'Re-Inventing Labour Law?' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law*

rights emerged and took hold, there was concern amongst scholars of labour law regarding what effect this new legal force would have upon the discipline.[18] The individualist focus of human rights was seen as a threat to the collective agenda of unions and their supporters.[19] Human rights vest in individuals, whereas important labour rights – particularly freedom of association – are considered to be group-based rights.[20] As human rights case-law evolved,[21] however, the benefits for unions and individuals of using human rights litigation have become clear – they both have strong rights claims that counterbalance the employer's economic power and the government's pro-business agenda. Nevertheless, some anxieties remain in the background,[22] and re-appear when events take a turn against the interests of workers and collective organisation.[23] However there is a general assumption that workers should enjoy protection of their fundamental rights from infringement by their employer. This project investigates the extent to which this assumption is given effect in the domestic system of employment rights and the extent to which change would be required in order to give adequate protection to those rights.

The first major debate that this thesis intersects with is the theoretical discussion regarding the aims of labour law itself. In Chapter 2, it will be suggested that the protection

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(Oxford University Press, 2011) 50, and Hugh Collins, Keith Ewing and A McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2012) 8.

[18] A notable example was Lord Wedderburn's discussion of the impact upon unions of the incorporation of the ECHR into national law: Lord Wedderburn, 'Freedom of association or right to organise?' (1987) 18 Ind Rel J 244. With regard to the HRA 1998 specifically, see Keith Ewing, 'The Human Rights Act and Labour Law' (1998) 27 ILJ 275.

[19] Keith Ewing, 'Human Rights, Social Democracy and Constitutional Reform' in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (Mansell Publishing, 1996)

[20] Kevin Kolben, 'Labor Rights as Human Rights?' (2010) 50 Virg J Int L 449, 471.

[21] For an interesting account of the evolution of both academic opinion and ECHR jurisprudence in the labour law field, see Virginia Mantouvalou, 'Labour Law and Human Rights' (2016) 41 NZ J Emp Rel 3.

[22] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101.

[23] See for example Alan Bogg and Keith Ewing, 'The Implications of the RMT Case' (2014) 43 ILJ 221 and Keith Ewing and John Hendy QC, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 ILJ 391.

of fundamental rights is one aspect of labour law's goals. The suggestion is deliberately pluralistic here, but the chapter touches upon the idea of a more singular conceptualisation of labour law as a detailed and contextualised structure of human rights protection.[24] This perspective on labour law's foundations is interesting, but it is yet to be fully expounded. As the focus of this thesis is more upon the effective enjoyment in practice of human rights at work, only a brief outline and discussion of a "labour law as human rights" theory is given here. The idea of labour law as grounded in human rights has a strong connection to another important debate, one which is remote from this project, regarding whether labour rights are human rights. This discourse revolves around questions such as whether it is appropriate or strategically beneficial to regard the right to strike or the right not to be unfairly dismissed as a fundamental human right.[25] The debate takes place at the boundary of civil liberties and social rights. This project focuses only on the enjoyment of what would traditionally have been called civil liberties. In particular, it takes the European Convention on Human Rights (ECHR) and examines its principles and application in the employment sphere. This project therefore sets aside the question of whether employment rights are human rights and whether the boundary between civil and social fundamental rights can be defended.[26]

There are several more general debates that inform the background of this thesis. One discussion that underlies this thesis is the distinction between public law and private

[24] See Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press, 2011); Virginia Mantouvalou, 'Are labour rights human rights?' (2012) 2 European Labour Law Journal 151; Pablo Gilabert, 'Labor human rights and human dignity' (2015) 42 Philosophy & Social Criticism 171, and Joe Atkinson, *Human Rights as Foundations for Labour Law* (forthcoming).

[25] See Kolben (n 20), Mantouvalou, 'Are labour rights human rights?' (n 24) and the contributions to *Labour Rights as Human Rights* (Philip Alston ed, Oxford University Press, 2005).

[26] For a critique of the division between civil liberties and social and economic rights, see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

law. The divide between public law and private law became of crucial importance once a separate procedure for judicial review was created and the House of Lords held that claims against public authorities which were of a public law nature could only be brought through that procedure.[27] Aside from the practical purpose of allocating claims to the appropriate route, the divide is now used in a normative fashion to 'defend' private law from external influences, such as public law.[28] Human rights norms are seen as associated with or part of public law. Therefore, the divide between private law and public law is seen as a 'conceptual obstacle' to the introduction of human rights norms into realms such as contract law, tort law, and employment law.[29] This stance has clear relevance to the initial premise of this thesis that workers should enjoy human rights protection against infringements by their employer. The early chapters will challenge aspects of this position in various ways. The debate regarding the features, purpose and necessity of the public/private divide continues apace. However only a narrow portion of this discussion will be drawn into this project. It will set out several arguments that would counter the claim that human rights should have no role to play in employment law particularly.

Much has been said with regard to the applicability of human rights to the private sphere. In particular, the question of whether the Human Rights Act 1998 (HRA) gives effect to human rights in disputes between private persons has been discussed at length.[30] Whilst the HRA was being enacted, some argued that its provisions gave the Convention's

[27] *O'Reilly v Mackman* [1983] 2 AC 237.

[28] For sceptical accounts of the current use of the public/private divide, see Dan Priel, 'The Political Origins of English Private Law' (2013) 40 Journal of Law and Society 481 and Karl Klare, 'The Public/Private Distinction in Labour Law' (1981) 130 U Penn LR 1358.

[29] Collins, *Justice in Dismissal: The Law of Termination of Employment* (n 17) 189.

[30] Alison Young has provided a useful 'map' giving all the possible ways in which the HRA may impact upon private relationships: Alison Young, 'Mapping horizontal effect' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011).

rights full horizontal effect.[31] This idea would mean that a private party, such as an employee or a tenant, could bring a suit based upon their human right – and nothing else – against another private party. Others favoured indirect horizontal effect, whereby existing private law rules were read in light of Convention rights or values.[32] In practice, new causes of action have not been created,[33] although the distinction between the development of existing legal areas and the creation of new ones has been proved to be slim.[34] This fine line is investigated in Chapter 3, whilst recounting the employer's various existing obligations to respect the human rights of their workforce. Some of these obligations match so closely with the contours of the human rights themselves that they are in truth ensuring full horizontal effect of those rights. The idea of indirect horizontal effect, of deliberately developing existing pieces of law so that they reflect human rights norms, is crucial to this project. It gives the impetus to alter aspects of employment law so that workers' human rights can be effectively enforced.

There is an associated question which must be discussed in order to offer the optimal standard of human rights protection. It is the question of what human rights mean when they are applied in the employment context. What is their shape and where do their

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[31] Sir William Wade, 'Horizons of Horizontality' (2000) 116 LQR 217 and Jonathan Morgan, 'Questioning the True Effect of the Human Rights Act' [2002] LS 259.

[32] A consistent advocate of indirect horizontal effect under the HRA has been Gavin Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?' (1999) 62 MLR 824 and Gavin Phillipson, 'Privacy: the development of breach of confidence – the clearest case of horizontal effect?' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011).

[33] Argued by Phillipson, 'Privacy: the development of breach of confidence – the clearest case of horizontal effect?' and Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, 2008) Chapter 9; for a contrasting viewpoint, see Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 Cambridge Law Journal 444.

[34] Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341, 352; Olha Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?' in Stefan Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International, 2008) 57, and Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 227.

boundaries lie? How do they interact with the important forces at work in the employment sphere? Do they respond adequately to concepts such as the contract of employment, the subordination of the employee and the power imbalance between the parties? Although it has been observed that human rights, developed in the light of the unique relationship between citizen and state, should not be transplanted directly into other contexts,[35] limited systematic attention has been paid to the process of reconceptualising human rights for their new settings. The problem of uncritical transplantation of rights into the employment context causes was exposed in *Pay v Lancashire Probation Service.*[36] Mr Pay was a probation officer who, in his own time, performed in a fetish club and ran a website selling BDSM products. When the courts were asked if these activities fell within the scope of his private life, and were therefore protected by Article 8 ECHR, their answer was "no". '[B]ecause the applicant's activities had been publicised on the website of Roissy of which he was a director and that he was present in bars and clubs, to which the public was admitted', the claimant's activities were not considered to be private.[37] A similar verdict was reached in *X v Y*, in which the activities in question were engaging in sexual conduct in a public toilet.[38] Virginia Mantouvalou has termed the approach taken by the courts as 'spatial':[39] what mattered was the type of space in which the conduct occurred, not its character or its strong connection to the values of Article 8 ECHR. State authorities, when acting in their public capacity, generally have a legitimate interest in exerting some control over public spaces and keeping the public safe. The individual has spaces in which they

[35] Hugh Collins, 'On the Incompatibility of Human Rights Discourse and Private Law' in Hans W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press, 2014) 46-48.

[36] *Pay v Lancashire Probation Service* [2004] ICR 187.

[37] Ibid [36].

[38] *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634.

[39] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912, 919.

are free of the state's regulation, primarily the private home. In the employment context, the relevance of space is less precise. For example, as noted by Mantouvalou, a domestic worker provides service in a private home but that should not result in any exploitation being shielded from sanction on an invocation of the employer's right to privacy.[40] An employee's right to private life would be little use in the employment relationship if it was limited to activities that take place in their home or another 'secluded, inaccessible location.'[41] So a reconfiguration of the right must take place in order to ensure an appropriate level of protection is granted to each human right.

Although Mantouvalou offers an alternative understanding of the right to privacy, it may be necessary in the future for similar projects to be undertaken with regard to other fundamental rights. Freedom of expression, for example, has only been partially redesigned for the purpose of application to work. The relationship between expression on social media and the contractual rules that prohibit bringing the employer into disrepute remain deeply troublesome.[42] To guarantee the highest standard of protection for workers, the meaning of human rights must be tailored to the employment context. Compared to the more theoretical nature of these works, this project's focus is structural, ensuring that an effective mechanism is available for workers to enforce their rights in the first instance. The next step is surely to elaborate upon the substance of the rights themselves. Only when both issues are tackled will workers enjoy full protection of their human rights.

[40] Ibid 920.

[41] Ibid 921.

[42] There are variety of examples of this issue in this thesis, for instance, *Smith v Trafford Housing Trust* (n 2), *Game Retail Limited v Laws* (2014) UKEAT/0188/14/DA, *Crisp v Apple Retail UK Ltd* [2011] ET 1500258/11 and *Preece v J D Wetherspoons* [2011] ET 2104806/10.

Chapter 1
Workers' Fundamental Rights and Employers' Duties

David Smith was unable to find work for some 18 years. After a 20-year career in the construction industry, suddenly he found that he was no longer being hired. Mr Smith was an active member of the trade union, UCATT. He had been a shop steward on some sites, as well as acting as a health and safety representative. In 1997, he worked for six months on a project for John Mowlem & Co. Unbeknownst to Mr Smith, John Mowlem was one of the many companies who used the services of the Consulting Association. The Consulting Association operated a secret database containing files on thousands of construction workers, those who were perceived as "troublemakers". Most workers on the database had been active union members, stop stewards or health and safety representatives. Much of the information held on the database was alleged by its subjects to be false. The workers were seen as a disruptive influence. As a result, they were refused employment and excluded from the industry. In 2009, the database was discovered. John Mowlem & Co had contributed information to the file held on Mr Smith. The existence of Mr Smith's file on the database was the reason he had been pushed out of the construction industry for 18 years. Along with Mr Smith, some 3,000 workers had been affected by the Consultation Association's blacklisting activities. Excluded from his chosen profession for half of his career, Mr Smith brought claims against the companies responsible for his blacklisting to the Employment Tribunal.[1] His case was unsuccessful, and he was left with no recompense.

[1] *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467.

What insights can we learn from Mr Smith's case? Mr Smith's situation shows the extent of the vulnerability of employees to the decisions of their employer. Even though Mr Smith only worked for John Mowlem for six months, the information provided by the company deprived him of his livelihood for 18 years. The impact of his one-time employer's decision upon the course of the rest of Mr Smith's life is shocking. Mr Smith was also unaware of the threat to his profession. He was therefore unable to challenge the decision made by the companies to refuse him employment for unlawful reasons. This sense of powerlessness is common to many employees when in dispute with their employer. Although they might have a right to appeal a decision to dismiss them, they cannot force the employer to change its decision. The blacklisting example also shows how employers, as a group, hold the ability to decisively change the fortunes of large numbers of workers. The Consulting Association's clients included many large construction companies. The companies exchanged information regarding thousands of workers. Through the companies' communally-exercised power to hire and fire workers, they could prevent any number of workers from earning a living. The livelihoods of all workers are dependent upon the whim of employing companies. The final twist of the knife for Mr Smith was that the law was unable to protect him against the wrongdoing of his past employer. No remedy for the severe damage he suffered was granted. The employer walked away from the case without reprimand.

Smith v Carillion shows that the law may fail completely to protect our most basic rights from violation by our employers. He suffered grave violations of a number of his human rights. He was systematically shut out of his sector of work for many years. This exclusion was in clear breach of his right to engage in his chosen profession, protected both by the EU Charter of Fundamental Rights and the ECHR.[2] The employers' activities

[2] The Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Article 15 and European Convention on Human Rights, Article 8 as applied in *Sidabras And Dziautas v Lithuania* (2006) 42 EHRR 6.

affected the course of Mr Smith's life with drastic consequences, destroying his capacity to make a living and pursue the occupation he had chosen and trained for. The blacklist contained personal information about Mr Smith, of which he had no knowledge. This constitutes a breach of his right to the protection and control over one's personal data.[3] Additionally, the companies admitted that information contained on the database, labelling the workers as trouble-makers, was defamatory.[4] The blacklist bore clear implications for Mr Smith's professional reputation, protected under Article 8 ECHR. All of these unlawful activities were pursued for the sole purpose of excluding from the construction industry workers who were considered undesirable as a result of their trade union affiliation and activities. The actions of the employers amounted to an egregious breach of Mr Smith's freedom to associate with whomever he chose and his right to join a trade union for the protection of his professional interests. It is difficult to imagine of a more serious infringement upon Mr Smith's human rights that could be perpetrated by an employer.

Mr Smith's case demonstrates the urgent necessity of constraining employers' actions. The fundamental rights of workers should not be signed away in a contract with the employer. Workers should not be required to leave their rights at the door of the workplace. To achieve this, employers should be subject to a duty to respect the human rights of their workers. Many scholars of employment law agree with this reasoning.[5] However, this position faces a theoretical objection that first must be addressed. The

[3] CFREU, Article 8 and ECHR, Article 8. The infringement upon Article 8 was acknowledged by the ECtHR in *Smith v United Kingdom* [2017] IRLR 771, [36].

[4] *Smith v United Kingdom* (n 3) [16].

[5] For a selection of endorsements of the position that human rights should be protected at work, see Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford University Press, 1992) 183; Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence & Wishart, 1995) 350; K. D. Ewing, 'Rights at the Workplace: An Agenda for Labour Law' in Aileen McColgan (ed), *The Future of Labour Law* (Cassell, 1996) 9-10; Hazel Oliver, 'Employment Law' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 344; Manfred Weiss, 'Re-Inventing Labour Law?' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 50 and Hugh Collins, Keith Ewing and A McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2012) 8.

essence of the objection is that private citizens are not bound by human rights or public law norms more generally.[6] Human rights impose duties only on governmental decision-makers. Private individuals are entitled to a realm of private freedom, in which they pursue their preferences without being required to consider the rights of others and the interests of society. The protection of a space in which individuals are free to make autonomous choices is central within a liberal political theory.[7] This ideal underlies the divide between public law and private law that many common law countries share.

This objection might be put in various ways and its influence can be seen in the work of scholars in private law and constitutional law. For example, in the US, some defenders of the state action doctrine also place reliance on this reasoning. Under the state action doctrine, only actions taken by state authorities are subjected to constitutional review. The starting point of BeVier and Harrison's defence of the state action doctrine is that the state, when it acts, does so on behalf of the citizens and must do so in their best interests.[8] Where there is state action, the constitution guarantees that it is taken in the best interests of the citizens. In contrast, 'when private actors exercise the private rights and perform the duties that government power underwrites …. they may legitimately act on their own behalf and in pursuit of their own ends as they conceive them.'[9] Private actors are therefore free to act how they wish, subject only to the rules of private law. No constitutional requirements apply to private actors. Jans Smits uses similar reasoning to support his more specific claim that private parties are not bound by fundamental rights.[10]

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[6] See Jan Smits, 'Private Law and Fundamental Rights: A Sceptical View' in Tom Barkhuysen and Siewert Lindenberg (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff Publishers, 2006) 19.

[7] Hugh Collins, 'The Decline of Privacy in Private Law' (1987) 14 Journal of Law and Society 91, 91.

[8] Lillian BeVier and John Harrison, 'The State Action Principle and its Critics' (2010) 96 Virg LR 1767, 1791, 1793.

[9] Ibid 1796.

[10] Smits (n 6) 19.

He argues that 'private persons do not need to pursue the public interest: they are autonomous and can make their own choices about what they consider to be just.'[11] For this reason, Smits concludes that individuals are not bound to respect each other's human rights.

How does this kind of objection affect the claim that employers should be subject to a duty to respect their workers' human rights? Kevin Kolben, in his analysis of the conceptual differences between human rights and labour rights, assumes that 'human rights regulate and apply to the relationship between states and individuals. Labor rights, on the other hand, generally require state intervention into the private sphere.'[12]

An employment relationship is almost always classified as a private relationship. At its centre is a contract of employment. A specialist body of doctrine is applied to this instrument, developed and adapted from the rules of private contract law. Individuals are free to choose for whom to work, what work to do and in what manner they should do it. They exercise the quintessential private freedom – freedom of contract – in making those choices. The other party to this private bargain, the employer, is similarly classified as a private actor. Employers make contracts with individuals and other companies in order to pursue their business interests. On a narrow view of the appropriate role of human rights, the employer, as a private party, should therefore act in a manner unrestrained by human rights. The objection leads us to the conclusion that employers should not be under a duty to respect the human rights of their workers.

There are two responses to this position. They are addressed here in turn. The first is that employers are not equivalent to other private actors. As we can see in the example of Mr Smith, between them, employers distribute opportunities crucial to a fulfilling and dignified life. They hold the power to prevent an individual from pursuing their chosen

[11] Ibid.

[12] Kevin Kolben, 'Labor Rights as Human Rights?' (2010) 50 Virg J Int L 449, 469.

profession. Private individuals do not possess this capacity to exert control over each other. Employers' status as distributors of opportunity justifies imposing additional responsibilities upon them. At the very least, employers should not be able to distribute opportunities on the basis of irrelevant or unjust criteria: trade union membership, political beliefs or private activities outside of work. The second response is that the employment relationship is not equivalent to a contractual relationship between two private individuals. Entering an employment relationship puts the individual's human rights at an unavoidable risk. In order to understand why, we must examine the key features of the relationship. Why are employers able and willing to infringe their employees' human rights? Employers hold a wide range of powers and exercise them for the purpose of financial gain. For the most part, they are unconstrained in their decision-making. Employers appear to operate in a manner unconcerned with the fundamental rights of their workforce, sharing a belief that businesses can legitimately infringe or curtail fundamental rights if the business' agenda requires it. Even employers who are well-intentioned will occasionally take decisions that prioritise other interests over the individual's fundamental rights. Detailed analysis therefore shows that a serious risk to human rights is generated by the entering and carrying out of an employer-employee relationship. If human rights are considered to be a set of entitlements that protect the most important interests of persons against a risk of abuse by possessors of power, it is clear that failing to combat this risk by imposing duties upon the employer is unacceptable.

I. The institutional status of employers

Employers have a 'quasi-public' role in modern life.[13] This consideration points to an outcome in which employers are not treated the same as individual, private actors. When an employer refuses an individual a job, the act is somehow different in quality from a

[13] Frances Raday, 'Constitutionalization of Labour Law' in Roger Blanpain and Manfred Weiss (eds), *The Changing Face of Labour Law and Industrial Relations* (Baden-Baden, 1993) 106.

person choosing their friends or buying a car. Why? To understand the crucial distributive function of employers, we must understand the value of work to individuals. This value is the origin of the employer's institutional status within society.

As argued by Alan Bogg, 'employment… is an "evaluatively complex practice". It must be understood in terms of the goods and ills that it instantiates.'[14] The ills must be constrained and monitored. They were demonstrated in the case of Mr Smith and will be considered further below. It is the goods of work that contribute to the institutional importance of employers and their distributive power over individuals. The Committee on Economic, Social and Cultural Rights summarised many aspects of the value of work:

> 'The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.'[15]

Most workers rely on their wage to fulfil their basic needs. Work therefore enables a minimum standard of living and for many, 'employment is *the* enabling opportunity.'[16] Work also provides an opportunity to work as a part of a group, to form connections with others and to be a productive member of a wider community. Work is often a means by which an individual finds self-respect and earns status from others. Having a job matters for our sense of 'self-fulfilment'[17] as well as the fulfilment of our essential needs. What does this mean for the status of employers as social actors in our society?

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[14] Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 Int Journal of Comp Lab Law and Ind Rel 7, 16.

[15] Committee on Economic, Social and Cultural Rights, *The Right to Work* (Economic and Social Council, General Comment No. 18, adopted on 24 November 2005) [1].

[16] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 210.

[17] Hugh Collins, 'Is There a Human Right to Work? ' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2015) 32.

Employers are 'gatekeepers of opportunities'.[18] Holding the power to select amongst a mass of applicants, the employer's decision fundamentally changes the life chances of the individual who is hired and the individual who is not. John Gardner notes that, for this reason, the employer is in a 'special privileged position in the distributive mechanics of society'.[19] Then, one single incident of choice is multiplied exponentially across companies and sectors. It becomes clear that, together, employers control the fate of workers, as a dependent group, in a manner not seen in a typical private relationship. For this reason, employers should be placed under a duty to respect the human rights of the workers that they choose and those that they don't. As argued by Raday,

> 'In employing a workforce, employers are carrying out a function which is so central to the determination of socio-economic opportunity and human dignity that they are bound to a standard of behaviour which is not imposed on all private actors.'[20]

Discrimination law ensures that employers cannot give effect to their discriminatory preferences. Going further and imposing a duty to respect the human rights of workers would ensure that individuals are not routinely excluded as a result of the way they choose to exercise their rights. Individuals who support controversial political parties or dress in accordance with their religious beliefs should not be refused employment on those grounds without a substantial justification. The companies that colluded to the severe disadvantage of Mr Smith because of his union activities would be acting unlawfully. Power to control the fate of others must not be left unchecked. The law should ensure that it is not exercise in a manner that breaches the human rights of members of the workforce.

II. The fundamental rights of workers under threat

In Europe, events of the 20th century demonstrated that a significant amount of power is vested in the organs of the state. The abuse of this power had disastrous consequences for

[18] Khaitan (n 16) 209.

[19] John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 OJLS 1, 11.

[20] Raday (n 13) 106.

many millions of people. To minimise the risk of recurrence, human rights documents were drafted to protect the most basic rights of citizens against interference perpetrated by state bodies. In the 21st century, it has become clear that the capacity to infringe an individual's human rights is not only possessed by the state. Clyde Summers, from an American perspective, powerfully observes that

> 'For the Founding Fathers, the greatest threat to personal freedom was the state with its capacity to control individuals. For us, there is a corresponding threat to personal freedom from private action which has the power to control individuals, deprive them of their life or livelihood, or invade their privacy and personal integrity. Employers can discharge workers because of their political views, compel them to contribute to political causes, or deny them jobs because of their sexual preferences. Movie actors can be blacklisted because they assert constitutional rights and television performers driven from the air by advertisers because they criticize the government. Private hospitals refuse to accept AIDS patients, landlords refuse to rent to single mothers with children, and insurance companies cancel policies or double the rates because the individual is classified, correctly or incorrectly, in a high risk group.'[21]

He argues, correctly and in common with many scholars that have followed him,[22] that '[c]onstitutional values cannot be fully realized in the face of unrestrained private power.'[23] Other actors have the capacity to prevent individuals from living a dignified and autonomous existence. That these actors may be unregulated in their exercise of this power is deeply concerning. Although we might investigate the influence of a number of other private actors, such as landlords and providers of essential services, here I shall assess the position of employers. Do employers pose a threat to the individual's exercise of their human rights?

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[21] Clyde W. Summers, 'The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law' (1986) 1986 U Ill L Rev 689, 692.

[22] See for example Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015) Chapter 1; Elizabeth Anderson, *Private Government: How Employers Rules our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017) 37-41; Aharon Barak, 'Constitutional Rights and Private Law' (1996) 3 Rev of Constit Studies 218, 228 and Frances Raday, 'Privatising Human Rights and the Abuse of Power' (2000) 13 Can J L & Jurisprudence 103.

[23] Summers (n 21) 693.

It is useful to understand the various types of power that an employer holds over its workforce. Mentioned above was the employer's capacity to choose amongst many suitable candidates. This oversupply enables the employer to offer terms that they consider acceptable on a 'take it or leave it' basis to the candidate. The employer benefits from the ability to keep searching for a worker willing to accept its terms. The employer's superior resources generate an 'inequality of bargaining power' between the parties. Rectifying this disparity has been one of employment law's aims since its inception.[24] The unilateral determination of terms and conditions feeds into the employer's bureaucratic control of the workplace. The employer possesses the 'power of an autonomous legislature'[25] in determining the minutiae of how employee should behave at work. An individual's responsibilities, tasks, standard of performance, hours, rest breaks, dress code and many other details are provided for in the employer's 'miniature legal system'.[26] The individual is subordinated to the employer's jurisdiction during their working life. This subordination is reinforced by the employer's disciplinary authority and power. The company Code of Conduct is a rule book, with consequences attached if an employee fails to comply. The sanctions available to an employer might include demotion, suspension, pay-based sanctions, warnings and re-assignment. The ultimate threat is that of dismissal. A dismissal has drastic long- and short- term consequences for the individual worker. As Hugh Collins argues, '[a]lthough the harm caused to the employee by dismissal will depend heavily on how quickly and in what capacity he or she regains employment elsewhere, there can be little doubt that in many instances the disciplinary power of an employer is equivalent or greater in its effects to that exercised by the criminal courts'.[27]

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[24] Mark Freedland and Paul Davies, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens, 1983) 18.

[25] Raday (n 13) 106.

[26] Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment' (1986) 15 ILJ 1, 4.

[27] Collins, *Justice in Dismissal: The Law of Termination of Employment* (n 5) 2.

How does the actual exercise of these powers by the employer result in systemic infringements upon the human rights of workers? In signing the contract of employment, an individual may notionally sign away the right to conditions that are sensitive to the exercise of their human rights. These measures might be generally hostile to the worker's ability to make valuable choices, such as long working hours with limited rest periods or a wage that is insufficient to meet the employee's basic needs. The contract may contain more specific measures, for example a term requiring invasive pre-employment testing or extensive screening of the individual's online activities that breaches the individual's right to privacy. In addition, the terms of the contract can be used to disincentivise the exercise of rights. For example, by including a term permitting deduction from wages for part- or non-performance of duties, the employer can lawfully refuse to pay striking employees and an employer will aim to deduct the greatest possible percentage of pay.[28] Severe pay deductions are an effective method of discouraging employees from engaging in strike action.

The legislative power of employers to write the rule-book of the enterprise is commonly exercised, perhaps unintentionally, in a manner that limits or infringes upon the fundamental rights of its workforce. Even the most apparently routine tasks of an employer – setting the dress and appearance code – have the capacity to interfere with an individual's human rights. A requirement to dress in clothing conventional to one's biological sex infringes an individual's Article 8 rights where they wish to express their identity by cross-dressing.[29] A rule that states that individuals should maintain a "professional appearance", which may include a requirement to refrain from wearing head-coverings, amounts to a severe curtailment of the ability of religious individuals to manifest their religious faith

[28] See *Hartley v King Edward VI College* [2015] EWCA Civ 455, [2015] ICR 1143.

[29] *Kara v United Kingdom* (1999) 27 EHRR CD272.

whilst retaining their position.[30] Similarly, inflexible shift patterns or working hours can interfere with an employee's religious observances.[31] With the rise of technology in the workplace, the threat to an employee's privacy is significant. IT policies subject employees to constant monitoring to ensure consistent productivity. Employers can access and read the private communications of individual employees where they suspect that the employee has breached a prohibition on private use of the employer's equipment and resources.[32] These examples demonstrate how an employer's bureaucratic powers are exercised in a way that interferes with the exercise of fundamental rights during working time.

More worryingly, employers are extending the subordination of their workforce beyond working time.[33] Any activities outside of work that could have a negative impact upon the employer's business or reputation can place the employee at risk of being in breach of an employer's rule-book. A Code of Conduct typically prohibits bringing the employer into disrepute. This wide prohibition can be relied upon to discipline workers for a range of conduct, some of which may amount of an exercise of the worker's human rights. Under this general rule, conduct protected by Article 8, 10 or 11 is regularly treated as grounds for disciplinary action and dismissal. 'Social media dismissals' are increasingly common:[34] jovial complaints made about colleagues and superiors, criticism of the employer's products online and online content that the employer deems to be offensive

[30] The major recent cases on this issue are *Eweida and others v United Kingdom* (2013) 57 EHRR 8 and C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] 3 CMLR 21.

[31] *Ahmad v United Kingdom* (1982) 4 EHRR 126 and *Mba v Merton London Borough Council* [2013] EWCA Civ 1562, [2014] 1 WLR 1501.

[32] *Bărbulescu v Romania* [2016] IRLR 235.

[33] See Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912 and Astrid Sanders, 'The law of unfair dismissal and behaviour outside work' (2014) 34 LS 328.

[34] See Astrid Sanders (n 33) and David Mangan, 'Social Media in the Workplace' in David Mangan and Lorna E. Gillies (eds), *The Legal Challenges of Social Media* (Elgar Publishing, 2017).

have all been considered grounds for dismissal.[35] The opinions expressed on social media may also be linked to other fundamental rights. An employee was demoted as a result of an even-tempered exchange with his Facebook friends regarding his concerns about churches being required to perform gay marriages against their beliefs.[36] Another employee was dismissed recently for expressing their republican beliefs, in the form of an aversion to the Royal family.[37] All of these examples demonstrate the risk to human rights generated by vesting unilateral rule-setting capacity in employers.

An employer might also consider an individual's political activities to be a legitimate ground for dismissal,[38] particularly where the political party in question is controversial and the employer considers that a perceived association between itself and the party through the employee's activities is undesirable. Another form of expression damaging to the employer is whistleblowing, where an employee discloses information they believe to be in the public interest but, as it damages the employer's business interests, they are dismissed as a result.[39] Drug and health screening also impact upon the way that an employee may spend their time outside work, with the threat of dismissal apparent even where drug use has no impact upon their performance at work.[40] Similarly, personal information such as HIV status has led to detrimental treatment by employers.[41] Even more intrusive are employers' actions that have regard to an individual's intimate and sexual

[35] *British Waterway Board v Smith* (2015) UKEATS/0004/15/SM, *Game Retail Limited v Laws* (2014) UKEAT/0188/14/DA and *Crisp v Apple Retail UK Ltd* [2011] ET 1500258/11.

[36] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2012] All ER (D) 201.

[37] *Gibbins v British Council* (2017) ET 2200088/2017.

[38] *Redfearn v Serco Ltd* [2006] EWCA Civ 659, [2006] ICR 1367 and *Vogt v Germany* (1996) 21 EHRR 205.

[39] See *Heinisch v Germany* (2014) 58 EHRR 31.

[40] *Kuehne & Nagel Ltd v Cosgrove* (2013) UKEAT/0165/13/DM.

[41] *IB v Greece* (Application no 552/10, 3 October 2013).

preferences and choices, whether that be engaging in an affair or involvement in the BDSM community.[42]

These examples show that employers possess the capacity to interfere with their workers' human rights. In the pursuit of their business goals, they make decisions that do infringe upon those rights. The significant risk of interference with human rights within the employment relationship justifies placing of constraints upon employers. They should be under a duty to act in a manner that complies with the human rights of their workforce. The law must ensure that the employer does not exercise their control and authority in a manner that infringes the human rights of individuals.

III. Not all employers? The risk to rights in "good" companies

An easy response to the account given above would be to state that these are examples of "bad employers" – not all employers are the villains in the story. There are two counter-arguments that can be made. First, any risk to human rights should be minimised and protected against, even if there is only a serious risk of infringement within a small percentage of companies and organisations. In addition, an individual's awareness that their exercise of their rights *could be* censured by the employer is a wrong in itself. The vast majority of workers are likely to have altered their behaviour or choices in order to please or appease their employer. Alan Bogg and Cynthia Estlund observe that this adjustment to conform with the employer's wishes and requirements is itself an unfreedom:

> 'Even if there is no actual interference in choices, the vulnerability to interference is a form of unfreedom, for it forces one to anticipate and accommodate oneself to the other's desires, backed as they are by the power to interfere.'[43]

[42] *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, [2006] 2 AC 28 and *Pay v Lancashire Probation Service* [2004] ICR 187.

[43] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 151.

From this insight, one learns that it may not matter if the employer actually exercises their powers over a particular worker by, for example, embarking upon a disciplinary process. The individual has already lost one aspect of their freedom by living 'in the shadow of managerial prerogative':[44] the ability to make autonomous choices free of outside influence. They assess and re-assess their preferences and goals in light of the employer's likely inclinations. The employer's dominant sway over the individual's choices 'creates a kind of *potential* for detriment, or threat, to well-being'.[45] This influence should be countered by constraining the employer's permissible range of conduct.

Secondly, a survey of the cases indicates that the initial claim is not true. Even "good employers" with good motives, who are trying to do the best thing for their workforce and their customers, can reach decisions that infringe the human rights of individuals. There are three instances in which a benevolently-minded employer might unintentionally impact upon a worker's human right. The first might be labelled the 'customer protective' decision. Mr Redfearn was elected as a local councillor representing the British National Party, a far-right, anti-immigration group. His work as a bus-driver brought him into contact with vulnerable individuals and their carers who were mostly of Asian origin. The decision to dismiss Mr Redfearn from his position was made on the grounds of health and safety, namely the 'considerable anxieties to passengers and their carers, who placed a great deal of trust in the drivers and escorts' that his continued presence could create.[46] The second example is the 'workforce protective' decision. Mr Smith was a Christian, who became engaged in a considered discussion on Facebook with a number of his colleagues (and Facebook friends) regarding whether churches should be required to provide marriage services for gay couples. Colleagues reported his comments

[44] Collins, *Justice in Dismissal: The Law of Termination of Employment* (n 5) title of Chapter 6.

[45] Thomas (n 22) 195.

[46] *Redfearn v Serco Ltd* (n 38) [8].

to his employer. A major point of concern during the disciplinary process was that he had mistreated his colleagues, upsetting them or causing the potential for that to occur.[47] The third instance is less common, but it is the 'worker protective' decision. Miss Ahmed worked for Amnesty International and was of Sudanese descent. She applied for a role internally, the remit of which would include research and visiting the Sudan. Amnesty International refused her application, on the basis that members of staff should not take roles in which they may be perceived to have a vested interest by reason of their own ethnicity. In addition to the neutrality issue, the organisation refused the job because staff who visit countries from which they are perceived to originate are at a greater risk of ill-treatment or violence than a perceived "outsider".[48]

In these cases, the employer was seeking to protect their customers or clients, the other members of the workforce or even the individual themselves. Even benevolent aims can be pursued in a manner that infringes an individual's human rights. The risk of infringement exists, whether or not the employer is a "knight in shining armour" or a villain upon the facts. Understanding that all kinds of employers pose a danger to the human rights of their workers offers a strong justification for protecting those workers against that risk. Protection of this kind requires the imposition upon employers to comply with a requirement to respect the human rights of their workers.

IV. The conflict between employment and fundamental rights

The culmination of these observations is that there is an inherent conflict between the free enjoyment of human rights and an employment relationship. Hugh Collins argues that characteristics of the employment relationship intrinsically conflict with the exercise of fundamental rights by workers. He contends that

> 'the relation of subordination is inherently opposed to the enjoyment of civil liberties [because] civil liberties must be exercisable as of right, whereas in the

[47] *Smith v Trafford Housing Trust* (n 36) [38].

[48] *Amnesty International v Ahmed* [2009] ICR 1450, [8].

> context of employment the enjoyment of civil liberties is normally dependent on permission from the employer or is subject to the employer's legitimate aims and purposes.'[49]

For example, whether an individual enjoys privacy in communicating with their family whilst at work depends upon the terms of the employer's policies. Exercising the right to manifest one's faith or attend worship during the week relies upon the employer's dress code or express permission to be absent during working hours. Rather than the employee making decisions in accordance with their priorities and preferences, they must seek the employer's consent to the manner in which they wish to exercise their rights. It is perhaps this inherent collision between the free exercise of rights and the employment relationship that has turned employment law's attention towards the protection of human rights over the course of its development. Although the mechanisms may be flawed, employment law already prohibits infringements upon human rights in various guises. Chapter 2 will explore this issue further.

It is utterly unacceptable to allow this clash between fundamental rights and employment to persist unregulated. Employment law must impose constraints on the employer's capacity to deny the opportunity to which workers are entitled: the exercise of their basic rights. We must ensure that it is unlawful for an employer to act deliberately in contravention of their workers' human rights. Imposing a duty to respect the human rights of individuals is the only way to address the subordination of workers' rights to the employer's interests and approval. Although employers may be notionally private actors, the employment relationship is rare in incurring a structural risk to the workers' fundamental rights. This danger to the rights of individuals justifies additional duties that require adherence to those rights.

[49] Hugh Collins, *Is the Contract of Employment Illiberal?* (forthcoming) 11.

Chapter 2
The Role of Human Rights in Employment Law

There is an additional or alternative way to frame the argument that employers should be required to respect their workers' human rights. We might argue that these duties are required because safeguarding the human rights of workers is an important aim of employment law. Only in recent years have scholars rephrased long-established goals of employment law in the language of human rights. On this view, it can be shown that the protection of workers' basic rights against infringement by their employer has always been inherent within employment law. Such protection necessitates corresponding duties upon employers. This argument also entails the realisation that, contrary to the way in which human rights are usually discussed, human rights are not only important in the public sphere. It is crucial to the real enjoyment of those rights that they are also relevant to the development and application of private law disciplines such as employment law.

It does not follow from the argument that human rights' protection should be incorporated into employment law, however, that the principles of international human rights law should be straightforwardly transplanted into employment law. Human rights were developed against the background of the characteristics of the state-citizen relationship. Adaptations must occur before the concepts are applied to the very different context of the employment relationship in order to make the protection most effective. Human rights concepts should develop semi-autonomously within labour law, ensuring they have a meaning and scope which is appropriate to the subject.

I. Two ways of thinking about human rights in labour law

There are two approaches that we might take to conceptualising the link between human rights and the purpose of employment law. Human rights could be viewed as a foundation for the discipline itself. This perspective would offer a strong justification for imposing a comprehensive duty upon employers to respect the human rights of workers. On the second view of the relationship between human rights and employment law, providing protection for human rights is one purpose of employment law amongst several, distinctive concerns that are important to the development of the discipline. Either view places a range of requirements upon actors within labour law in the process of its development and application to particular cases.

A) Human rights as the foundation of employment law

One way of theorising the relationship between human rights and employment law is to offer a theory of employment law which is grounded directly in the 'special weight' of fundamental rights.[1] Although a handful of authors have considered the normative question of whether some labour rights can be legitimately considered human rights,[2] only tentative steps have been taken to conceptualise the whole of a particular domestic system of labour law as an elaboration of workers' fundamental rights.[3] These perspectives can be built upon a theoretical analysis that offers a moral conception of the definition of a human right[4] or

[1] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 139.

[2] Virginia Mantouvalou, 'Are labour rights human rights?' (2012) 2 European Labour Law Journal 151 and Pablo Gilabert, 'Labor human rights and human dignity' (2015) 42 Philosophy & Social Criticism 171.

[3] See Mantouvalou's comment that her approach 'does not necessarily engage with positive law or activists' strategies … but examines the issue as a matter of moral truth.' Mantouvalou (n 2) 163. A prelude to this kind of theory: Joe Atkinson, *Human Rights as Foundations for Labour Law* (forthcoming) and Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016).

[4] Atkinson (n 3).

might adopt the list of human rights that can be found in international human rights instruments.[5] How are these theories constructed? Are they likely to be successful? This section offers a brief account and critique of "employment law as human rights" theories.

An outline of an "employment law as human rights" theory

On this view of employment law, each piece of protection that it provides should be able to be traced back to a fundamental human right. The content and success of such a theory therefore greatly depends upon what range of rights one admits as fundamental. If we take the narrowest group of human rights that are generally accepted, the "first generation" of civil and political rights that are enshrined in the Convention, for example, we get one picture of employment law. Employment law would remain concerned with prohibiting forced labour, compulsory labour, slavery or servitude.[6] The right against forced labour would require employment law to protect from unpaid work or work to which the individual has not consented. Health and safety regulation would be necessary to provide protection for workers' right to life or their Article 8 rights.[7] The duties imposed upon employers to respect freedom of association, discussed in Chapter 3, would be maintained but more emphasis might be placed on the right to privacy at work and the workers' general freedom of speech. From the right to respect for private and family life, we might derive protection from excessive working hours that leave little space for activities outside work and rights to leave to care for family members and, if access to paid work is considered to be an element of one's Article 8 rights, Article 14 would support attempts to ensure that

[5] See Gilabert (n 2) and Mantouvalou (n 2).

[6] European Convention on Human Rights, Article 4, recently reflected in the Modern Slavery Act 2015.

[7] See Emily A. Spieler, 'Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right' in James A. Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press, 2003) 94 on the relationship to the right to life and *Brincat and Others v Malta* [2014] ECHR 60908/11.

the opportunity to benefit from work is not distributed without discrimination.[8] It could be argued that the right to a fair trial in Article 6 could guarantee procedural rights if the individual is being deprived of a civil right, such as their right to exercise a profession.[9]

There is one major problem with this account. It appears to be an incomplete picture of modern employment law. To take one example, the right not to be unfairly dismissed – a cornerstone of English employment law – is not straightforwardly established on a civil liberties foundation of labour law. One might argue that protection for the right to work can be derived from Article 8[10] but this secondary form of protection may not accord with the emphasis placed upon the right not to be unfair dismissed as a core and fundamental right of workers upon most practical and scholarly views of employment law. To address this apparent flaw, a theorist might open up their perspective and include a wider range of fundamental rights within employment law's foundations. The EU Charter of Fundamental Rights contains civil liberties and a number of social or "solidarity" rights[11] which provide a basis for a greater proportion of employment law's scope. Article 30 protects against unjustified dismissal; Article 31 provides a right to fair and just working conditions, including limits upon working time, and collective bargaining and rights to consultation of the workforce are included.[12] A similarly extensive list of rights applicable to employment are included in the European Social Charter and the UN Declaration of Human Rights contains rights that could provide a foundation for various labour standards. A theory of employment law grounded upon a larger category of fundamental rights is likely to be more

[8] See *Boyraz v Turkey* (2015) 60 EHRR 30 and *Sidabras And Dziautas v Lithuania* (2006) 42 EHRR 6.

[9] See *R (G) v Governors of X School* [2011] UKSC 30, [2012] 1 AC 167, [33].

[10] Hugh Collins, 'Progress towards the Right to Work in the United Kingdom' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2017) 252.

[11] The Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Chapter IV.

[12] Ibid, Articles 30, 31, 28 and 27.

persuasive to labour scholars, as it recognises the importance of key labour rights and it more successfully accounts for the regime of employment law found in most developed jurisdictions.

Reconstructing the priorities of employment law?

If the theory overcomes the potential objection of incompleteness, what other objections might it face? The strongest objection amongst scholars to embracing the rise of the rights discourse was that, by focusing upon the individual's rights, the claims of the collective would be damaged.[13] Kennedy recalls the way in which being individual rights holders changes our thinking – it 'blunts articulation of a shared life…blunts awareness of diversity, of the continuity of human experience, of overlapping identities… these tendencies inhibit expression of the experience of being part of a community.'[14] Speaking more directly to the concerns of labour lawyers, 'the human rights movement intensifies the sense of entitlement in individuals and groups at great cost to their ability to participate in collective political life and to their understanding of own lives as part of a more diverse community.'[15] A major function of employment law has always been conceived to be the enhancement of the collective voice of workers, deployed to secure a better deal for workers. Making individuals first and foremost rights-holders rather than members of their collective community was perceived as potentially very damaging to employment law.

Although the interaction between human rights law and collective representative bodies has not been friction-free, it has been persuasively argued that this threat to

[13] This point has been argued persuasively by Jay Youngdahl, amongst others: see Jay Youngdahl, 'Solidarity First: Labor Rights are Not the Same as Human Rights' (2009) 18 New Labour Forum 31.

[14] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101, 112.

[15] Ibid 112-3.

collective labour law has not come to fruition to the extent that was feared.[16] Whilst rights with an individual focus were the first to come to light in the Strasbourg jurisprudence, such as the right not to be a union member,[17] the rights of trade unions have been recognised by the Court more recently. The rights of unions to control their own affairs[18] and to represent their members' interests through bargaining and strike[19] have been defended in recent ECtHR cases. In addition to the empirical argument that human rights litigation has not done net damage to the position of unions, one could make a normative argument. Reinforcing the individual's right to freedom of association contributes to the strength of the union. The individual may gain rights against treatment by their employer that would disincentivise trade union membership or participation in union activities.[20] To prevent discriminatory dismissals of union members is also to protect the union's position in the workplace and remove a strong deterrent that employers could otherwise use to limit union power. As Alan Bogg comments, 'a successful legal regime' combines both individual and collective rights within its strategy, where workers and unions reap the benefits of mutually supportive individual and group rights to freedom of association.[21]

An additional concern might be that if 'projects must be expressed in the vocabulary of "rights" to be heard, good policies that are not framed in that way go unattended.'[22] The practice and policies of employment law currently pursues a range of

[16] See ACL Davies, 'Workers' Human Rights in English Law' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 180-183.

[17] See the finding of the ECtHR that closed shops were contrary to Article 11: *Young, James and Webster v United Kingdom* (1981) 3 EHRR 20.

[18] *Associated Society of Locomotive Engineers & Firemen (ASLEF) v United Kingdom* (2007) 45 EHRR 34.

[19] See *Demir v Turkey* (2009) 48 EHRR 54 and *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10.

[20] See *Wilson v United Kingdom* (2002) 35 EHRR 20.

[21] Alan Bogg, ''Individualism' and 'Collectivism' in Collective Labour Law' (2017) 46 ILJ 72, 101.

[22] Kennedy (n 14) 108.

worthwhile goals, but what would happen to those elements that cannot be reframed as human rights concerns to fit into the redrawn theoretical framework? Commentators upon international labour law have been preoccupied with a variation upon this concern since the ILO's Declaration of Philadelphia in 1998. The Declaration placed an obligation upon states to respect, promote and realise the following fundamental principles and rights: freedom of association and recognition of collective bargaining; the elimination of forced labour and the abolition of child labour, and the elimination of discrimination in respect of employment and occupation.[23] This has led to anxiety regarding the loss of status and the 'inevitable down-grading of non-core rights'.[24] As observed by Fenwick and Novitz,

> 'understanding the protection of workers' interests as human rights is likely to broaden their appeal at a time of marginalisation of trade unions as antiquated and outdated organisations. What may be problematic… is that one may implicitly denigrate the status of workers' claims where it is more difficult to phrase them in terms of human rights.'[25]

Similarly, by narrowing our focus to those rights of workers that are also recognised as human rights, we may 'draw on their status [as civil liberties or human rights] in a manner detrimental to other legitimate concerns of labour.'[26] McCrudden and Davies, for example, observe that '[n]one of the rights identified touch directly, for example, on the appropriate wage that should be paid, nor even on the need for minimum wage setting procedures.'[27]

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[23] International Labour Organisation, *Declaration on Fundamental Principles and Rights at Work* (1998), [2].

[24] Philip Alston, ''Core Labour Standards' and the Transformation of International Labour Rights Regime' (2004) 14 EJIL 457, 462 and 448-490; Spieler (n 7) 85-86 and Jill Murray's arguments regarding the dominance of the 'core/rights position' within international labour law: Jill Murray, 'Taking Social Rights Seriously: Is There a Case for Institutional Reform of the ILO?' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010).

[25] Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 24.

[26] Ibid 28.

[27] Christopher McCrudden and Anne Davies, 'A Perspective on Trade and Labor Rights' (2000) 3 J Int'l Econ L 43, 51.

There has also been disquiet over the fate of working time,[28] social security income for those displaced from work or unable to work and the rights of migrant workers[29] on a "core/rights"[30] view of international labour law. Versions of these concerns would be most likely to plague any attempt to ground employment law in human rights. If we are to place employment law's roots in the normative force of longstanding and internationally recognised human rights, then we risk neglecting campaigns for other concerns that are usually considered to be within its realm. Alternatively, we may reduce the force of some arguments that are currently of primary importance but would be considered secondary or derivative concerns on a human rights view.

A floor of rights, rather than a regulatory ceiling

The risk of the detraction of attention from non-human rights areas is linked to a broader concern about the shape of employment law on this view. Human rights, particularly those contained in the Convention, should be perceived of as a minimum standard of protection. Discussing the pervasive governance that workers face in the workplace and the strategies that might be used to combat it, Elizabeth Anderson notes that '[t]here are limits…to how far a bill of rights can go in protecting workers from abuse… they can at best offer a minimal floor.'[31] That a worker should not be dismissed for associating with a union or exercising their freedom of expression ensures only basic protection for that worker's exercise of their autonomous decision-making. Whilst human rights-based safeguards are

[28] Deirdre McCann, 'Decent Working House as a Human Right: Intersections in the Regulation of Working Time' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 515.

[29] Lance Compa expresses concern regarding the fate of health and safety protection, social protection for those displaced or unable to work, and the rights of migrants: Lance Compa, 'Core labour rights: promise and peril' *International Union Rights* (2000) <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1175&context=articles> accessed 2 May 2018.

[30] Murray (n 24) 363.

[31] Elizabeth Anderson, *Private Government: How Employers Rules our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017) 69.

crucial to maintaining workspaces that are respectful of workers' autonomy, one might be worried that theorizing employment law as an application of human rights norms would result in the regulation of only the most serious, rights-infringing behaviour. Rather, this basic standard of behaviour towards workers should be enhanced by other regulation that demands fair and decent treatment at work.

Jill Murray observes, for example, that human rights often provide a 'weak signal' to law and policy-makers when they devise strategies and regulation for the sphere of work.[32] She uses the example of attempting to construct schemes that allow workers to reconcile domestic care with work or increase the participation of women in the workforce out of the right to work without discrimination. The right not to be discriminated against gives 'very little' information about the appropriate approach that legislators should take to these issues.[33] Similarly, Article 8 might be considered to require some limitation on the hours that employers can demand of their workers[34] and the fulfilment of human rights obligations could be considered to require a minimum wage such that the individual is able to meet their basic needs.[35] But this would constitute a low base-line for worker's remuneration and exclude from employment law's concern issues of justice between groups within the workforce and the need to ensure that workers are rewarded in a manner that enables them to live a decent and fulfilling life. Right to work arguments may go further in requiring regulatory systems to be established ensuring fair treatment, but the

[32] Murray (n 24) 369.

[33] Ibid.

[34] See McCann's commentary on the importance of working time practices for workers' participation in community and social activities, reconciliation with caring responsibilities and the exercise of other human rights such as freedom to manifest one's religion: McCann (n 28) 519-520, 522.

[35] See *MSS v Belgium and Greece* (2011) 53 EHRR 2.

right to work in Convention law is currently focused on gaining access to a profession[36] rather than the substantive treatment of workers whilst at work.

A proponent of a "employment law as human rights" view would have to defend the theory from the objection that, without linking their theory to other rights with a more social focus,[37] it only prescribes a floor of protection which enables workers to make essential life choices without intervention. The theory does not assist legislators in making complex compromises when making regulatory choices or ground advocates' arguments in favour of enhanced terms and condition of work. Indeed, we must acknowledge the risk that, in re-organising employment law around a human rights theory, we would lose the 'directness and specificity' of labour rights that are well-established in domestic legal systems. Existing regulatory mechanisms may offer more 'sophisticated mechanisms' than those that would be available under a human rights-based view.[38] Virginia Mantouvalou, in exploring a theory of the kind set out here, draws a distinction between rights of workers that are human rights and other labour rights 'that involve the detailed regulation of the employment relation'.[39] Admitting that not all aspects of employment law can be effectively grounded upon human rights and that some of its usual provisions are instead 'labour standards' may allow a human rights-based theory to benefit from both the strong normative claims of human rights and the comprehensive regulation that has developed

[36] *Sidabras And Dziautas v Lithuania* (n 8).

[37] Such as the UDHR rights, the ESC or the Charter of Fundamental Rights. Gilabert (n 2) uses the UDHR in his thesis regarding labour rights as human rights but first must defend the status of these rights within the human rights order. Murray (n 24) adopts a different approach of expanding the rights discourse to a 'confluence of broadly defined social rights and the ILO's own concept of decent work' at page 381.

[38] McCann (n 28) 527.

[39] Mantouvalou (n 2) 169.

around the employment relationship. Abandoning the latter in the pursuit of the former may, however, be deeply 'counterproductive'[40] for employment lawyers.

B) Human rights has always been one concern of employment law

One point that can be drawn from the discussion of an "employment law as human rights" theory is the prominence of concerns about workers' basic rights within labour law. The past and present of labour law have been concerned with the safeguarding of a range of important rights and interests vested in individual workers, although the terminology of "fundamental" or "human" rights was a late arrival, appearing only in the most recent stages of labour law's evolution.

Many aspects of employment law can be shown to be based upon what would now be recognised as fundamental rights. Very early legislation of the workplace, notably the Factory Acts, limited the number of hours that children could work in factories and introduced some basic safety requirements. These early safeguards were later supplemented with a common law duty upon the employer to provide a safe working environment for their employees.[41] Similarly, a concern for the continuation of the unions' ability to act on the behalf of their members led to the Trade Union Act 1871 which protected the unions from liability under common law doctrines such as restraint of trade. The Trade Disputes Act 1906 similarly protected unions from liability for inducing breach of contract and interference with a business. This mode of providing unions with immunity against existing wrongs remains a part of modern employment law.[42] These early rules prevented onerous child labour, protected the workers' right to life by improving the safety

[40] Jan Smits, 'Private Law and Fundamental Rights: A Sceptical View' in Tom Barkhuysen and Siewert Lindenberg (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff Publishers, 2006) 15.

[41] *Wilsons & Clyde Coal Company Ltd v English* [1938] AC 57.

[42] Trade Union and Labour Relations (Consolidation) Act 1992, section 219.

of the workplace and provided the basics of a right to engage in collective action. All three themes can be seen in the modern human documents and principles. The worker's freedom and liberty has been guaranteed by their right to terminate the contract.[43] The courts also refused to grant an order that would require an individual to provide work against their will[44] – a decision in line with the modern right not to be subjected to forced labour. The doctrine of restraint of trade prevents individuals being unjustly deprived of their right to pursue a chosen occupation. Elements of discrimination law can also be seen in the common law regarding access to an occupation.[45] For example, the obligations that have been implied by law into the contract of employment protect workers from being treated in an unreasonable or undignified manner and impose natural justice constraints upon the employer's exercise of their powers.[46] All of these pieces of regulation from across the history of employment law give piecemeal protection to the human rights of the workforce.

This point is reinforced by an examination of the statutes of employment law. With regard to the statutory instruments that regulate the employment relationship, Collins and Mantouvalou observe that,

> 'In retrospect, it is possible to see that the enactment of various statutory employment rights in the 1970s, such as the right not to be unfairly dismissed and the laws against sex and race discrimination, were inspired, at least in part, by a human rights perspective on the tasks for labour law…the individual was provided with a mandatory right as the basis for a legal claim for compensation against an employer.'[47]

As will be explained in Chapter 3, the extensive regulation of discrimination in the workplace and labour market ensure that workers are not treated in a discriminatory manner. The freedom for all to engage in work is supported by family-related leave entitlements – maternity leave, paternity leave and parental leave. Longstanding statutory

[43] Collins and Mantouvalou (n 3) 192.

[44] *De Francesco v Barnum* (1890) 45 Ch D 430.

[45] *Nagle v Fielden* [1966] 2 QB 633.

[46] See Chapter 7 for discussion of the implied terms in the contract of employment.

[47] Collins and Mantouvalou (n 3) 195.

protection of the individual's freedom to associate with a union has been in place, by requiring that exclusions or expulsions from union can only be undertaken on a small number of grounds.[48] Aspects of unfair dismissal law protect workers from being dismissed as a result of exercising their fundamental rights, particularly their collective rights as members of trade unions.[49] Employees are protected from blacklisting on the grounds that they are union members and their right to collective bargaining and information regarding managerial decisions are established aspects of the employment law regime. These more recent statutory additions demonstrate that labour law has tackled many human rights issues, showing that workers' fundamental rights have been at the core of the discipline over the course of its development.

Although an "employment law as human rights" theory is appealing in the context of this project because of its capacity to offer a strong normative grounding to the claim that employers should be under a duty to respect their workers' human rights, it is also troubling in some respects. Employment and labour law have almost always been perceived as seeking to achieve several key goals or as ensuring the protection of a number of vital interests for workers. Conceiving the whole of labour law as a singular elaboration of human rights risks neglecting other goals that have traditionally been pursued by employment law: the redistribution of power from capital to labour,[50] concerns regarding social justice,[51] and tackling the subordination of workers to their employer,[52] for example.

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[48] See for example in section 5 of the Trade Union and Labour Relations Act 1974.

[49] Industrial Relations Act 1971, sections 24(5) and 26(2).

[50] Mark Freedland and Paul Davies, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens, 1983) 18.

[51] See Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labor Law' (2008) 35 J L & Soc 341, 345. More recently, social justice as an ideal for labour law was strongly defended by Supiot: Emilios Christodoulidis and Ruth Dukes, 'Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot' (2010) 19 Social & Legal Studies 217, 221.

[52] Hugh Collins, 'Labour law as a vocation' (1989) 105 LQR 468, 484.

Labour law is also seen to contribute to the achievement of equality,[53] freedom,[54] autonomy[55] and dignity[56] on behalf of workers. What is crucial when positioning the protection of human rights within this broader conceptual framework is not to eclipse these important, specific, and unique values and objectives that employment law has pursued and achieved for many years. When we are presented with such an impressive plurality of ideas and ideals, it becomes clear how troubling it would be to narrow the purpose of labour law to a singular focus upon the protection of human rights. One of the key benefits of maintaining the autonomy of employment law as a discipline is that the boundaries permit of independent investigation and elaboration of this variety of aims, how they might be combined and how they might best be pursued by legal mechanisms. Ensuring that effective protection for human rights contributes to the achievement of a variety of the broader values and aims of employment law, justifying giving it a prominent place within any analysis of the subject.

It is beneficial to note a final consequence of the acknowledgement that employment law has a history of protecting the human rights of workers. If human rights are considered an organic concern of employment law, then the importance of the theoretical divide between private law disciplines, of which employment law is one, and public law which is the traditional home of human rights norms, diminishes. The resistance that might otherwise be encountered by a project that is seen to fundamentally challenge

[53] Judy Fudge, 'Labour As a 'Fictive Commodity': Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

[54] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 112 and Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 151-159.

[55] As in Spector's theory of 'equal autonomy': Horacio Spector, 'Philosophical Foundations of Labor Law' (2006) 33 Fla St U Law Rev 1119.

[56] David C. Yamada, 'Human Dignity and American Employment Law' (2009) 43 U Rich L Rev 523.

that divide is unnecessary here. Although the argument here is not, as it may be elsewhere,[57] for the abolition of the divide between public law and private law, it is important to realise the extent to which employment law and public law face similar concerns[58] and tackle them in comparable ways. When faced with a problem common to both spheres, each can learn from the other in how to deal with it. Anne Davies has observed the propensity of labour law to 'borrow' public law concepts.[59] One explanation for this tendency is that the two areas of law share similar purposes, such as the protection of individuals' basic rights from infringement, although the particular means by which they achieve them are tailored to the surrounding social and legal context of the respective disciplines.

C) What does this mean for actors in employment law?

If it has been established that human rights, although not the entirety of employment law's purposes, have a significant role to play in that domain, what function should those rights play in developing the law? What effect should they have upon judges deciding particular cases? We have established above that the protection of human rights is a goal that is internal to employment law and legitimately pursued by its rules. In this light, Anne Davies calls for a 'human rights culture' in employment law.[60] A human rights culture describes 'an ideal situation in which key actors in the legal system regard compliance with human rights norms as an important goal which takes priority over other considerations and which should be pursued with vigour.'[61] In the courts, it 'would be evidenced by careful consideration to determine whether rights were relevant to any decision, a generous

[57] Dawn Oliver, *Common Values and the Public-private Divide* (Cambridge University Press, 2010).

[58] See John Laws, 'Public law and employment law: abuse of power' [1997] PL 455.

[59] ACL Davies, 'Labour Law as Public Law' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy Of Labour Law* (Hart Publishing, 2015).

[60] Davies (n 16) 183.

[61] Ibid.

interpretation of what those rights required… and, in appropriate cases, rigorous scrutiny of any interference with rights using the proportionality test.'[62] The government within its sphere would actively promote the enjoyment of human rights, through legislative review and engagement with international human rights bodies, and it must avoid actions that infringe human rights.[63] This, I would argue, is the ideal way in which the key actors responsible for shaping employment law would respond to the claim that the protection of human rights is an important function of employment law.[64]

One practice that would contribute to the fulfilment of such a human rights culture is the 'opening-up' of existing compromises and balances that have been struck within employment law to human rights scrutiny.[65] Human rights law is simultaneously developing externally to employment law, specifically through the decisions of the European Court and national bodies that apply human rights norms. The principles developed there can be applied to employment law, reviewing the established doctrines and rules, prompting reconsideration of the established legal position in the light of the principles of human rights law.[66] Encapsulating how such a process of review might be conducted, Collins and Mantouvalou observe that

> 'a human rights perspective offers … a presumption that the personal scope of employment law and associated statutory rights should be universal. In so far as rights under the contract of employment or statutory regulation are perceived to be founded on fundamental rights, any exclusions from those rights would receive strict scrutiny and require justification.'[67]

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[62] Ibid.

[63] Ibid 184.

[64] It should be noted at this stage that Davies goes on to comment that 'there is, as yet, little evidence of the emergence of a human rights culture in the United Kingdom since the enactment of the HRA.'

[65] This point is made more generally by Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 European L J 766, 767.

[66] Hugh Collins, 'On the Incompatibility of Human Rights Discourse and Private Law' in Hans W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press, 2014) 41.

[67] Collins and Mantouvalou (n 3) 199.

The independently developed principles of human rights law thereby provide a fresh perspective upon the established patterns of employment law, forcing scholars and policy makers to justify discrepancies where they arise and where that is not possible, providing the impetus to amend the inconsistency. The deficiency may take a variety of forms: a dearth of protection for a particular group of individuals, legislation that protects against an incomplete range of infringements or judicial analysis that is inadequate when held up against human rights standards. The process of highlighting problematic areas within the regulation of the employment relationship is ongoing, with input from international courts and supervisory bodies as well as academic commentary. It is this type of appraisal of the current state of English individual employment law that this thesis is engaged in.

More concretely, how might adherence to human rights influence the courts when facing the variety of issues that they deal with? In many instances, as will be demonstrated in Chapter 3, Convention rights are already reflected to some extent in the duties placed by directly upon employers. Human rights are thereby incorporated into employment law. Here, the only responsibility of the court is to ensure that the standards and rules set out in the legislation are purposively applied to grant the most effective protection to the claimant's human rights as possible.[68] The principles that can be derived by the body of decisions of the Strasbourg Courts, in accordance with the discussion offered in Section II below, would be useful in carrying out this purposive exercise in interpretation.

In some cases, however, employment law fails to meet the demands of human rights law. As we have shown that human rights *should* be reflected within employment law, the aim of the court should be to rectify the deficiency. Indeed, as has been observed by Raday, '[i]t is in the nature of constitutional human rights protection to transfer the power to

[68] One instance where the courts failed to perform this function was *Associated Newspapers Ltd v Wilson, Associated British Ports v Palmer* [1995] 2 AC 454, [1995] 2 WLR 354. The House of Lords read the statutory protection for trade union members in a narrow fashion so as to exclude the use of collective bargaining. The court's interpretation of the statute led to a successful complaint in Strasbourg: *Wilson v United Kingdom* (n 21).

determine the limits of rights and powers away from the legislature and bestow it on the courts.'[69] The provisions of the Human Rights Act 1998 confer a wide competency, or even an obligation, upon the courts to engage in judicial redevelopment of the law. For example, if the court comes across a deficiency in the domestic system of employment protection that is likely to amount to a breach of the Convention, it would appear to breach the court's own obligation to act compatibly with the Convention under section 6 not to correct that deficiency.[70] Indeed, the Court of Appeal has admitted that the effect of section 6 is to 'to reinforce the extremely strong interpretative obligation imposed on the employment tribunal by section 3 of the HRA.'[71] The courts are under a strong obligation to develop the law in line with the rights of the Convention, but that obligation is limited by one main factor. The HRA gives no mandate to the courts to create new causes of action:[72] if there is no existing private law action that the claimant can rely upon, and the courts in turn can develop, it is for the legislature to rectify the issue. This situation is relatively rare in employment law.

II. The particularities of protecting human rights in employment

This section explains a further consequence of human rights being legitimately part of employment law's aims: protection of human rights should not be perceived as a 'top-down' imposition straightforwardly transplanted onto the existing legal regime. Rather, employment law, as it has done thus far, must use human rights ideas in a manner that is suitable to the context in which they are being applied. Two particular issues of tailoring the meaning of human rights to the employment sphere will be discussed here.

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[69] Frances Raday, 'Privatising Human Rights and the Abuse of Power' (2000) 13 Can J L & Jurisprudence 103, 103.

[70] Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) PL 423, 440.

[71] *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634, [58].

[72] Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, 2008) 263.

A) The irrelevant doctrines of international law

The first point is specific to the process of drawing upon Convention rights in domestic employment law. Human rights were conceived in relation to the state and its functions and Convention rights have been developed by a court with an international supervisory remit. These features have led to the development of two doctrines that are used regularly by the ECtHR in examining employment-related cases but should play no role in a domestic tribunal's scrutiny of an employer's actions. The doctrines are the 'margin of appreciation' and the 'doctrine of positive obligations' and their application entails a more lenient approach to the process of justifying an infringement. Both are only relevant to the duties placed upon and deference shown to state authorities.

The 'margin of appreciation' is a recognition of the principle of subsidiarity[73] and that the member states could protect and fulfil Convention rights via a number of routes, balancing rights in different ways. The margin is used 'to balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the Convention.'[74] The Court has stated that '[b]y reason of their direct and continuous contact with the vital forces of their countries…. it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context'.[75] It is applied, for example, where a state has a piece of legislation which is intended in part to protect a particular right but the legislature had to reach a compromise between the enforcement of the right and other important societal interests[76] or where the ECtHR is reviewing a national court's decision that an infringement upon an individual's

[73] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 721.

[74] Ibid 720.

[75] *Handyside v United Kingdom* (1979) 1 EHRR 737, [48].

[76] *Redfearn v United Kingdom* (2013) 57 EHRR 2, [48].

Convention right was necessary in order to pursue a legitimate aim.[77] As the 'margin of appreciation' is a feature of an *international* system of judicial supervision, it has no role in the deliberations of national courts.[78] This has been recognised by the judiciary: '[i]n applying the Convention rights which have been reproduced as part of domestic law by the Human Rights Act 1998, the concept of the margin of appreciation has, as such, no application.'[79]

A similar analysis can be applied to the ECtHR's doctrine of positive obligations or positive duties. The Court has long held that the states' obligations under a number of the Convention's articles extend beyond the 'primarily negative undertaking[s]'[80] contained in the ECHR text. The Court has imposed a duty on member states to ensure that the national framework provides effective protection for human rights. Importantly, the member states are under an obligation to protect individuals from interferences with their ECHR rights by other private parties.[81] This principle extends the Court's purview to reviewing private law legislation that offers this protection between private individuals[82] and to examining the reasoning and outcomes reached by national courts in determining private law disputes.[83] In general, the Court requires that a 'fair balance' should be struck between the competing interests in the case.[84] But, '[t]he duty clearly lies with the state but at the municipal level it is likely to discharge it by imposing corresponding duties on private

[77] *Sánchez v Spain* (2012) 54 EHRR 24, [54].

[78] David Pannick, 'Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment' [1998] PL 545, 548, and Keir Starmer, *European human rights law: the Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, 1999) 190.

[79] *R. (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [63] (Lord Hoffman).

[80] *Martínez v Spain* (2015) 60 EHRR 3, [114].

[81] *Young, James and Webster v United Kingdom* (n 16) [49].

[82] See, for example, *Redfearn v United Kingdom* (n 76).

[83] See, for example, *Eweida and others v United Kingdom* (2013) 57 EHRR 8.

[84] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, [67].

individuals either by legislation or under the common law.'[85] In other words, the positive obligations fall on the legislature and the courts in their respective spheres and, with regard to the courts, they require that the courts act in manner that gives effective protection to the human rights of the individuals that come before them. Giving that effective protection requires the courts to enter into a vigorous engagement with whether the infringement was strictly necessary to fulfil a legitimate aim, they should avoid relying on the 'fair balance' analysis that the Court deploys under its doctrine of positive obligations.

B) The particular characteristics of the employment relationship

Just as ideals such as justice or freedom can be expounded in a manner that is more or less sensitive to the peculiarities of the working relationship, so can human rights concepts. It has been demonstrated that transferring the meaning and scope of human rights that have been developed in international and domestic cases against the state can lead to severe deficiencies in the standard of protection offered to individuals.[86] As Collins argues, '[e]xisting declarations of the rights of citizens can be drawn upon by analogy, but the context of the workplace requires a more refined and differentiated discourse to protect employees against the arbitrary use of managerial power.'[87]

First, we might consider the factual differences between the powers and capacities of the state as opposed to the employer. Although the similarities between the state and the employer are sufficient that they attract interest as actors from employment and human

[85] Leigh and Masterman (n 72) 236.

[86] See, for example, the conception of privacy adopted in *X v Y* (n 71) and *Pay v Lancashire Probation Service* [2004] ICR 187 and Virginia Mantouvalou's arguments that it was inappropriate for application to the employment relationship: Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912, 922 onwards.

[87] Hugh Collins, 'The Productive Disintegration of Labour Law' (1997) 26 ILJ 295, 306.

rights commentators alike,[88] there are important differences.[89] Employers have no power to permanently remove the liberty of their employees by imprisoning them, although the state cannot straightforwardly end or threaten to end its relationship with a citizen in response to behaviour that it disagrees with. The state cannot act in certain ways which are available to employers. It cannot offer financial inducements to its citizens to give up fundamental rights that they enjoy. It cannot 'downgrade' a citizen's status to express disapproval of their actions, in the way that an employer can demote an employee. It cannot unilaterally determine the rules of the relationship and thereby restrict the exercise of fundamental rights in a major sphere of an individual's life. An employer's powers are more immediate and intrusive than those of the state. In the 'panoptic design' of the workplace,[90] a manager can watch an employee throughout the day, checking how often and for how long they interact with others instead performing their duties, or they can surveil closely their activity through IT systems or productivity monitoring. These distinctive ways in which the employer can exercise their prerogative must be considered in applying human rights standards to the workplace if we are to avoid providing insufficient and ineffective protection to workers.

Contracting out of fundamental rights

These differences between employers and the state as power holders point to the first major feature of the employment relationship to which a conception of human rights must respond. A state cannot enter into an agreement with an individual that they should not

[88] See Hazel Oliver, 'Employment Law' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 344 and Oliver (n 57) Chapter 6.

[89] The limitations of the analogy between governing and employing relations has been highlighted by Frances Raday: Frances Raday, 'Constitutionalization of Labour Law' in Roger Blanpain and Manfred Weiss (eds), *The Changing Face of Labour Law and Industrial Relations* (Baden-Baden, 1993) 106.

[90] Guy Mundlak, 'Human Rights and the Employment Relationship: A Look Through the Prism of Juridification' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2002) 323.

exercise their fundamental rights for a certain period of time or in certain ways. The contractual foundation of the working relationship means that such an action is entirely possible. Human rights as applied in the public sphere offer no guidance on how to tackle this problem. Restrictions on fundamental rights are regularly included in contracts of employment and employees could, in theory at least, waive their rights altogether if they wished. The principles that protect human rights in the employment sphere must be conscious of this key difference and respond appropriately.[91]

Attempts by the employer to rely on exclusionary rules or terms that waive aspects of fundamental rights and freedoms, such as a term that waives the right to privacy of correspondence by guaranteeing the employer's right to monitor all employee correspondence – raise two main issues. First, is the employee's consent genuine? The choice to waive an entitlement to a right might be an important exercise of autonomy. For example, an individual might choose to become a minister for a Church, in accordance with their calling, which entails a restriction upon their right to private life and property rights as a result the vows of chastity and poverty that the ministry requires. In more usual employment situations, however, we might have reason to doubt whether a waiver of a right is a genuine exercise of autonomy.[92] The inequality of bargaining power and the necessity of receiving a wage in return for work would usually leave workers with little opportunity to challenge terms that they would rather not agree to and resigning from their post when those terms impede the exercise of their rights may not be a realistic option.

The second issue is whether the employer was justified in imposing the restriction or removing the right in the underlying contract. In the ECtHR, the examination of justification is undertaken by applying the necessity and proportionality tests. Some restrictions are likely to be justified. For example, a judge's freedom of expression can be

[91] See Collins and Mantouvalou (n 3) 200-202.

[92] See Gillian Morris, 'Fundamental Rights: Exclusion by Agreement?' (2001) 30 ILJ 49, 54.

restricted in the interests of maintaining the impartiality of the judiciary and a developer can be prevented from telling the world her company's trade secrets as that would constitute an infringement of the company's right to property. Similarly, protection of the employer's reputation has been held to justify proportionate action being taken against a whistleblower, who is protected under Article 10.[93] But the contractual restrictions may overstep the boundaries of necessity by imposing rules that deprive an individual of the most important aspects of their fundamental rights where there is no demonstrable legitimate aim or the necessity of requiring an individual to waive their rights could not be established.[94] The ECtHR has made it clear that instructions issued under the guise of contractual prerogative cannot be used to deprive employees of their rights completely,[95] an important limitation on the influence that a contract of employment can have on the exercise of human rights. Engaging with these kinds of issues is crucial to the success of any provision that aims to protect human rights at work and a proportionality-based framework should be used to ensure that employers do not abuse their contractual powers in order to impose excessive restraints and waivers upon their employees.

Rights against rights: the reconciliation of conflicting rights

The second difficulty in an attempt to transplant human rights from international human rights law into employment law is that, in private law disputes, both sides have rights. Inserting the mode of analysis used to check whether a state has disproportionately infringed the rights of an individual in its pursuit of the communal interest straight into an examination of an employment dispute discloses a risk that the employer's rights will be overlooked. The state is not a rights-holder and it can only act in the general interests to limit the rights of others. In contrast, the employer has a variety of contractual and statutory

[93] See *Heinisch v Germany* (2014) 58 EHRR 31.

[94] *Schüth v Germany* (2011) 52 EHRR 32, [71].

[95] *Bărbulescu v Romania* [2016] IRLR 235, [80].

rights that are protected by private law. The right to property and the right to protect one's reputation can be called to the employer's aid in a variety of situations when justifying an infringement with an individual's fundamental right. Employers also have a right to manage their business which should not be interfered with without a solid reason to do so.[96] The move from the vertical scenario, where only one party holds rights, to the horizontal setting must be sensitive to the need to reconcile two sets of rights.[97]

An employment scholar, sceptical of employer's motives and conduct, cannot leave the point there. There is another risk in human rights analysis making the jump from public to private. The risk is the opposite one: that employers will be given too much leeway in the protection of their fundamental rights in a manner that is deeply detrimental to the standard of protection available to individual workers. We must be careful to distinguish between two types of claim. The first type of claim is that an employer's rights are genuinely under threat or have been infringed, for example where an employee makes public accusations to harm the reputation of the employer without cause or a worker is found to have stolen the employer's property. In these kinds of situations, the employer has a legitimate reason to infringe an employee's rights, as long as its conduct is no more than necessary and so forth. However, in some situations, the claim to property rights or reputation management may be decoded as an appeal to structure or run a business in the most profitable way. Through this route, considerations of 'economic efficiency' re-enter the discussion and threaten to limit the effectiveness of any duty upon employers. This must be strongly resisted. As argued firmly by Manfred Weiss, '[f]undamental values expressed by fundamental rights cannot be pushed aside by business interests or economic

[96] See ibid at [124] for reference to employer's rights to ensure the 'smooth running of the company'. Stronger guarantees can be found in the CFREU: Article 16 sets out the freedom to conduct a business.

[97] See Collins, 'On the Incompatibility of Human Rights Discourse and Private Law' (n 66) 50.

considerations.'[98] This is a view shared by other commentators[99] and is supported by the analyses of John Rawls that 'justice requires that liberty may only be limited for the sake of liberty and *not for the sake of other social and economic advantages*.'[100] As argued by Fredman with regard to the right not to be discriminated against,

> 'limits on the duty not to discriminate should not be based on an employer's economic interests. Appropriate limits to the right not to be discriminated against should derive from human rights considerations, particularly the need to protect the rights and interests of others.'[101]

In applying human rights standards in employment law, we must be alive to the risk that the rights of workers might be compromised on account of considerations of economic or managerial efficiency. This business agenda is not of sufficient importance to justify an infringement upon fundamental rights, even if the arguments are delivered through the medium of the right to enjoyment of property or the right to protect a business' reputation.

Summary

The protection of workers' human rights can be seen to be an important objective of employment law. It may be yet proven that large amounts of employment law can be founded upon human rights, but this prospect has not been investigated fully here. Once the importance of human rights within employment law's agenda has been realised, the argument in favour of imposing human rights duties upon employers is strengthened. However, it has been made clear that the ideas and concepts used within the human rights discourse must not be uncritically transplanted into employment law. The peculiarities of the employment relationship mean that the concepts and approach towards the application

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[98] Manfred Weiss, 'Re-Inventing Labour Law?' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 50.

[99] Mantouvalou (n 2) 171; Spector (n 55) 1146; Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights' (2007) 29 Comp Lab L & Pol'y J 29, 39.

[100] HLA Hart, 'Rawls on Liberty and Its Priority' (1973) 40 U Chi LR 534, 534 (emphasis added).

[101] Sandra Fredman, 'Equality Law: Labour Law or an Autonomous Field?' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 273.

of human rights standards must be altered to take into account its contractual and bilateral nature. In the next chapter, further evidence will be given that human rights concerns have already been integrated into employment law. It will be demonstrated that employers are under duties that mirror or have been adapted to reflect the demands of their workers' human rights to a significant degree.

Chapter 3
The Existing Human Rights Duties of Employers

Employers are already bearers of human rights responsibilities to a significant degree, reinforcing the argument made in Chapter 2 that an important purpose of employment law is to protect the human rights of workers. These duties are imposed by various means. There are a number of statutory instruments that impose responsibilities upon employers that are co-extensive with the obligation not to interfere with a particular Convention right. The Equality Act 2010 and the Trade Union and Labour Relations (Consolidation) Act 1992 contain provisions of this kind, amongst others. Alternatively, other legal instruments might be interpreted in a manner that reflects the needs of an individual's human right. For example, the test of 'fairness' in unfair dismissal law has been developed so that it includes a proportionality test in circumstances where the individual argues that their human rights have been infringed.[1] The same process of evolution has occurred in the common law. Where common law principles fail to reflect the human rights of workers, they have been altered in order to do so. Through these several methods, employers are constrained in their actions by the duty to respect the Convention rights of their workers.

I. The mechanisms of horizontal effect

There are two main ways in which employers have become duty bearers of their workers' human rights. In practice, these duties come about in a manner that maps roughly onto the distinction that has been drawn between the 'direct horizontal effect' and the 'indirect

[1] *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634.

horizontal effect' of human rights.[2] 'Horizontal effect' denotes that the dispute is between two parties in their private law capacities, rather than a vertical dispute between an individual and the state in which human rights are conventionally considered to apply. The *direct* horizontal effect of human rights indicates that a private party is able to make a claim against another private party for an infringement of their human rights. For example, A sues B, a private sector employer, for a breach of their Article 10 right to freedom of expression. *Indirect* horizontal effect of human rights occurs when existing legal rules or rights are altered in order to incorporate or reflect the human rights of one or both of the parties. Here, A would sue B on the basis of a pre-existing right, such as the right not to be unfairly dismissed under the Employment Rights Act 1996, and the question of whether that existing right has been breached would be assessed in a way that gives due regard to A's Article 10 ECHR right.[3] If the indirect horizontal effect of a fundamental right is fully embraced within a particular norm of private law, the result can in practice be the same as direct horizontal effect: B is put under a duty to respect A's Article 10 right.[4]

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[2] See Alison Young, 'Mapping horizontal effect' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) drawing upon Ian Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 ICLQ 57 at 75 onwards; Deryck Beyleveld and Shaun D. Pattinson, 'Horizontal applicability and horizontal effect' (2002) 118 LQR 623, and Gavin Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?' (1999) 62 MLR 824, 826 and 830-31.

[3] See, for example, *X v Y* (n 1) discussed further below.

[4] Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341, 352; Olha Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?' in Stefan Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International, 2008) 57; Hugh Collins, 'On the Incompatibility of Human Rights Discourse and Private Law' in Hans W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press, 2014) 39, and Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 227.

Within the domestic human rights scheme, there is no textual support for the existence of direct horizontal effect.[5] Despite this, I argue here that some human rights enjoy *de facto* horizontal effect within the employment relationship. The text of the HRA 1998 is argued to provide indirect horizontal effect in a number of ways.[6] Section 6 is the starting point, stating that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.'[7] Section 6(3) includes courts and tribunals within the definition of a 'public authority'.[8] One can therefore argue that each adjudicative decision is an act which should be compatible with Convention rights. This reasoning could apply in any type of case, including private law decisions.[9] In disputes where the key issue is the interpretation of a statute or statutory instrument, section 3 places an explicit and specific duty on the courts to read and give effect to that instrument compatibly with the Convention 'so far as it is possible to do so'.[10] These mechanisms can be potent in prompting or requiring change in the private legal sphere. Their impact upon the extent and shape of the obligations that employers owe to their workforce will be explained further below.

What should Convention rights look like in a dispute between A and B and how should a legal system protect them? On its face, the ECHR is only 'vertically' binding: it grants rights to individuals that are enforceable against the state.[11] The Convention's reach has been extended to private relationships through the ECtHR's doctrine of positive obligations. Under Article 1, each signatory state has an obligation to secure the

[5] Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, 2008) 263.

[6] Young (n 2) 18-22.

[7] Human Rights Act 1998, section 6(1).

[8] Ibid, section 6(3).

[9] A notable example of Convention values influencing the development of the common law is *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[10] HRA 1998, section 3(1).

[11] European Convention on Human Rights, Article 34.

Convention rights to those in their jurisdiction.[12] This has been held to include protecting individuals from interferences with their ECHR rights by other private parties.[13] All of the Articles focused upon in this thesis – Articles 8, 9, 10 and 11– have been held to entail positive obligations upon the signatories to the ECHR.[14]

Within the employment sphere, the doctrine of positive obligations has been found to require states to provide a legal framework which gives an opportunity for a complaint that an employer has infringed an individual's human rights to be examined. A court must be able to strike a fair balance between the interests of the parties, irrespective of the individual's length of service.[15] Other examples include ensuring that workers are protected from being treated less favourably on grounds that they have exercised their fundamental rights and providing safeguards for workers against being made offers that induce them to surrender important fundamental rights.[16] As an arm of the state, the ECtHR has also placed demands upon the national courts and tribunals. Under the doctrine of positive obligations, the courts must strike a fair balance between the individual's fundamental rights and the employer's legitimate aims when deciding a case[17] and ensure that any penalty imposed upon an individual has a reasonable relationship of proportionality to the employer's cited aim.[18] The Strasbourg Court can thus review a wide range of conduct that takes place in

[12] Ibid, Article 1.

[13] The first instance of intervention to protect against private infringement in labour law was *Young, James and Webster v United Kingdom* (1981) 3 EHRR 20, [49].

[14] *Martínez v Spain* (2015) 60 EHRR 3, [114]; *Eweida and others v United Kingdom* (2013) 57 EHRR 8, [84]; *Sánchez v Spain* (2012) 54 EHRR 24, [58], and *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10, [131].

[15] *Redfearn v United Kingdom* (2013) 57 EHRR 2.

[16] *Wilson v United Kingdom* (2002) 35 EHRR 20.

[17] *Eweida and others v United Kingdom* (n 14).

[18] *Fuentes Bobo v Spain* (2001) 31 EHRR 50.

the private sphere and uses the doctrine of positive obligations indicate what national authorities must do in order to adequately protect human rights in private relationships.[19]

II. Employers' existing obligations that give horizontal effect to human rights

This section recounts a number of key instruments that impose duties upon an employer to respect the human rights of its workers. In some instances, employers will be amongst a group of private sector duty bearers under these pieces of legislation that include landlords, education or service providers, and trade unions.[20] This section focuses only on the duties of employers under these statutes and the way in which they correspond to ECHR rights held by individuals. It is argued that in effect these instruments give direct horizontal effect to the worker's human rights within the employment relationship, although the protection offered may be imperfect.

Before moving to the extensive statutory provisions that are coterminous with the duty to respect workers' human rights, it is interesting to reflect on the protections that the common law provides to human rights interests. Article 4 protects all individuals from slavery, servitude and forced or compulsory labour.[21] In circumstances in which Article 4 is breached, the response would be primarily through criminal law[22] but a number of private law rules would also be breached. The wrongdoer would potentially be culpable for a variety of torts; specifically, torts against the person such as battery and false imprisonment, for intentional infliction of psychiatric injury, and deceit or unlawful means

[19] For a review by a past President of the Court of the operation of positive obligations, see Dean Spielmann, 'The European Convention on Human Rights: The European Court of Human Rights' in Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007).

[20] See for example the duties imposed upon trade unions, landlords and service providers by the Equality Act 2010.

[21] ECHR, Article 4.

[22] Modern Slavery Act 2015.

conspiracy.[23] If a worker was promised a wage in return for their labour that was never received, they would have an ordinary breach of contract claim. Remedial rules in contract law also provide protection from forced labour. In particular the 'continuing strength of the rule against specifically enforcing an employee's promise to work bears witness to the … presence of the anti-slavery norm.'[24] In the words of Lord Justice Fry in *De Francesco v Barnum*,

> 'I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner.'[25]

These established rules of private law can be pieced together to provide protection from slavery, servitude and forced labour, as set out in Article 4 ECHR. Although the Convention's prohibition of forced labour will not be fulfilled without criminal sanctions,[26] the duties of employers under contract and tort law go some way to vindicating the Article 4 rights of the victim. In modern employment law, most of the duties imposed on employers that are co-extensive with the obligation to respect human rights are imposed by statute.

A) Equality Act 2010

The right to equality or non-discrimination is a human right established in all human rights documents.[27] Within the European Convention scheme, there is no freestanding right to

[23] See Pam Stewart, 'Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia' (2011) 34 University of New South Wales Law Journal 898.

[24] Todd D. Rakoff, 'Enforcement of Employment Contracts and the Anti-Slavery Norm' in Dan Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2003) 291.

[25] *De Francesco v Barnum* (1890) 45 Ch D 430, 438.

[26] See *Siliadin v France* (2006) 43 EHRR 16.

[27] ECHR, Article 14 and The Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Article 21.

equality, but discrimination in the enjoyment of the other Convention rights is prohibited.[28] Thus, another human right must be engaged by the facts before the Court will examine a possible breach of Article 14. Anti-discrimination legislation in most European jurisdictions is derived from the EU directives on equality,[29] which recognises in its preamble that it protects a 'universal right' to protection against discrimination.[30] EU-based anti-discrimination law protects workers against two main forms of discrimination: direct discrimination, where A is treated less favourably than B because of their sex, race, religion etc,[31] and indirect discrimination, which occurs when B applies a facially neutral provision, criteria or practice which puts a protected group of which A is a member at an unjustified disadvantage.[32] In the UK, the Equality Act 2010 protects claimants from discrimination on the grounds of age, disability and gender reassignment; marriage and civil partnership, pregnancy and maternity, race, religion or belief; sex and sexual orientation.[33]

Direct and indirect discrimination have been recognised by the ECtHR to constitute an infringement of the prohibition on discrimination. For example, in *Boyraz v Turkey*, it was held that a dismissal from employment on the sole ground of an individual's sex engages Article 8's right to respect for one's private and family life. The Court considered that a difference in treatment on grounds of sex between persons in a comparable situation (here, individuals working as security officers within the civil service) with no objective

[28] ECHR, Article 14.

[29] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L-39/40, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L-180/22 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L-303/16.

[30] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L-303/16, preamble (4).

[31] EqA 2010, section 13.

[32] Ibid, section 19.

[33] Ibid, section 4.

and reasonable justification can breach Article 14.[34] In *Thlimmenos v Greece,*[35] the applicant was refused an appointment as an accountant on the grounds that he had previously committed a felony. The felony was insubordination in the armed forces, which had been motivated by the applicant's religious beliefs as a Jehovah's Witness. The facts were found to engage the applicant's Article 9 rights, and, by treating a felony motivated by religious beliefs in the same way as all other felonies, the rules breached Article 14. The national authorities should have treated individuals like Mr Thlimmenos differently:[36] a facially neutral rule had a discriminatory impact on his particular religious group. In a more recent case regarding the provision of education, the ECtHR has adopted the language of indirect discrimination for the first time, holding that it constitutes a breach of Article 14.[37]

The case-law of the ECtHR shows that those subject to the duties of the kind contained in the Equality Act are duty bearers of one specific human right: the right not to be discriminated against.[38] Employers and employment agencies are subject to this duty with regard to their employees, workers under a contract personally to do work and agency workers.[39] The Equality Act places private employers under a duty to respect their workers' fundamental right not to be discriminated against and the duties correspond to what is required by Strasbourg under Article 14. Although an individual may use the language of the Equality Act on the claim form, in practice, the Act gives direct horizontal effect to the Convention's prohibition on discrimination and the human right not to be discriminated against.

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[34] *Boyraz v Turkey* (2015) 60 EHRR 30, [50].

[35] *Thlimmenos v Greece* (2001) 31 EHRR 15.

[36] Ibid [44] and [48].

[37] *DH v Czech Republic* (2008) 47 EHRR 3, particularly paragraphs [182]-[184].

[38] The Equality Act also provides protection for other human rights because it protects individuals from detrimental treatment on grounds related to, for example, their right to respect for their private law or their right to manifest their religious belief. This will be discussed further below.

[39] EqA 2010, sections 39, 55, and 57 respectively.

B) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A)

The ECHR guarantees every individual the right to freedom of association. Article 11 includes within this freedom 'the right to form and to join trade unions for the protection of his interests.' These rights are subject to qualifications, importantly an infringement can be justified in order to protect the rights and interests of others.[40] Article 11 has been interpreted to include a number of collective activities, such as the right to collectively bargain and the right to strike,[41] and some individually-held rights, such as the worker's right to have their union represent their interests in negotiations and the freedom not to associate with a union.[42] The state is furthermore under an obligation to ensure that there is a regulatory scheme under which these rights are protected within private employment relationships.

Although the provisions are undoubtedly imperfect in places,[43] TULR(C)A places a duty upon employers to respect their workers' right to freedom of association under Article 11. For example, under section 137, it is unlawful to refuse a person employment because they are, or are not, a member of a trade union.[44] This protects a worker's freedom to join and freedom not to join a union at the point of entry into employment. Sections 146 and 152 protect workers and employees from detriment and dismissal respectively on grounds related to their union membership and activities.[45] In addition, and in direct

[40] ECHR, Article 11(2).

[41] *Demir v Turkey* (2009) 48 EHRR 54 and *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251, [24].

[42] *Wilson v United Kingdom* (n 16) and *Young, James and Webster v United Kingdom* (n 13).

[43] See Hugh Collins, Keith Ewing and A McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2012) 466-7 and ACL Davies, 'Workers' Human Rights in English Law' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 185-6.

[44] Trade Union and Labour Relations (Consolidation) Act 1992, section 137.

[45] Ibid, sections 146 and 152.

response to the ECtHR's ruling in *Wilson and Palmer v UK*,[46] a worker has the right not be made an offer, the sole or main purpose of which is to induce the worker to not become a member of a union, to not take part in its activities or make use of its service or to achieve the result that the worker's terms are no longer negotiated by collective agreement.[47] With regard to the rights of unions with which workers can choose to associate under Article 11, TULR(C)A sets out the mechanism by which trade unions can be 'recognised' for the purposes of collective bargaining[48] and places obligations upon employers in connection with collective bargaining such as the duty to disclose information and the duty to consult worker representative before a redundancy occurs.[49] The Act sets out the rules and procedures through which unions can take industrial action[50] and offers some protection from dismissal for workers who participate in industrial action.[51] In these variety of ways, TULR(C)A requires the employer to respect the freedom of association of their workers, both as individuals and through their representative unions, thus making employers duty-bearers of this particular human right. Due to the significant overlap between the provisions of TULR(C)A and the contours of Article 11 ECHR, one can make a strong argument that the Act gives direct horizontal effect to the Convention right.

C) Public Interest Disclosure Act 1998

The ECtHR has developed specific principles within the broader scope of Article 10's freedom of expression that protect whistleblowers (persons making a disclosure that they

[46] *Wilson v United Kingdom* (n 16).

[47] TULR(C)A 1992, sections 145A and 145B.

[48] Ibid, Schedule A1.

[49] Ibid, sections 181 and 188.

[50] Ibid, Part V.

[51] Ibid, section 238.

believe is in the public interest).[52] The Court has given guidance on the appropriate recipient of the disclosure and on how courts should weigh the factors relevant to a complaint related to whistleblowing. Of particular importance to the Court is that individuals should not suffer a severe disadvantage as a result of a well-intentioned disclosure which they believed was in the wider public interest.[53] Many of the cases resolve around the disclosure of wrongful conduct within an employing organisation by a worker, who is then dismissed.

This is one instance in which the UK legislators were well ahead of the principles enunciated by Strasbourg. The Public Interest Disclosure Act 1998 (PIDA) sets out the types of disclosures that are protected and states that a worker – which is broadly defined[54] – should make the disclosure internally to their employer initially. In terms of rights to protection, the Act states that the worker has a right not to be subjected to detriment by his employer as a result of a protected disclosure under the Act.[55] This duty is supported by the classification, by the Act, of the dismissal of a whistleblower as automatically unfair for the purposes of unfair dismissal law.[56] This provision makes it more straightforward for a worker who can demonstrate that they have been fired as a result of blowing the whistle to make a successful unfair dismissal claim. It has been argued that such exemptions from the usual test of unfairness indicate a concern to protect the fundamental rights of workers.[57] Whistleblowing may be considered another instance where employers

[52] *Guja v Moldova* (2011) 53 EHRR 16, *Heinisch v Germany* (2014) 58 EHRR 31 and *Kudeshkina v Russia* (2011) 52 EHRR 37.

[53] *Heinisch v Germany* (n 52) [91].

[54] Employment Rights Act 1996, section 43K.

[55] Public Interest Disclosure Act 1998, section 2.

[56] Ibid, section 5.

[57] Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909, 915. Automatically unfair dismissals will be discussed further in Chapter 5.

are under a duty to respect a specific human right of their workers and one aspect of Article 10 is directly horizontally effective in the employment context.

D) The EU General Data Protection Regulations

All businesses that operate within the European Union and process personal data of natural persons – or 'data subjects' – are subject to the General Data Protection Regulations.[58] Employers hold personal data regarding their workforce and the Regulations require them to process the data in accordance with the principles laid out in Article 5 including lawfulness, fairness and transparency, collection for legitimate purposes and limiting the collection of data to what is necessary in relation to that purpose.[59] The individual has a collection of rights under the Regulations, which are enforceable by the national supervisory authority such as the Information Commissioner's Office: the right to information about the data processing and the right to a copy of the data being processed,[60] the right to rectify inaccurate data and to erasure[61] and the right to object to their data being processed for particular purposes.[62] The Regulation states in both its preamble and in Article 1(2) that it 'protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.'[63] Although the EU Charter makes reference to data processing in the form of a separate right, Article 8, the protection of individuals with regards to the use of their personal data has links to the broader Article 8 ECHR right to protection of one's private life.[64] The regulation makes reference to the

[58] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L-119/1.

[59] Ibid, Article 5.

[60] Ibid, Article 15(1) and (3).

[61] Ibid, Article 16 and 17.

[62] Ibid, Article 21.

[63] Ibid, Article 1(2).

[64] See *S v United Kingdom* (2009) 48 EHRR 50, [103].

case-law and principles of the European Convention, particularly in relation to the meaning of a legitimate purpose for processing.[65] Although the mechanism of enforcement is through a supervisory body, rather than the courts, the Regulations place employers under duties to respect the data processing aspects of Article 8 ECHR.

What does an examination of these various legislative instruments tell us about the responsibilities of employers with regards to human rights? It can be seen that employers are already subject to legislative duties that overlap with the requirements of the Convention with regards to protecting individuals against unjustifiable infringements committed by other private parties. This range of duties, that have existed and evolved in employment law for many years, show that employment law has been consistently concerned with protecting employees from interference with their human rights. I argue further that these instruments also give direct horizontal effect to a sub-group of Convention rights in all but name. The next section turns to indirect horizontal effect to demonstrate how an obligation to respect the human rights of workers can be layered onto existing causes of action and the surrounding common law principles can be altered in order to better reflect human rights. In practical terms, the effect of this process of alteration and redirection generates a duty upon employers to respect the human rights of their workers.

III. The indirect effect of human rights upon courts' decision-making

What indirect effect have the human rights of workers had upon the obligations of their employer? This section will highlight the importance for employers' duties of the obligation placed upon the courts by the Human Rights Act 1998 to interpret legislation compatibly with the Convention. It will also note an instance in which the existence of a

[65] General Data Protection Regulations, preamble [73].

fundamental right to strike was used by the Court of Appeal to reverse the previous common law position regarding the how the law should be applied to industrial action. Finally, this section will discuss the possibility, created in a recent ECtHR decision, that there will be a general obligation upon national courts to read all private law instruments in a way that is compatible with the Convention. It observes the dramatic impact that this may have on the duties of employers, as any dispute involving a contract of employment or for the provision of work could be decided by reference to human rights considerations.

A) The duty to interpret legislation compatibly with the Convention

In an area of law closely regulated by statutes and statutory instrumentation, the key to the impact of the HRA upon employment law lies in section 3. Section 3 requires that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'[66] There are limits to the interpretive abilities of the judges under section 3[67] and if a compatible interpretation is not possible, the court may make a declaration that the legislation is incompatible with a Convention right under the provisions of section 4. Because of the mass of statutory material that regulates the employment relationship, the duty of compatible interpretation had the potential to have significant impact upon employment law. This potential has been realised in some areas, although the extent to which human rights ideas have been embraced by the lower tribunals will be questioned in Chapter 5.

X v Y: the right not to be unjustifiably dismissed on human rights grounds

[66] HRA 1998, section 3(1).

[67] The courts must not adopt a meaning of statute that is inconsistent with one of its fundamental features or the meaning must be compatible with the 'underlying thrust' of the legislation: *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [33] (Lord Nicholls).

The central example of the application of section 3, and the other provisions of the HRA, within individual employment law is Lord Justice Mummery's judgment in *X v Y*.[68] Although *obiter,* his Lordship set out a framework for examining a dismissal by a private sector employer that involves human rights issues. Mr X worked for a charity that assisted young offenders. His employer discovered that Mr X had been cautioned by the police for gross indecency and had failed to disclose the caution for a number of months. He was dismissed as a result. Mr X pursued a claim of unfair dismissal under section 94 of the Employment Rights Act 1996. To test the fairness of the dismissal, the tribunal would usually ask whether a reasonable employer might reasonably have dismissed him for the reason put forward by the employer.[69] Mr X contended that his dismissal was in breach of Article 14 in conjunction with Article 8 and that the Employment Tribunal had misdirected itself by deciding that the HRA was irrelevant to the case. He argued that the tribunal had not considered the question of whether the dismissal was an interference with Article 8, as required by section 3 HRA.

Lord Justice Mummery gave the main judgment for the Court of Appeal. The employer was not a public authority so the horizontal impact of the HRA lay at the heart of the issues raised. His Lordship's 'short answer' to the questions raised by the case was that Article 8 was not applicable as '[t]he applicant's conduct did not take place in his private life nor was it within the scope of application of the right to respect for it.'[70] His longer answer explained the impact of the HRA 1998 upon the right not to be unfairly dismissed – the claim made by Mr X. His Lordship stated that '[t]he effect of section 6 in the case of a claim against a private employer is to reinforce the extremely strong

[68] *X v Y* (n 1).

[69] *British Leyland UK Ltd v Swift* [1981] IRLR 91, 93 (Lord Denning MR).

[70] *X v Y* (n 1) [52].

interpretative obligation imposed on the employment tribunal by section 3 of the HRA.'[71] Thus '[b]y a process of interpretation the article 8 right is blended with the law on unfair dismissal in the ERA' and in its consideration of an unfair dismissal claim, a tribunal must consider whether the dismissal amounts to an unjustified interference with the employee's Convention rights.[72]

Later in this thesis, it will be questioned whether Lord Justice Mummery's framework has been embraced by the tribunals as a part of their every-day reasoning process.[73] Nevertheless, the *X v Y* framework is remains good law, that has been referenced occasionally in suitable cases.[74] Collins comments that, after *X v Y*, 'a private employer has to conform to the requirements of fundamental rights when dismissing and disciplining employees.'[75] Rather than simply satisfying a tribunal that their decisions fall within a 'range of reasonable responses', an individual may now demand that that the employer provide a Convention-compliant justification for their decision. Collins argues that this statutory gloss is so close to imposing duties directly on private employers that the 'boundary between indirect and direct scarcely seems to matter in practice'.[76]

Mba v Merton LBC: reading down 'group disadvantage' in Article 9 cases

It was mentioned above that the Equality Act 2010 provides some protection for a worker's fundamental rights as an incident of its core protection for the right not to be discriminated against. In particular, there is an overlap between the right not to be discriminated against on the grounds of one's religion and the Article 9 right to freedom of religion and belief

[71] Ibid [58]

[72] Ibid [59].

[73] See Chapter 5.

[74] See for example *Game Retail Limited v Laws* (2014) UKEAT/0188/14/DA and *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 525.

[75] Collins, 'The Challenges Presented by Fundamental Rights to Private Law' (n 4) 230.

[76] Ibid.

and the right to manifest that belief. But in order to prove that an individual has been a victim of indirect discrimination, they must prove that the employer's apparently neutral practice 'puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it'.[77] The question then arises in the context of religion whether this 'group disadvantage' requirement is compatible with Article 9's individualised protection. A recent ECtHR case, *Eweida v UK*,[78] highlighted this disparity and a subsequent domestic case, *Mba v Merton LBC,*[79] resolved the discrepancy using section 3 HRA.

In *Eweida,* four complaints regarding the UK's compatibility with Article 9, and in one case Article 14, were heard together in Strasbourg. The claimants had been variously disciplined or dismissed for reasons that related to their choices regarding manifesting their religious beliefs in their professional lives. Ms Eweida was employed by BA as an air steward. She wished to wear a Christian cross at work, but she was not permitted to work whilst wearing a visible cross outside her uniform. Ms Eweida choose not to return to work until the company policy was changed and she made an indirect discrimination claim when the employer refused to pay her for the period during which she did not work. Her claim was unsuccessful in the national courts because she failed to prove that she was a member of a group who shared a protected characteristic (their religion) that was disadvantaged by BA's policy.[80] She based her arguments solely on the impact that the airline's policy had on her, rather than establishing the existence of a broader group of Christians who would be similarly disadvantaged. She complained to Strasbourg on Article 9 grounds. Ms Eweida directly challenged the 'group disadvantage' requirement in her arguments. She argued that

[77] EqA 2010, section 19(2)(b).

[78] *Eweida and others v United Kingdom* (n 14).

[79] *Mba v Merton London Borough Council* [2013] EWCA Civ 1562, [2014] 1 WLR 1501.

[80] *Eweida and others v United Kingdom* (n 14).

she had been 'denied protection under national law … because she was unable to adduce evidence that this was a scriptural requirement or a widely practised manifestation of belief.'[81]

The ECtHR analysed what amounts to a 'manifestation of belief' entitled to protection within Article 9. Required is an act that is 'intimately linked to the religion or belief' held by the individual and the Court stated that 'there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.'[82] Applying these principles, the Court considered that Ms Eweida's conduct was a manifestation of her religious belief attracting the protection of Article 9. By refusing to allow Ms Eweida to remain in her post whilst wearing a cross, the employer had infringed that right. The Court's finding was that the national authorities had failed in its positive obligation under Article 9 by according too much weight to the company's desire to project a corporate image within the balancing exercise.[83] McCrea observed that, following *Eweida*, the domestic approach of requiring proof of some kind of group disadvantage was exposed as 'out of line' with Strasbourg's view of Article 9, and possibly Article 14, which disclosed no need for a collective dimension to the infringement.[84]

The domestic response has been nuanced in ensuring that anti-discrimination cases involving Article 9 issues reflect the principles applied in *Eweida*. In *Mba v Merton London Borough Council*,[85] the claimant was a Christian. She worked as a care assistant at a children's home. According to her contract, she was required to work Sundays as and when required, although her employers endeavoured not to roster her on Sundays if possible. Eventually she was required to work on a Sunday shift and refused to do so. After

[81] Ibid [66].

[82] Ibid [82].

[83] Ibid [94]-[95].

[84] Ronan McCrea, 'Religion in the workplace' (2014) 77 MLR 277, 287-288.

[85] *Mba v Merton London Borough Council* (n 79).

unsuccessfully raising a grievance, the claimant resigned. She made an indirect discrimination claim and was unsuccessful in the tribunal. The employer succeeded in convincing the tribunal that its shift rules were justified by the need to run their service, in light of their staffing requirements and cost considerations.

The Court of Appeal addressed directly the dissonance between anti-discrimination law and Article 9 as applied in *Eweida.* Maurice Kay LJ stated a general rule that, despite the reference to a requirement of 'group disadvantage' in indirect discrimination law, 'it is not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage.'[86] Lord Justice Elias, with whom Lord Justice Vos agreed, took a different approach to ensuring that the Equality Act applied in a manner compliant with *Eweida.* Elias LJ relied heavily upon section 3 in his analysis. Noting that freedom of religion does not depend upon proof of group disadvantage, Elias LJ considered how this approach could be utilised in the domestic context.[87] The anti-discrimination mechanism was the only available option, but his Lordship did not feel able to 'read down' the group disadvantage requirement in the blanket manner adopted by Maurice Kay LJ. Rather, his Lordship relied on section 3 HRA to ensure that, where Article 9 is engaged on the facts, it would not weaken a claimant's case that their beliefs are not widely shared or that there no disadvantaged shared by many other members of their faith.[88]

In the eventual determination of Ms Mba's complaint, despite their Lordships' corrections in law, the result ultimately remained the same. The aspects of the tribunal's judgment that were not appealed were sufficient to establish the proportionality of the discrimination as 'the council had established that there was really no viable or practicable

[86] Ibid [17].

[87] Ibid [35] (Elias LJ).

[88] Ibid.

alternative way of running Brightwell effectively'.[89] For future cases where Article 9 is engaged upon the facts, the Court of Appeal removed the need for the claimant to satisfy the group disadvantage element of the test for indirect discrimination law. Through interpretive alteration under section 3 HRA, the Court of Appeal ensured that the Equality Act was an appropriate mechanism through which a claimant could vindicate their Article 9 rights. Employers' obligations were thus remoulded to embody a Convention-compliant duty to respect an additional fundamental right of workers, giving strong indirect horizontal effect[90] to Article 9.

B) The influence of the Human Rights Act upon the common law

The common law has also been used to give greater effect to the employer's duty, as it currently exists, to respect the human rights of their workforce. An example of this common law-based indirect horizontal effect is *RMT v Serco Ltd, London & Midland Railway v ASLEF*.[91] Domestic law protects unions and their members in the organisation and carrying out of strikes through a system of immunities. TULR(C)A 1992 protects unions from liability in tort, for wrongs such as inducing a breach of contract, by providing immunity. The immunity can only be obtained if the union fulfils a complex bundle of balloting and notification requirements. If the union fails to obtain immunity, the employer will usually get an injunction to prevent the strike from going ahead. In applying the statutory requirements necessary to receive immunity, a common law rule had developed that the statute should be applied strictly against the union.[92]Although judges occasionally

[89] Ibid [24] (Maurice Kay LJ).

[90] According to Alison Young, '[s]trong indirect horizontal effect refers to a model of indirect horizontal effect that places an obligation upon the court to interpret the common law so as to ensure its compatibility with Convention rights.' Young (n 2) 39.

[91] *Serco Ltd v National Union of Rail, Maritime & Transport Workers* [2011] EWCA Civ 226, [2011] ICR 848.

[92] *Express Newspapers Ltd v McShane* [1979] ICR 210.

recognised the onerous burden this rule placed upon unions in performing one of their key functions,[93] the principle persisted.

In *RMT v Serco*,[94] the unions had made a number of small mistakes in the balloting process and there were issues with the notification of industrial action that had been given to the employer. The lower court issued an interim injunction preventing the strike. This decision was made on the basis of the common law principle of interpreting the statute strictly against the unions. In the Court of Appeal, Lord Justice Elias reversed this approach. Commencing his judgment his Lordship noted that, whilst the common law has never conferred a right to strike, international documents recognise such a right. He observed that the right to strike has been recognised by the ECtHR as an element of Article 11 ECHR,[95] which is given effect in the UK by the Human Rights Act 1998.[96] His Lordship considered the existence of the right to strike to be relevant to the issue of how the statutory regime should be construed and applied. Elias LJ argued that

> 'if one starts from the premise that the legislation should be strictly construed against those seeking the benefit of the immunities, the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should hold sway unless the legislation clearly dictates otherwise. I do not think this is now a legitimate approach, if it ever was. In my judgment the legislation should simply be construed in the normal way, without presumptions one way or the other.'[97]

In the remainder of his judgment, his Lordship's 'self-consciously neutral approach'[98] towards the interpretation of TULR(C)A led him to accept a number of the unions' arguments. For example, he held that there was no obligation upon the union to improve

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[93] See Lord Neuberger MR's comments that the requirements placed upon the unions with regard to balloting are 'rather onerous', 'strict' and 'unnecessarily prescriptive': *British Airways plc v Unite the Union* [2010] EWCA Civ 669, [2010] ICR 1316, [72]-[73].

[94] *Serco Ltd v National Union of Rail, Maritime & Transport Workers* (n 91).

[95] See *Enerji Yapi-Yol Sen v Turkey* (n 41) [24] and *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, [84].

[96] *Serco Ltd v National Union of Rail, Maritime & Transport Workers* (n 91) [8].

[97] Ibid [9].

[98] Ruth Dukes, 'The Right to Strike under UK Law: Something More Than a Slogan?' (2011) 40 ILJ 302, 306.

its record-keeping[99] and *obiter* that, where specific statutory defences do not apply to a 'trifling mistake', a *de minimus* doctrine is available to the union where an immaterial or accidental mistake would otherwise invalidate a ballot.[100] The outcome of the case was that Court of Appeal found in favour of the unions and the injunctions were discharged.

In *RMT v Serco*, it is evident that the international recognition of the right to strike inclined the court to reject the restrictive common law approach to the application of statutory immunities in industrial action disputes. Although the established judicial approach has been noted for its hostility towards unions taking industrial action,[101] the Court of Appeal adopted a neutral interpretative approach which led to a rare union victory. Although the neutral approach has not been universally adopted, Elgar and Simpson note that subsequent decisions reflect Elias LJ's approach towards injunction applications.[102] It was noted above that TULR(C)A provisions impose a duty upon employers to respect their workers' right to freedom of association. Decisions like *RMT* ensure that the common law, which determines the way in which these important provisions apply to particular cases, is in line with the demands of those fundamental rights. The indirect horizontal effect of human rights upon the path of the common law established a closer consistency between the application of TULR(C)A's provisions and the Convention case-law on Article 11.

C) Reading private law instruments

Before leaving the issue of the employer's duty to respect their workers' human rights, I will give a brief outline of an ECtHR case, *Pla and Puncernau v Andorra,*[103] which could have a significant impact upon the interpretation of the contract of employment. The

[99] *Serco Ltd v National Union of Rail, Maritime & Transport Workers* (n 91) [75].

[100] Ibid [86].

[101] Lord Wedderburn, 'Industrial Relations and the Courts' (1980) 9 ILJ 65, 70.

[102] Jane Elgar and Bob Simpson, 'The impact of the law on industrial disputes revisited: a perspective on developments over the last two decades' (2017) 46 ILJ 6, 17.

[103] *Pla v Andorra* (2006) 42 EHRR 25.

challenge in *Pla and Puncernau* regarded the Andorran High Court's interpretation of a will written by an ancestor of the complainants. The court had to consider whether the phrase 'son or grandson of a lawful and canonical marriage' in the ancestor's will excluded an adopted grandson. The Andorran court considered that only biological grandchildren could inherit under the will. The decision was challenged on behalf of an adopted grandson before the ECtHR. The majority of the Court found in his favour. The decision was found to be within the scope of Article 8, meaning that Article 14 could be applied to the facts on the grounds that the Andorran court's decision discriminated against adopted children.[104]

The majority of the ECtHR was critical of the Andorran court's interpretation, arguing that there was no express exclusion of adopted children in the will and therefore the national court's decision interpretation amounted to a 'judicial deprivation of an adopted child's inheritance rights' that could not be justified under Article 14.[105] The majority stated that national courts should endeavour to make a will effective 'without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.'[106] This statement may appear innocuous but it has latent significance for the interpretation of legal instruments created by private parties, including the contract of employment.

The majority decision imposes an obligation upon national courts to interpret private law instruments compatibly with the Convention.[107] As Dean Spielmann observes, 'the Court made it clear that in ascertaining the validity of such instruments and in the absence of an express disownment of adopted children by the testator, the domestic court

[104] Ibid [55].

[105] Ibid [60], [61].

[106] Ibid [62].

[107] Spielmann (n 19) 437.

must apply the principles of the Convention.'[108] Richard Kay observes that, following the majority decision in *Pla and Puncernau*, 'the prospects for European supervision of national law appear endless.'[109] Cherednychenko expressed concern that 'the Court clearly demonstrated its readiness to extend its control not only to the law of succession, but also the field of general contract law.'[110] The Court has subsequently summarised its position in the following manner, citing *Pla and Puncernau*:

> Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.[111]

Much of UK employment law is tied to the contract of employment. To it attach a variety of statutory rights and many obligations and rights are enforced through its terms. *Pla and Puncernau* therefore opens a new route to challenge and alter key elements of the current regime of employment law. For example, one interpretation of a clause in a contract of employment may allow a claimant to vindicate their fundamental rights through an existing domestic mechanism, whereas the alternative interpretation would prevent the individual from doing so. A *Pla*-style approach would mandate a national court to consider the ECtHR jurisprudence that emphasises the wide availability of effective human rights protection[112] and opt for the first interpretation. This would be in accordance with the ECtHR's demand that any interpretation of a document must closely correspond to the Court's case-law based upon the Convention. If *Pla* proves to be a case that establishes a

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[108] Ibid 440.

[109] Richard S. Kay, 'The European Convention on Human Rights and the control of private law' (2005) 5 EHRLR 466, 478.

[110] Olha Cherednychenko, 'Towards the control of private acts by the European Court of Human Rights?' (2006) 13 Maastricht J Eur & Comp L 195, 207.

[111] *Mustafa and Tarzibachi v Sweden* (2011) 52 EHRR 24, [33].

[112] See for example *Sindicatul Păstorul cel Bun v Romania* (n 14) and *Redfearn v United Kingdom* (n 15). For further discussion, see Chapter 4.

prominent new doctrine which the ECtHR is willing to apply, it has great potential to prompt a reshaping in the obligations of private employers in the UK. Indirect horizontal effect may be required in almost any dispute with the contract of employment at its centre. A fresh drive to make contracts compliant with the Convention could lead to a major shift in the approach of the domestic courts and tribunals and a raft of new duties upon employers that have not yet been enacted or created in English law.[113]

There is a secondary point that may be yet more contentious. Judge Garlicki, in his dissenting opinion, questioned whether under the majority decision the duty bearer was in actuality the state. Judge Garlicki believed that the real question at issue regarded the horizontal effect of the Convention as 'the case did not involve any direct interference by the national courts with the applicants' Article 8 rights.'[114] In his view, the case was about whether and to what extent testators should be permitted to discriminate between heirs in their will.[115] If Judge Garlicki's interpretation of the facts is correct, and the *real* duty bearer was the testatrix, this would mean that 'the *Pla* case is of a totally different character from the well-established case law of the Court'.[116] If this line of reasoning takes hold within the ECtHR's case-law, '*[a]ll* private transactions may … become subject to control as to their compatibility with the ECHR as exercised by the ECtHR.'[117] In disputes between employers and their workers, the question for the domestic courts would thus be whether an employer is permitted to include a term in their contracts that infringes the human rights of the workforce. This scrutiny would be more searching and immediate than the Court has applied to private actors' conduct until this point. Whether the dissentient or the majority

[113] The possibility of using the common law of the contract of employment to protect human rights is discussed in depth in Chapter 7 and Chapter 8 below.

[114] *Pla v Andorra* (n 103) [O-II4].

[115] Ibid [O-II4].

[116] Cherednychenko, 'Towards the control of private acts by the European Court of Human Rights?' (n 110) 207.

[117] Ibid.

opinion represent a true account of the case, it remains true that '[t]he obligation [to interpret private law instruments compatibly] will bear a great impact in the development of areas of law traditionally thought of as distant from human rights adjudication.'[118]

Summary

This chapter has demonstrated that significant swathes of employment law impose a duty upon employers to respect the human rights of members of their workforce. Through direct statutory protection, re-interpretation of existing statutory causes of action, or re-direction of the common law, the employer is bound by an obligation not to infringe specific fundamental rights as they have been explained and developed in Strasbourg. Further, the Court's decision in *Pla and Puncernau* could result in a more transparent placing of obligations upon private parties within the Convention regime, requiring national courts to explicitly examine whether actions embedded in private law instruments such as contracts are permissible. However, the English Supreme Court has resisted a wide interpretation of *Pla and Puncernau* and the later case of *Mustafa and Tarzibachi v Sweden*.[119] This judgment indicates that the impact of *Pla and Puncernau* will be minimal, unless the dispute before the national courts regards a very similar situation.

One might ponder whether, on the evidence presented in this chapter, the project to protect human rights in working relationships is either complete or soon to be so. If employers are already subject to substantial duties to respect the human rights of their workers and there are mechanisms that the courts can use to correct the application of statutes and the development of the common law, what more needs to be discussed? A great deal of this thesis will analyse where domestic protection for human rights at work falls well short of the standards set out in the Convention and the Court's case-law. This severe and wide-ranging inadequacy continues despite the availability of the tools that the

[118] Spielmann (n 19) 464.

[119] *McDonald and another v McDonald* [2016] UKSC 28, [2017] AC 273, [56]-[58].

courts need to improve the standard of protection and the increasing collection of ECtHR decisions that set out the positive obligations that each Article entails. To highlight just one example, the framework set out by Lord Justice Mummery in *X v Y* will be discussed further in Chapter 5 in order to demonstrate the extreme reluctance of the tribunals to engage in a genuine and thorough proportionality analysis. Often no attempt at the *X v Y* framework is made even in cases where Convention rights are clearly engaged or infringed. The rest of this thesis will demonstrate the clear distinction between the human rights obligations of employers in theory and the lack of enforcement of those obligations in practice by the lower courts and tribunals.

Chapter 4
The Narrow Personal Scope of Employment Rights

The rights contained in the European Convention apply universally. According to Article 1 of the ECHR, '[t]he High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[1] This guarantee is mirrored in the other articles, which commence 'Everyone has the right to…' or 'No one shall be…'. The universality of the Convention's protection is reinforced by Article 14's prohibition on discrimination between persons in the enjoyment of Convention rights and freedoms.[2] The ECtHR has examined a range of cases involving working relationships and has shown no regard for the employment status of the individual. The legal form of the relationship between the individual and the actor who interferes with their rights is of no concern to the court. It has examined a complex joint hiring process of a state school's teacher of Religion which required the recommendation of a third party (the Church),[3] the dismissal from office of a judge[4] and the dismissal of a whistleblowing civil servant,[5] as well as complaints of Convention breaches from a bus-driver,[6] a domestic worker,[7] military personnel[8] and a cabaret hostess.[9] An applicant is entitled to exercise and

[1] European Convention on Human Rights, Article 1 (emphasis added).

[2] Ibid, Article 14.

[3] *Martínez v Spain* (2015) 60 EHRR 3.

[4] *Kudeshkina v Russia* (2011) 52 EHRR 37.

[5] *Guja v Moldova* (2011) 53 EHRR 16.

[6] *Redfearn v United Kingdom* (2013) 57 EHRR 2.

[7] *Siliadin v France* (2006) 43 EHRR 16.

[8] *Markin v Russia* (2013) 56 EHRR 8.

[9] *Rantsev v Cyprus* (2010) 51 EHRR 1.

vindicate their Convention rights before Strasbourg irrespective of their migration status,[10] whether or not their work was lawful under the state's immigration rules and even if their activities were criminal in nature. The ECtHR, for example, has considered the infringement of the fundamental rights of an individual who had committed fraud in applying for a job with a fake passport.[11] These cases show that 'the only condition for being entitled to human rights is the status of being human'[12] – contractual details, the rules of national regulatory systems, migration status and illegality are irrelevant to the ECtHR.

Only under one Convention right do we see indications of how the Strasbourg Court would approach the entitlement to vindicate fundamental employment rights. Article 11 is a guarantee of freedom of association. It includes the 'right to form and to join trade unions for the protection of his interests'[13] although this is a qualified right and the state is permitted, by Article 11(2), to impose 'lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'[14] The Court has had occasion to consider the appropriate scope of such 'lawful restrictions' upon the entitlement to trade union rights under Article 11 and has consistently held that the limitations upon freedom of association contained in Article 11(2) must be 'construed strictly'.[15] Further, restrictions imposed upon individuals' Article 11 rights must 'not impair the very essence of the right to organise' and 'it is incumbent on the state concerned to show the legitimacy of any restrictions to such persons' right to organise.'[16] The exclusion in Article 11(2) of these three groups of workers from the right to freedom of

[10] *Siliadin v France* (n 7).

[11] See *Paulet v United Kingdom* (2015) 61 EHRR 39.

[12] Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 198.

[13] ECHR, Article 11.

[14] Ibid, Article 11(2).

[15] *Demir v Turkey* (2009) 48 EHRR 54, [97].

[16] Ibid [97].

association is thereby kept narrowly constrained by the Court. Any attempt by states to introduce restrictions or prohibitions of a broader scope than is strictly necessary are found to be in breach of the Convention.[17]

Under Article 11, trade unions receive additional protection, albeit qualified, which may be the subject of a complaint. This consists of the right to be legally recognised,[18] the right to collectively bargain,[19] and the right to strike.[20] In some cases, therefore, the ECtHR must first establish whether the members of the association were workers entitled to form a trade union to protect their working interests. For example, in *Sindicatul Păstorul cel Bun v Romania,*[21] the applicant union was formed to protect the interests of clergy and lay members of the Romanian Orthodox Church. The first question for the Court was whether the collective aspects of Article 11 were applicable: were the union members performing their duties for the Church as part of an employment relationship?[22] The Court drew two points from the materials of the International Labour Organisation.[23] First, the existence of an employment relationship should be determined by a consideration of the facts, rather than how it is characterised in any agreement between the parties. Second, ILO conventions make clear that workers have the right to establish collective organisations without any distinction. The Court went on to find that the duties carried out by the union's members had many of the 'characteristic features of an employment relationship'.[24] The Bishop

[17] Ibid and *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251. See also *Matelly v France* (Application No 10609/10, 2 January 2015) and *Tüm Haber Sen and Çinar v Turkey* (2008) 46 EHRR 19.

[18] *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10.

[19] *Demir v Turkey* (n 15).

[20] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10.

[21] *Sindicatul Păstorul cel Bun v Romania* (n 18).

[22] Ibid [141].

[23] Ibid [142].

[24] Ibid [143].

appointed the individuals and set out their rights and obligations. Under his leadership, they carried out their assigned tasks, being paid by the Church or through state funds. Employer's tax contributions were paid by the Church and the individuals were entitled to the same range of welfare and social security benefits as ordinary employees. The 'special features' of their work - the spiritual purpose of their role and the heightened duty of loyalty to which the members were subject – were not sufficient to remove the individuals from the scope of Article 11's protection. The association was therefore entitled to rights as a trade union.

What principles can be extracted from *Sindicatul Păstorul cel Bun?* Firstly, the Court, in line with its approach to Article 11(2), aims to include individuals within the protective sphere of the Convention where possible. The Court demonstrated that commitment by adopting a presumption that the clergymen were protected unless special features of their role took them outside Article 11's scope. This inclusive approach was also indicated by its reference to enjoying collective rights 'without distinction' – all workers are entitled to form a union. The ECtHR examines the substance of the relationship, making broad assessment of the features of the relationship, without getting caught in technical contractual detail. Finally, it did not defer to the national regulatory system's classification of the priests as outside the scope of labour law. From this example, we can see that, in the rare instances where the Convention's guarantees are not universally applicable, the Court ensures that they apply as broadly as possible and without arbitrary or unjustified distinctions between different groups of individuals.

In contrast, domestic employment law protects only a tightly defined group of individuals. In order to make a common law or statutory dismissal claim, an individual must demonstrate that they are an employee: an individual working under a contract of employment. This apparently simple issue conceals a variety of potential obstacles to making a claim before the courts. Some workers provide their services under an

arrangement that does not include a contract between them and the party who controls their activities. A notably example is agency workers, working for a client of their agency but without signing a contract with each end user. Another group of individuals may hold a contract, but the courts are unable to enforce it because, for example, the contract is tainted with illegality or subject to diplomatic immunity. Finally, the individual must satisfy the court that they are an employee, rather than an independent contractor. This classification process often results in claimants who have suffered infringements upon their human rights being denied access to a court. There are additional restrictions upon the entitlement to make a statutory unfair dismissal claim. The claimant must satisfy the requirement that they have completed two years of continuous service with their employer.[25] They must not work in an occupation that is excluded from the statute's protection. Recent case-law has examined the effect of this constraint upon members of the parks police.[26] Each of these restrictions will be examined in turn.

I. Does the individual have a contract?

In contrast with the extensive reach of human rights, an individual must satisfy a number of requirements in order to claim employment rights. The first question that must be answered is whether the individual has a contract with the entity against which they are claiming. This requirement is an aspect of all of the employment statuses to which rights attach: employee,[27] worker for the purposes of basic rights such as the minimum wage[28] and worker under the Equality Act 2010.[29] A variety of workers may be working without being party to a contract and thereby excluded from an entitlement to most employment

[25] Employment Rights Act 1996, section 108.

[26] *Vining and others v London Borough of Wandsworth* [2017] EWCA Civ 1092, [2017] IRLR 1140.

[27] ERA 1996, section 230(1).

[28] Ibid, section 230(3)(b).

[29] Equality Act 2010, section 83(2)(a).

rights. One example is office holders such as judges, such as District Judge Gilham who was held to be outwith the scope of whistleblowing laws that protect 'workers' as her duties are defined by statute rather than conducted in accordance with a contract of employment.[30] A Church of England minister received a similar outcome in his whistleblowing complaint against the Diocese.[31] Other examples include sub-contractors, who are hired to provide services by a contractor but might work under the direction of a principal, and agency workers, who are the most numerically significant group who provide services without a contract with the party for which they work. Estimates put the number of agency workers in the UK between 1 and 1.5 million.[32] In most situations, agency workers do not have an express contract with the business to which they provide their services: their work is supplied in accordance with the worker's contract with the agency and agency's agreement with the end user. This arrangement has the consequence that the agency worker cannot normally make a claim against their end user in unfair dismissal law, anti-discrimination law or the common law.

Contract law requires necessity in order to imply a contract where one does not exist. It must be necessary to imply the contract in order to give effect to the business reality of the transaction and explain the actions of the parties. In the agency situation, the worker performing work for the end user can be explained by reference to the two separate contracts: the first between worker and agency and the second between agency and end user for the supply of their services. Applying this common law test with no modification results in the agency worker being unprotected by employment law in their relationship with the end user. Although for a brief time some courts sought to tackle this issue by

[30] *Gilham v Ministry of Justice* [2017] EWCA Civ 2220, [2018] IRLR 315, currently on appeal to the UK Supreme Court.

[31] See *Sharpe v Worcester Diocesan Board of Finance Ltd and another* [2015] EWCA Civ 399, [2015] ICR 1241.

[32] Department for Business, Enterprise and Regulatory Reform, *Agency working in the UK: A review of the evidence* (Employment Relations Research Series No. 93, 2008).

loosening the standard of necessity in agency cases,[33] the contractual necessity approach was re-asserted in *James v London Borough of Greenwich*.[34] Overall, the application of an unmodified contract law approach to the relationship between worker and end user leaves a very narrow scope for relying upon an implied contract and leaves the worker exposed to unreasonable behaviour by the end user.

The consequences, in terms of the vindication of individuals' human rights claims, of the common law test were made most clear in *Smith v Carillion JM Ltd.*[35] Mr Smith worked through an agency for JM as an engineer for a short period between 1997-1998. He was a member of a trade union and had also served as a health and safety representative. After 2001, he stopped receiving offers of work. Much later, it was discovered that a group of companies had been utilising a database that provide details of workers who were 'troublesome', particularly those who were active union members. Mr Smith was on the database and JM admitted that it had provided information for the database about him. Mr Smith believed that he had effectively been 'blacklisted' as a result of his union activities. He commenced a claim against Carillion, which had since taken over JM, for detrimental treatment because he had taken part in union activities under TULR(C)A 1992 and for exercising safety functions under the ERA 1996.[36] A key part of Mr Smith's argument was his Article 11 rights had been infringed upon and the courts should read the statutes in a manner that gives effect to that right, as required by section 3 of the HRA.[37]

In common with the law of unfair dismissal and other forms of employment regulation, Mr Smith had to demonstrate that he was working under a contract of employment in order to succeed in his claim. The first hurdle was demonstrating that he

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[33] *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, [2004] ICR 1437, [53].

[34] *James v Greenwich London Borough Council* [2008] EWCA Civ 35, [2008] ICR 545.

[35] *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467.

[36] Ibid.

[37] Ibid [18].

had a contract with JM, who managed the construction site and had provided the information to the blacklisting company. The Employment Tribunal applied the necessity test and refused to imply a contract between JM and Mr Smith because he had been supplied to JM through the operation of agency supply contracts. The Court of Appeal agreed with the tribunal's analysis of the facts.[38] Again finding against Mr Smith, the Court of Appeal further held that the HRA's duty to interpret legislation compatibly with Convention rights – which could have been used to expand the scope of the legislation in order to include Mr Smith – was not applicable as the events in question occurred before the Act came into force.[39] Mr Smith was therefore denied legal protection as an employee or a worker. The court's decision left a grave infringement of his human rights unremedied by employment law. As Alan Bogg has argued, '[t]he blacklisting of trade unionists is a serious violation at the very core of freedom of association. Its consequences were catastrophic in destroying Mr Smith's ability to secure employment in his chosen occupation.'[40]

The inability of Mr Smith to vindicate his human rights against an infringing end user has been mirrored in other cases. The original case of *James v Greenwich* was a case of unfair dismissal after a period of sickness, a case that may have alternatively been considered an instance of disability discrimination. *Muschett v HM Prison Service* concerned both a potentially unfair dismissal and a Race Relations Act claim that was rejected at the first stage because 'Mr Muschett was under no contractual obligation to HMPS to do any work for HMPS: and that there was no contract between Mr Muschett and HMPS' and it was not necessary to imply a contract between them on the facts.[41] The lack

[38] Ibid [37].

[39] Ibid [43].

[40] Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 CLP 67, 110.

[41] *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451, [38]-[39].

of a contract between agency worker and end user has similarly prevented other claimants from vindicating their right not to be discriminated against through a legal claim.[42] These cases demonstrate that the application of the common law approach towards the implication of contracts to the situation of agency workers leads directly to a significant proportion of the workforce being unable to enforce their human rights. This enforcement deficit exists despite the fact that the entitlement to human rights is independent of one's contractual status and should protect individuals against infringements by any party, particularly where they are in a position of subordination to and dependence upon that other party.

Professor Freedland has challenged the ongoing use of the bilateral contracting model and suggested a restatement or 'authoritative reformulation of underlying contractual law' along the lines of a trilateral contract.[43] This possibility was mentioned in *Dacas* and remains entirely viable.[44] Support for this contractual construction can be gained from recent developments in vicarious liability.[45] In the context of agency work, such a solution would allow for a more flexible attribution of responsibility between the hiring parties for any wrongs committed. It appears to be in line with the ECtHR position on the subject, which would likely disregard the contractual matrix of agency work[46] and is only concerned with ensuring that the worker's rights are adequately protected from a breach from any source – whether that is the supplier, the client or the government. One step could be imposing responsibility upon end users to respect the fundamental rights of agency workers, as occurs in anti-discrimination law.[47] The law as it currently stands leaves this

[42] *East Living Ltd v Mr R Sridhar* [2008] Appeal No UKEAT/0476/07/RN.

[43] Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 52-56.

[44] *Dacas v Brook Street Bureau (UK) Ltd* (n 33) [19].

[45] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510.

[46] See *Martínez v Spain* (n 3).

[47] EqA 2010, section 41.

group in a lacuna of protection, vulnerable to unchecked management prerogative and unremedied infringements upon their human rights.

II. Are the courts able to enforce the contract?

A separate issue is whether the contract upon which the claimant relies is enforceable by the domestic courts. There are a number of different ways that this issue might prevent a claimant from enforcing their rights. Most straightforwardly, their claim might be out of time. For example, a recent breach of contract case – *Smith v Trafford Housing* – was brought in contract rather than unfair dismissal law because the claimant was unable to file their claim within the three-month window permitted by the ERA 1996.[48] The contract might be void or voidable on grounds such as misrepresentation by the employee or as an *ultra vires* contractual exercise by a public authority.[49] There are two particular barriers to enforceability that have come to the courts' attention in recent years: the prospect that the contract is tainted by illegality and diplomatic immunity of the employer.

A) Illegality affecting the underlying contract

Based on a concern to preserve the integrity of the legal system and its internal consistency, the illegality doctrine states that '[n]o court will lend its aid to a man who founds his cause of action on an immoral or an illegal act'.[50] Because both statutory claims and common law claims against an employer rely on or are linked to the existence of a contract, where the contract is formed or executed illegally, the courts may refuse to 'lend its aid' to the worker.[51] *Zarkasi v Anindita* offers a useful demonstration of the operation of the illegality

[48] ERA 1996, section 111(1).

[49] *Secretary of State for Justice v Betts and others* [2017] ICR 1130.

[50] *Holman v Johnson* (1775) 1 Cowp 341, 343 (Mansfield CJ).

[51] This section focuses upon the line of cases that discuss and apply the contractual test for illegality, stemming from the decision in *Tinsley v Milligan* (1994) 1 AC 340. Most employment cases are analysed as cases of contractual illegality, only occasionally are the tortious principles of illegality applied: see *Vakante v Addey & Stanhope School* [2004] EWCA Civ 1065, [2005] 1 CMLR 3, [9].

defence in an unfair dismissal case.[52] The claimant was an Indonesian national who, after agreeing the course of action with her employer, gained entry to the UK using a false identity. The claimant was a domestic worker for the defendant and during her stay, she was paid less than the minimum wage. When the defendant refused to allow her to return to Indonesia in accordance with a prior agreement, the claimant left her employment. She subsequently made an unfair dismissal claim and a claim for unlawful deduction of wages. The Employment Tribunal was unsympathetic: it found that she moved to the UK voluntarily, in the knowledge that she was working illegally, and held that as a result she could not rely on her illegally formed contract of employment to found either claim. The EAT agreed that the illegality went to the heart of her employment arrangement and that Ms Zarkasi's claim should not be permitted to proceed.[53]

The signs that the courts' approach may change began to show in another employment-related case, *Hounga v Allen.*[54] The definitive statement of the approach that the courts should take to questions of contractual illegality is now found in *Patel v Mirza.*[55] Lord Toulson's judgment was driven by the need to ensure that the application of the illegality defence matched its 'essential rationale… that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system'.[56] He stated that,

> 'In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a

[52] *Zarkasi v Anindita and another* [2012] ICR 788.

[53] Ibid.

[54] *Hounga v Allen and another (Anti-Slavery International intervening)* [2014] UKSC 47, [2014] 1 WLR 2889.

[55] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

[56] Ibid [120].

> proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.'[57]

In particular, Lord Toulson indicated that 'the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability' should be relevant to a court's considerations.[58] Overall, his Lordship argued that the courts should engage in 'a principled and transparent assessment' of the factors he identified and avoid 'a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.'[59]

What will the impact of Lord Toulson's judgment be in employment law disputes regarding fundamental rights? I propose that the proportionality-balancing exercise will limit the application of the illegality defence to only the most exceptional cases of serious illegality for which the claimant is solely culpable. Where a worker is making a claim that would enforce their fundamental rights, it has been argued that this should weigh heavily under Lord Toulson's (b):[60] denying the individual their claim on the basis of minor illegality in the underlying contract should be considered as a relevant and important public policy factor. In the earlier case of *Hounga*, the UK's obligations under international conventions to combat human trafficking and protect its victims weighed heavily against the application of the illegality defence to a victim's employment claims.[61] The concern for the protection of victims of human rights violations could be extended to the broader obligation placed upon the UK by the Convention to secure to everyone in the UK jurisdiction the Convention rights and freedoms.[62] Due to the normative strength of human

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[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] See Alan Bogg and Sarah Green, 'Rights Are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts' (2015) 44 ILJ 101, 112-3 and Alan Bogg, 'Illegality, Public Policy and the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment at Work* (Oxford University Press, 2016).

[61] See *Hounga v Allen* (n 54) [52].

[62] ECHR, Article 1.

rights claims and the need to offer an effective remedy where those rights have been infringed, it could argued to be disproportionate to the rational of maintaining the coherence of the legal system to deny a claim due to illegality.

This argument is reinforced when one considers that the courts are now entitled to take into account the intention and respective culpability of the parties to the dispute. In a number of the employment cases where employers have raised an illegality defence, it was the employer who decided upon the illegal course of action or arranged for the means by which it was carried out. For example, in *Hall v Woolston Hall*,[63] the employer devised and implemented a payroll scheme designed to avoid tax. Ms Hall's questions about the lawfulness of the scheme were dismissed by her employer. When she was later dismissed shortly after becoming pregnant, the employer attempted to argue that her claim was barred by illegality. The Court of Appeal found in her favour. As she merely acquiesced in the illegal conduct, rather than actively participating in it, she should not be prevented from bringing a claim. The court was concerned that the claimant would lose the opportunity to enforce an important right by reason of a course of conduct which they did not plan or intend to follow. In cases such as *Hall*, the employee acquiesces to the employer's conduct, as a result of their position of subordination to the employer and in the light of the social and economic pressure placed upon them.[64] If the courts are encouraged to consider the relative culpability in situations like this, the likelihood that the claim will be permitted to proceed will be increased. Combined with the strong argument from a public policy perspective that individuals should be permitted to enforce their most fundamental rights against a defendant, it is strongly arguable that the courts should let workers in this situation have their claims examined by a tribunal.

[63] *Hall v Woolston Hall Leisure* [2001] 1 WLR 225.

[64] Bogg, 'Illegality, Public Policy and the Contract of Employment' (n 60) 420.

There is one situation in which there remains a chance that employees will be barred from progressing their claim is where they are solely responsible for the illegality and the employer had no knowledge at the time that the contract was formed or performed illegally. For example, in the facts of *Paulet v UK*, the claimant obtained a fake French passport. Using this passport, he obtained jobs in the UK and worked for four years without any right to work.[65] His employers were not complicit and had no knowledge of his illegal actions. In these circumstances, it may be concluded that permitting a claim by Mr Paulet would undermine the public policy behind the immigration and asylum rules and the outcome of the issue would rest upon whether the courts consider it proportionate to bar the claimant from enforcing their rights. If the claimant was denied the opportunity to make a claim against their employer to vindicate their fundamental rights, this would be out of step with the principles of the European Convention. Mr Paulet took a case to Strasbourg after his wages were confiscated alongside his conviction for a number of criminal offences. The domestic courts argued that the confiscation order pursued a public interest of reinforcing the restrictions upon the ability of foreign nationals from working in the UK. Despite Mr Paulet's fraudulent conduct, the Strasbourg Court examined his argument under the right to peacefully enjoy one's property. The Court considered that the deprivation of his property was disproportionate to the aim pursued. This case emphasises that, in the eyes of the ECtHR, fundamental rights are not just enjoyed or enforceable by the virtuous.[66] All potential applicants, whether guilty or complicit in illegal conduct or not, should be able to bring a claim to court. Any instance in which domestic law prevents this vindication of fundamental rights puts employment law out of line with Strasbourg.

B) Diplomatic immunity

[65] *Paulet v United Kingdom* (n 11).

[66] Bogg and Green (n 60).

Another potential barrier to a court enforcing an individual's claim is where their employer benefits from diplomatic immunity and the proceedings concern 'the employment… of the member of a consular post', in the words of the State Immunity Act 1978.[67] The impact of this statutory rule upon the ability of individuals to raise a claim in the court was demonstrated in *Benkharbouche v Embassy of Sudan.*[68] Two domestic workers brought a number of claims against their employers for breach of the minimum wage and of working time regulation and for unfair dismissals. Their respective employers, as embassies based in London, asserted the defence of immunity under the SIA 1978 and the workers' claims were rejected by the Employment Tribunals. The claimants used two human rights arguments to attack the immunity provisions: one based upon the requirement, through section 3 HRA, to read the legislation compatibly with Article 6 ECHR (the right to a fair trial) and alternatively that the Act breached their right to an effective remedy, contained in Article 47 of the EU Charter.

The Supreme Court gave judgment in favour of the claimants. The crucial question was whether the immunity contained in the Act went beyond was required by customary international law. Giving the judgment of the court, Lord Sumption found no basis in international law for extending immunity beyond acts of sovereign authority to acts of a private law nature, such as embassies' dealings with domestic staff.[69] The relevant provisions of the SIA 1978 were therefore found to be incompatible with Article 6 ECHR and also in violation of its equivalent in the EU Charter, Article 47.[70] As a result of the second finding, the immunity was disapplied for the purposes of the rights derived from EU law (discrimination, harassment and working time breaches) as a consequence of the

[67] State Immunities Act 1978, section 16(1)(a).

[68] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2017] 3 WLR 957.

[69] Ibid [66]-[67], [69].

[70] Ibid [76], [78].

direct effect of EU law. Rights with their foundations only in domestic employment law, which included unfair dismissal and a failure to pay the minimum wage, remained barred by the SIA 1978. The Court of Appeal considered that it was impossible to read the legislation compatibly with Article 6 ECHR without reaching a result that would be inconsistent with a fundamental feature of the legislation.[71] As a result, the Court of Appeal issued a section 4(2) declaration of incompatibility with the Convention[72] but was unable to ignore the effect of the immunity upon the domestic employment claims. They were unable to proceed, a result which was confirmed by the Supreme Court.[73]

Whilst it is undoubtedly a positive step for the enforcement of human rights that the EU law claims were permitted to progress to a tribunal hearing, claimants who are unable to raise grievances within the scope of EU employment law will remain unprotected from infringements upon their rights. There is no indication that the government intends to take steps to address the declaration of incompatibility issued by the Court of Appeal[74] so UK law remains inconsistent with the requirements of the Convention on this point. From the perspective of embassy staff, the SIA 1978 acts as an arbitrary bar that prevents them from enforcing their fundamental rights, despite being in the same position of subordination and vulnerability as other workers. This deficiency must be remedied if employment law is to offer an effective vehicle for the vindication of human rights.

III. Is the contact 'for services' or 'of service'?

Numerically, the most significant category of individuals that are excluded from employment law's protection are independent contractors. To access the differentiated

[71] *Benkharbouche v Embassy of the Republic of Sudan; Janah v Libya* [2015] EWCA Civ 33, [2015] 3 WLR 301, [67].

[72] Ibid [86].

[73] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* (n 68) [79].

[74] Ministry of Justice, *Responding to Human Rights judgments* (Cm 9535, December 2017) 48.

contractual rules that have been built up in the common law to protect employees,[75] or to make a claim for unfair dismissal,[76] the individual must work under a contract of employment or 'of service' rather than a contract for services. As was seen above in the case regarding the Article 11 rights of clergymen, the ECtHR seeks to include a wide range of individuals within the Convention's protective scope and pays very little regard to their contractual terms and conditions. In contrast, the approach of the domestic courts to the question of whether an individual is an employee is bound up with technical tests. The courts are easily swayed by the employer's attempts to mask the underlying relationship of subordination that is often present.

The distinction between independent contractors and employees is central to the personal scope of employment law's protection. To pursue an unfair dismissal claim[77] or a common law claim for wrongful dismissal,[78] the claimant must satisfy the court that they work under a contract for service. It is a difficult distinction to apply and the courts have developed a variety of factors that it considers in order to reach a result. Does the employer control the activities to be done and how they should be done?[79] Is the individual in business on their own account? Do they take a risk of profit and loss?[80] Are they integrated into the employer's business?[81] In some cases, the courts search for a contract between the parties by examining whether there is an 'irreducible minimum' of promises between the parties: an ongoing obligation upon the company to offer work and a corresponding

[75] Discussed in Chapter 8 and 9.

[76] ERA 1996, section 203.

[77] Ibid, section 203.

[78] See for example Lord Steyn's observation that the implied term of mutual trust and confidence is 'an incident of all contracts of employment': *Malik v Bank of Credit and Commerce International S.A.* [1998] AC 20, 45.

[79] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 WLR 775, [1968] 2 QB 497, 515.

[80] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184.

[81] *Beloff v Pressdram Ltd* [1973] FSR 33, 42.

obligation upon the worker to accept it.[82] Increasingly the courts prefer to look to the realities of the way in which the relationship is conducted, rather than how it is described in the contractual documentation.[83] However, a persistent problem is that 'those who describe themselves as self-employed often manifest many of the characteristics of employees – they may in practice be dependent, have inferior bargaining power and they risk exploitation.'[84] They remain excluded from the protection of employment law. This exclusion stands even where the individual is subordinated to the power of the employer in a similar way to a typical employee and has suffered a breach of their human rights at the hands of their employer.

Examining the instances in which the courts have applied the distinction between employee and contractor discloses clear evidence that its existence and application deprives a variety of claimants of the opportunity to challenge and receive a remedy for a rights infringement. This restriction upon the capacity of significant numbers of individuals to vindicate their rights through employment law presents a sharp contrast to the approach of Strasbourg outlined above. Two cases demonstrate this deficiency in domestic employment law's capacity to enforce the fundamental rights of all individuals.

The case of *O'Kelly v Trusthouse Forte*[85] discloses a serious infringement of the workers' right to freedom of association. The infringement went unnoticed and unremedied by the court. A hotel assigned work to a pool of "regulars" - casual waiters who the company relied upon and offered work to regularly. Some of the "regulars" worked between 30 and 40 hours a week. If a waiter failed to work an assigned shift, they would not be allocated future work. For many of the workers, the hotel was their only source of

[82] *Nethermere (St Neots) Ltd v Gardiner and another* [1984] ICR 612, 624 (Stephenson LJ).

[83] See *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745.

[84] Catherine Barnard and Alysia Blackham, 'Discrimination and the Self-Employed: The Scope of Protect in an Interconnected Age' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017) 198.

[85] *O'Kelly and Others v Trusthouse Forte Plc* [1983] 3 WLR 605, [1984] QB 90.

income. They were unable to maintain two jobs in order to mitigate the risk of not receiving any shifts from the hotel. The three waiters in question were members and stewards for the Hotel Catering Workers Union. Not long before their dismissal, the claimants began asserting that the "regulars" should receive contracts of employment, with the help of the union. They each received a letter from the hotel employer stating that their services were no longer needed. The waiters made a claim for unfair dismissal before the industrial tribunal, arguing that they had been dismissed for an inadmissible reason: their trade union membership and activities.

The first question for the tribunal was to classify their working arrangements. The waiters' claim was rejected at this initial stage. The court considered that the claimant did not have a contract. The 'commanding economic power' of the defendants and the advantages for the claimants of being offered work consistently led to a firm expectation of work allocation but 'it was not a contractual promise'.[86] The only possible contractual arrangement was 'a contract to offer and accept individual contracts of employment' for particular engagements.[87] In addition, the Court of Appeal reinstated the Industrial Tribunal's original finding that, if there had been a contract in place, it would not have been one of employment. Although the waiters behaved as employees whilst at work and relied upon the income that their shifts provided, the tribunal considered them to be independent contractors. A significant influence in reaching this result was that the custom of the industry was to classify casual waiters as independent contractors. This conclusion left the waiters with no means by which they could challenge the serious infringement with their freedom of association, which includes the freedom to join a trade union.[88]

[86] Ibid 116 (Ackner LJ), 124 (Donaldson MR).

[87] Ibid 125.

[88] Hugh Collins, Keith Ewing and A McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2012) 204.

In *Vining v Wandsworth LBC,*[89] the Court of Appeal accepted that, although not every dismissal alone is sufficient to engage Article 8, certain severe consequences are capable of doing so. Reading a number of ECtHR decisions together, it held that consequences such as negative impact upon an individual's reputation or impact upon their private life, including their ability to create future social relations through work; stigma that may attach to the individual as a result of their dismissal or difficulties getting future employment that may arise as a result of the dismissal could engage Article 8.[90] This reasoning confirms Lord Justice Elias' thoughts as he set them out in the earlier case of *Turner v East Midlands Trains*.[91] In *Vining*, the claimants were made redundant and the Court of Appeal therefore held that there were no consequences of the kind that would engage Article 8 upon the facts.[92] But *Vining* establishes the idea that serious effects upon the claimant, in particular upon their reputation and their future employment prospects, can engage Article 8 in a range of circumstances. These consequences may arise regardless of whether the workers' contractual arrangements fulfil the courts' multi-factor analysis. It does not in principle matter what legal label is used to describe the relationship – if these consequences occur, employment law should be capable of intervening to offer protection to the individual's Article 8 rights.

The application of the classificatory tests for a contract of employment operate to deny a claim to individuals, even where these Article 8-engaging consequences occur. In *Quashie v Stringfellows,*[93] Ms Quashie worked as a lap dancer in the defendant's club for 18 months, at which point she was told she was no longer allowed to work as a result of an allegation that she was using drugs. Such a serious allegation, if it became widely known,

[89] *Vining and others v London Borough of Wandsworth* (n 26).

[90] Ibid [47].

[91] *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 525, [28]-[32].

[92] *Vining and others v London Borough of Wandsworth* (n 26) [57].

[93] *Quashie v Stringfellows Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99.

could certainly result in damage to one's reputation, attach stigma to the claimant and make it more difficult for her to find future employment – particularly in an industry which imposes such strict 'house rules' regarding drug and alcohol use. Thus, Article 8 was arguably engaged by her dismissal. Her claim for unfair dismissal, however, fell at the first hurdle. The Court of Appeal held that Ms Quashie was an independent contractor, and therefore not permitted to launch an unfair dismissal claim.

Critical to the court's conclusion were its findings on the issues of pay, mutuality and economic risk. The fact that the claimant was paid directly by her clients, rather than the defendants, was considered to be a very important factor.[94] The payment was in 'Heavenly Money' given to clients by the club upon entry which the dancers then 'cashed in' at the end of the night. As Albin has observed, in reality, the means of payment was a mechanism that enabled the defendant to check on the quality of the claimant's services and to provide performance-related pay: the more 'Heavenly Money' she earnt from clients, the better the service she was providing.[95] In addition, this mechanism of payment and the possibility of Ms Quashie making a loss in an evening was perceived as the claimant undertaking economic risk - 'a very powerful pointer against the contract being a contract of employment'.[96] Finally, as Ms Quashie was under no obligation to work a particular number of shifts per week and the club was under no obligation to pay Ms Quashie a fixed wage, the courts considered the arrangement to be lacking the required 'mutuality of obligation'.[97] Albin has argued that the court's reading of the facts led them to an incorrect conclusion, particularly in the light of Ms Quashie's inability in practice to

[94] Ibid [45].

[95] Einat Albin, 'The case of Quashie: between the legalisation of sex work and the precariousness of personal service work' (2013) 42 ILJ 180, 186-187.

[96] *Quashie v Stringfellows* (n 93) [51].

[97] Ibid [45]-[46].

manage her economic risks and the extensive control exercised by the club.[98] Although Albin's arguments are highly convincing, *Quashie* exposes the inadequacy of the personal scope of unfair dismissal law for human rights purposes, whether or not she was correctly classified as an independent contractor. Her dismissal potentially amounted to an unjustified infringement with her Article 8 rights, given its impact on her reputation and ability to gain future employment, and yet the tribunals refused to examine her case. This refusal is in sharp contrast to the universality of the rights contained in the ECHR.

IV. The Qualifying Period

An individual wishing to make an unfair dismissal claim faces further obstacles that may prevent a tribunal from examining the substance of their complaint. The Employment Rights Act 1996 contains additional requirements that must be satisfied before a claim can be made. Certain categories of employee are excluded from the statute's protection, such as members of the police force and mariners.[99] The application of these occupational exclusions is discussed further below. Section 108 of the ERA 1996 provides that the right not to be unfairly dismissed is subject to the individual completing a period of continuous service with the employer that they intend to claim against.[100] The qualifying period is currently set at two years.[101] In most cases, the claimant will have to prove they have been continuously employed by the same employer before they are able to make a claim against it. On the basis of the 2010 statistics, approximately 6.2 million workers had continuous periods of employment between 0 and 2 years.[102] This means that around 20% of the workforce is therefore excluded from the protection of unfair dismissal law. In addition to

[98] Albin (n 95).

[99] ERA 1996, section 199 and 200.

[100] Ibid section 108.

[101] The Employment Rights (Increase of Limits) Order 2016, SI 2016/288, article 3.

[102] Department of Business, Innovation and Skills, *Resolving Workplace Disputes: Final Impact Assessment* (November 2011) Chart 3.2.

the general restrictions upon the personal scope of employment law, these rules of eligibility to claim lead to a serious inadequacy in unfair dismissal law's capacity to assist individuals who wish to vindicate their human rights.

To calculate the length of continuous service completed by a potential claimant, the tribunal counts the cumulative number of weeks in which the individual has worked for the defendant employer.[103] There are a few enumerated exceptions which deem continuity to exist during a break in service.[104] Otherwise if the worker has not performed work in a given week, their continuity of service will be broken. The harsh operation of the qualifying period is somewhat mitigated by two categories of cases. The qualifying period is disapplied for cases in which the reason is classified as 'automatically unfair'. These cases include dismissals for reasons related to pregnancy, or taking any form of family leave;[105] dismissing an employee for performing worker-representative functions;[106] and dismissing an employee due to their refusal to work hours that contravene the Working Time Regulations or their assertion of other statutory rights such as the National Minimum Wage.[107] The second set of circumstances is when the claimant is able to bring a claim under another cause of action to which the qualifying period does not apply. The most prominent example of this is the Equality Act 2010: if the claimant's dismissal was also an act of discrimination, and they pursue it under the Equality Act, the qualifying period does not apply. Although these are narrow exemptions, they go some way to increasing access to a tribunal in a limited class of cases.

[103] ERA 1996, section 212(1).

[104] Ibid section 212(3).

[105] Ibid sections 99, 104C, 105(1) and The Maternity and Parental Leave etc. Regulations 1999, SI 1999/3312 reg 20.

[106] ERA 1996, sections 100, 103, 105(1) (3) and (6) and the Transnational Information and Consultation of Employees Regulations 1999, SI 1999/3323 reg 28.

[107] ERA 1996, sections 101A, 104A, 105(1), (4A) and (7A).

A) *Redfearn v UK*: Strasbourg examines the qualifying period

Mr Redfearn was employed by a private company, Serco, as a driver. His primary task was transporting vulnerable persons and their carers around the local area. The majority of his customers were of Asian origin. The company received no complaints from service users regarding the manner in which he conducted his duties. The dispute began when a local newspaper reported that Mr Redfearn was running for election as a BNP local councillor. He was briefly transferred to a non-customer facing role after complaints by other workers and the union. When Mr Redfearn was elected as a councillor, the company dismissed him. Serco cited a number of possible risks to the company: the concern that Mr Redfearn's presence would cause anxiety amongst passengers, potential damage to Serco's reputation and that the situation would put the company's contract with the local City Council in jeopardy.

As Mr Redfearn did not meet the one-year qualifying period of continuous service required to launch an unfair dismissal claim at the time, he instead attempted to make a claim for discrimination on the grounds of race. The Court of Appeal rejected his claims.[108] It was incorrect to frame the issue as one of racial discrimination – it was discrimination on the grounds of political opinion which is not regulated by employment law. The court indicated that, had Mr Redfearn satisfied the eligibility criteria for an unfair dismissal claim, he may have succeeded as it would not usually be fair to dismiss an employee for their political activities outside of work.[109]

Mr Redfearn took his case to the ECtHR alleging that the domestic system failed to protect his ECHR rights. The Court considered his complaint under Article 11 read in light of Article 10. He argued that his fundamental rights must be effective from the first day of employment, and not rendered illusory by the requirement that an employee's human rights

[108] *Redfearn v Serco Ltd* [2006] EWCA Civ 659, [2006] ICR 1367.

[109] Ibid [10].

can only be exercised fully after the completion of a period of service with the relevant employer. He based his case on the ECtHR's doctrine of positive obligations: alleging that the UK was under an obligation to enact legislation that would provide him with protection from termination on the grounds of his political affiliation.[110] The UK government claimed it had fulfilled its obligations and that the qualifying period was within its margin of appreciation because the qualifying period pursued a legitimate aim: creating greater employment opportunities by encouraging recruitment and avoiding unjustified involvement by tribunals in dismissal decisions.

The majority of the court found in favour of Mr Redfearn. In light of the seriousness of the sanction and its consequences, the majority held that the dismissal was capable of striking at the substance of his Article 11 rights. The Court held that the operation of the qualifying period had deprived the applicant of the only effective means of challenging his dismissal.[111] The task before the court was to examine whether, by making the unfair dismissal claim subject to a qualifying period, the UK had exceeded its margin of appreciation in implementing domestic protection of the applicant's Article 11 rights and therefore failed to fulfil its positive obligations under that article. The Court accepted that the qualifying period was a reasonable means to bolster the domestic labour market, but it was concerned that a system which could allow a dismissal purely on grounds of political affiliation carried the potential for abuse.[112] It was considered critical that a domestic court should be able to pronounce on whether or not, in each particular case, the employer's interests should prevail over the employee's rights. The Court found that it was incumbent upon the UK to take appropriate measures to protect employees – including those with less

[110] *Redfearn v United Kingdom* (n 6) [33].

[111] Ibid [52].

[112] Ibid [52], [55].

than one year of service – from dismissal for reasons related to their political opinions.[113] This could either have been through the creation of a further exception from the qualifying period or through the creation of a free-standing claim for unlawful discrimination on grounds of political opinion. As the UK had failed to take these steps, it was in breach of its positive obligation to secure adequate protection for the applicant's Article 11 rights.

B) An evaluation of the judgment and its ramifications for domestic law

The minority of the Strasbourg Court disagreed that the UK's positive obligations extended to creating exceptions to the qualifying period: it should be left to Parliament to decide which areas require special protection and therefore the necessary scope of any exceptions.[114] The minority would have permitted the UK a wider margin of appreciation in striking the balance between the enforcement of an individual's fundamental right against their employer and the general interest, accepted by the Court to be to 'create greater employment opportunities' by protecting companies from the risk of unwarranted claims.[115] This ready acceptance leads to a significant shortcoming of the majority's and minority's reasoning: both sides of the Court failed to examine fully the qualifying period itself. No attempt was made to scrutinise whether the aims put forward by the government were truly legitimate or whether the qualifying period, as the means chosen to pursue them, was the most appropriate way to achieve those aims. For example, the government cited a wish to avoid 'unjustified involvement' of tribunals in dismissal cases as part of its aim.[116] In unfair dismissal law, a tribunal will only become involved in the employer's decision if it is considered to be so unreasonable that no reasonable employer would have made that

[113] Ibid [57].

[114] Ibid [OI-7].

[115] Ibid [OI-7].

[116] Ibid [53].

decision.[117] I would question whether it is 'unjustified' for a tribunal to intervene and award compensation in cases where the employer has gone so seriously wrong that no reasonable employer would have made the same decision. It appears to me that these are precisely the cases where a remedy is required to recognise the wrong done to the claimant.

The impact of *Redfearn* in the UK was the introduction of an exception to the qualifying period in the Enterprise and Regulatory Reform Act 2013. Section 13 inserted a provision into ERA 1996 stating that '[the qualifying period] does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation'.[118] This change brings the UK into line with the letter of the Strasbourg *dicta*. As has been observed by Collins and Mantouvalou, however, the Court's reasoning in *Redfearn* 'is equally applicable to all Convention rights that create positive obligations on parties to the Convention'[119] which currently includes Article 8's right to respect for private life, Article 9 on freedom of religion and Article 10's freedom of expression. The Court has previously transferred its reasoning between Articles 8, 9, 10 and 11[120] so it is very likely that the positive obligations as phrased and applied in *Redfearn* under Article 11 would be similarly applicable to the other articles.

The consequence of this analysis is that the government's amendment is 'apparently inadequate to address the full challenge posed by the ECtHR to the qualifying period for unfair dismissal'.[121] Collins and Mantouvalou suggest that a broader exception would be appropriate: for cases where a Convention right has been invoked and there is an interference with that right inherent in the reason for dismissal, the qualifying period should

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[117] According to the test in *Foley v Post Office, HSBC Bank plc v Madden* [2000] ICR 1283, [2000] IRLR 827, discussed further in Chapter 5.

[118] Enterprise and Regulatory Reform Act 2013, section 13.

[119] Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909, 915.

[120] See for example *Eweida and others v United Kingdom* (2013) 57 EHRR 8 at [83].

[121] Collins and Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (n 119) 915.

not apply.[122] It is likely that a further challenge to the qualifying period, either domestically or before the ECtHR, is necessary to prompt such a modification to be implemented. Another *Redfearn*-type case under a different Article may arrive soon. Alternatively, the qualifying period might be challenged beyond its role in restricting the capacity of applicants to render effective particular Convention rights. More generally, it could be proved that the qualifying period operates to the disadvantage of female workers or young workers who are likely to be newer recruits or in shorter term employment.[123] One could argue that it is therefore indirectly discriminatory and in Convention terms a breach of Article 14, in combination with Article 8. Another possibility could be to argue that the qualifying period operates as a procedural bar that denies claimants access to a court, which could be considered in breach of Article 6. As the 'very essence' of an employee's right to access to justice is impaired by the qualifying period,[124] it may be difficult for the government to justify the decision to retain the requirement of continuous service.

V. Occupational exclusions and their avoidance in *Vining*

By section 200(1) ERA, a variety of the Act's provisions 'do not apply to employment under a contract of employment in police service or to persons engaged in such employment.'[125] Members of the police force are thereby excluded from the protection of unfair dismissal law. In *Redbridge LBC v Dhinsa*,[126] the Court of Appeal examined whether this section applies to parks police employed to patrol open spaces and parks. As constables in a police force, they were excluded by section 200 from bringing a claim in unfair

[122] Ibid 916.

[123] See *R v Secretary of State for Employment (Ex p. Seymour-Smith) No. 2* [2000] 1 WLR 435, K D Ewing and John Hendy, 'Unfair dismissal law changes - unfair?' (2012) 41 ILJ 115, 119, and DBIS, *Resolving Workplace Disputes: Final Impact Assessment* [A2.3].

[124] *Stubbings v United Kingdom* (1996) 23 EHRR 213, [50].

[125] ERA 1996, section 200(1).

[126] *Redbridge London Borough Council v Dhinsa and another* [2014] EWCA Civ 178, [2014] ICR 834.

dismissal law.[127] This judgment would appear to be fatal to the chances of a second group of claimants, also parks police, who brought unfair dismissal and collective consultation complaints under the ERA only three years later. However, the claimants in *Vining* had human rights arguments to make, which changed the result completely. This section will discuss *Vining v Wandsworth LBC* and the impact of the reasoning in that case for the other obstacles of personal scope outlined above.

A) Human rights arguments removing barriers to a claim

The claimants in *Vining* were two parks policemen and their union, UNISON. The employees were made redundant and alleged they had been unfairly dismissed. UNISON sought an award for a failure to consult collective representatives during the redundancy process under TULR(C)A 1992, which similarly excludes employees in police service and their representatives from redundancy consultation rights.[128] The claimants argued that the exclusionary provisions of the statutes amounted to an infringement of their Article 8 rights, with regard to the unfair dismissal complaint, and the right to freedom of association in Article 11 ECHR, with regard to the consultation complaint. The union argued that the duty to interpret legislation compatibly with Convention rights contained in section 3 HRA should be applied to permit its claim to progress. The Court of Appeal found in favour of the union but reject the individual claimants' arguments.

In addressing the individuals' Article 8 arguments, the court held that the 'mere fact of dismissal from employment' was not sufficient to engage Article 8.[129] The ECtHR case-law shows rather than the particular consequences of a dismissal for the applicant may engage the right, such as reputational damage, stigmatization, an effect on the individual's

[127] Ibid [70].

[128] Trade Union and Labour Relations (Consolidation) Act 1992, section 280.

[129] *Vining and others v London Borough of Wandsworth* (n 26) [43].

self-esteem and self-respect, or impact upon their capacity to make future social relations or find employment.[130] In a redundancy situation, the court considered that these special factors were not present: there was no suggestion that the claimants had engaged in wrongful conduct and no stigma attached to the dismissal.[131] Difficulty finding new employment occurs to some extent after every dismissal and was insufficient alone to engage Article 8. This finding also led to the rejection of the arguments made on the basis of Article 14, which relied upon Article 8 being engaged. Section 200 applied to the claimants' case unaltered and the unfair dismissal claims were therefore rejected.

UNISON's arguments on the basis of Article 11 led to a different response. The court viewed the right to be consulted before dismissals to be an essential element of Article 11, either as an aspect of collective bargaining as recognised in *Demir v Turkey* or as an activity analogous to it.[132] Under Article 11, the state has a positive obligation to put in place a legislative scheme that strikes a fair balance between the relevant competing interests and 'any provision of that scheme which restricts its availability to particular classes of workers requires to be justified, albeit that the state is recognised to have a wide margin of appreciation.'[133] Because the government had not advanced any justifications for why the police force should be excluded from TULR(C)A's scope, the court found a breach of Article 11. Turning to the interpretive obligation in section 3 HRA, the court was unable to find a re-formulation of the statutory language that drew the line between workers were the exclusion was justified and those were it was unjustified. Nevertheless, the outcome reached by the court was that, through an application of section 3 HRA, the

[130] See ibid [47] citing *Volkov v Ukraine* (2013) 57 EHRR 1, *IB v Greece* (Application no 552/10, 3 October 2013), *Boyraz v Turkey* (2015) 60 EHRR 30 and *Sidabras And Dziautas v Lithuania* (2006) 42 EHRR 6.

[131] *Vining and others v London Borough of Wandsworth* (n 26) [49].

[132] Ibid [63].

[133] Ibid [64].

relevant exclusionary provision does not apply to members of the parks police. UNISON was therefore able to pursue their consultation complaint in the tribunal.

B) The future of personal scope requirements after *Vining*

There is a significant disparity between the requirements of the Convention and domestic employment law. The Convention's rights are available universally. Where the Court engages with questions of employment status, it applies something akin to a presumption in favour of protection in order to ensure that the Convention is applied very broadly. Domestic employment law includes a litany of restrictions upon the entitlement to make a claim to a tribunal. The restrictions prevent individuals from enforcing their human rights, where they have been breached by their employer. *Vining* is the first case where the court addressed this deficiency, finding a way to remove the obstacle that prevented the union from enforcing their members' fundamental rights.

The decision in *Vining* could have profound effects upon the application of the rules of personal scope in future cases in which the claimant makes human rights arguments. From the decision emerges a principle that puts pressure upon any restriction upon the right to make a claim that falls out of line with the requirements of the Convention, given force by the HRA. If a fundamental right is at stake upon the facts of the case, the court must find a way to allow it to progress, hear the complaint and make a ruling. It has been shown that Article 8 can be engaged by a range of consequences of dismissal, which may be shown to arise frequently if courts are susceptible to reasoning in *Vining*. The principle also applies to any dismissal that engages other human rights, meaning that the limitations set out above could be tested in a range of cases. In addition, the decision in *Redfearn* exposed the vulnerability of the qualifying period to challenge on human rights grounds, a vulnerability that has been shown to remain after the government's minimal amendments to its operation. Many aspects of the law in this area could be successfully challenged using human rights arguments, and *Vining* indicates that the courts may be willing to rewrite the

law in order to achieve compatibility with the Convention. If these steps are taken by the courts, employment law's rules of personal scope will be fundamentally reshaped in order to achieve compliance with the requirements of fundamental rights.

This reasoning might be resisted on the grounds that other recent cases do not show the same willingness to adapt the established rules in order to give effect to the individual's human rights. This contrasting approach has been evidenced in two particular cases. Neither case is damning for the reasoning adopted in *Vining*, as both were decided on their own particular facts and could straightforwardly distinguished by a court determined to follow the *Vining* approach.

In *Gilham v Ministry of Justice,*[134] a judge claimed protection as a whistleblower. She made disclosures regarding the judiciary's unsafe working conditions and excessive workload. Ms Gilham claimed that she had been subjected to detriment as a result. The difficulty that she faced was that judges are traditionally considered to be office-holders and that their appointment is not contractual in basis. She would therefore be excluded from protection as a whistleblower as an individual without a contract.[135] Ms Gilham instead argued that the Convention required that she should be recognised as a worker in order to receive statutory protection. She supporter her claim with the argument that she must be afforded protection as a whistleblower in order to vindicate her right to freedom of expression, protected by Article 10 of the Convention. The Court of Appeal rejected Ms Gilham's arguments. It considered that her Article 10 rights could be vindicated by making a claim against her employer under section 7 HRA.[136] Section 7 creates a public law claim for a victim of an infringement with their Convention rights. Because section 7 was considered to provide adequate protection for her Article 10 rights, there was no need to

[134] *Gilham v Ministry of Justice* (n 30).

[135] Whistleblowing protection is extended to 'workers' as defined by section 230(3) of the ERA 1996: see section 47B.

[136] *Gilham v Ministry of Justice* (n 30) [88].

alter the definition of 'worker' or its application in order to give Ms Gilham a whistleblowing claim.

Two points can be made regarding the relevance of *Gilham* to the courts' general approach towards fundamental rights claims that have been barred from court. Firstly, the facts are very specific. The method of avoidance of the issue used by Lord Justice Underhill in *Gilham* would not be available in private sector cases. Only public authority employers are directly subject to the duty to act in compliance with Convention rights, which is enforced through section 7. If an individual working in the private sector had come before the court seeking access to protection as a whistleblower, the court would have been forced to confront the issue. *Vining* indicates that the court should find a way to accommodate a wider group of individuals within the scope of employment law if necessary to permit them to vindicate their human rights. Secondly, we might question the reasoning offered by the court for holding that the HRA claim provided adequate protection for Ms Gilham. It is interesting that the court did not cite a whistleblowing case which had been brought under section 7 HRA, indicating that the ERA is the preferred route for claimants. This is perhaps because the claimant was more likely to receive substantial damages under the ERA whistleblowing claim. The section 7 cause of action is part of public law, where damages are generally lower, and it is explicitly linked to 'just satisfaction' as defined and applied by the ECHR.[137] 'Just satisfaction' may not involve the award of any damages and only more serious infringements are remedied by large sums.[138] Ms Gilham was therefore very unlikely to receive a substantial sum in 'just satisfaction' of her claim, undermining the Court of Appeal's stance that section 7 provided adequate protection for her Article 10 rights. Other courts might consider more seriously the need to offer effective protection for the individual's fundamental rights and whether the public law claim was capable of doing

[137] Human Rights Act 1998, section 8(3).

[138] See Chapter 6 for further detail.

so. This observation raises further questions about the persuasiveness of *Gilham v Ministry of Justice.*

The second case that might be cited as contrary to the approach taken in *Vining* is *Smith v Carillion.* In *Smith*,[139] Mr Smith was blacklisted from employment in the construction industrial. As an agency worker, he lacked a contract with the end user that refused to hire him. The courts refused to imply a contract between Mr Smith and the company. The Court of Appeal rejected his argument that the necessity test for implication should be modified so that he could vindicate his human rights against the blacklisting companies. The court rejected his argument because the wrong occurred a matter of months before the entry into force of the HRA. The duty of compatible interpretation in section 3 was therefore inapplicable. Alan Bogg has accused the court of an 'abdication of [it's] constitutional responsibility.'[140] Again, this case in unusual in revolving around such a historic breach of human rights. The court took advantage of another means to evade the issue which would not be available to most courts. It does not stand for a generally applicable rule that goes against the court's approach in *Vining.*

What would happen if the court had been forced to confront the inconsistency between domestic principles and the ECHR in *Gilham* and *Smith?* Claimants could place great reliance upon section 3 HRA, which contains the duty to interpret statutes compatibly with the Convention. The provisions of the ERA contain many of the exclusionary rules that claimants may wish to challenge. Section 3 could be deployed to require the court to alter the statutory language or the meaning that it is given. The courts, much like in *Benkharbouche*, could disapply specific provisions in the particular case where they would prevent the claimant from vindicating their rights. Alternatively, the courts could adopt an approach more favourable to the individual in classifying their contract on the facts, tipping

[139] *Smith v Carillion (JM) Ltd* (n 35).

[140] Bogg, 'Common Law and Statute in the Law of Employment' (n 40) 110.

the balance towards finding a contract of employment. Similarly, a contract could be implied more readily between worker and putative employer by the courts, by applying the 'necessity' test less strictly. When making an assessment of the public policy factors relevant to an illegality defence, the decision in *Vining* clearly indicates that barriers to a claim should be disregarded wherever possible. More challenging for the courts might be statutory bars to a claim, such as the qualifying period. Some creativity might be required to find a way around these rules, although in *Vining* the court was willing to go against the clear wording of the statute and the previous applications of its definitions to achieve the result. This proactive approach may indicate that other obstacles to individuals bringing their human rights cases before the courts will be similarly evaded, even where the impediment takes the form of clear statutory language.

Summary

The narrow personal scope of domestic employment law is incompatible with Convention principles of universality and inclusive protection. The Strasbourg Court does not require a particular type of contract or length of service in order to address an individual's complaint. In contrast, an individual seeking to vindicate their rights through domestic employment law will be stymied in numerous restrictions on their entitlement to make a claim. They must have an enforceable contract with the relevant employer, one that is classified as the basis of an employment relationship, and which they have been working under for at least two years. Unless the UK government could offer a persuasive justification for these restrictions, it is very likely that they would be considered to amount to a breach of the Convention. There are encouraging signs in *Vining* that the judges will do whatever they can in order to mitigate the harshness of the exclusionary rules. However, this approach has not be replicated in other recent cases. If the courts continue to accept limitations upon the personal scope of unfair dismissal law, as well as the restrictions

contained in employment law more generally, the capacity of employment law to vindicate the rights of individuals will remain inadequate.

Chapter 5
Standards of review: Proportionality and the 'Range of Reasonable Responses'

The standard of review applied by a court determines the strength and effectiveness of a legal right. Scrutiny that is too laxly conducted will be of little use to the claimant. If a court questions the reasons for which an action has been taken and whether any other courses of action were available to the decision-maker, it ensures that the claimants rights have not been breached for an irrelevant or insufficient reason or in a manner that could have been avoided. The standard of review used in unfair dismissal law is therefore crucial in considering whether it is offering adequate protection to the fundamental rights of individuals. If the tribunals fail to scrutinize employers' actions carefully, unfair dismissal law will be incapable of protecting the fundamental rights of workers adequately, regardless of its other features.

In this chapter, I will discuss the standards of review applied by the courts where a complainant alleges that the dismissal amounts to a *substantive* breach of their human rights rather than a *procedural* breach.[1] This chapter examines the domestic standard of review in unfair dismissal law, contrasting it with the proportionality analysis used to test potential justifications for infringements upon Convention rights by Strasbourg. It will be noted that, although the courts have attempted to integrate questions of proportionality into

[1] Employers' procedures have also produced interesting case-law and commentary: see further, *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 525 and *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704. For commentary, see Simon Deakin and Gillian S Morris, *Labour Law* (6th edn, Hart Publishing 2012) 544; Astrid Sanders, 'Does article 6 of the European Convention on Human Rights apply to disciplinary procedures in the workplace?' (2013) 33 OJLS 791 and ACL Davies, 'Labour Law as Public Law' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy Of Labour Law* (Hart Publishing, 2015) 234-235.

the assessment of fairness, the framework established has not been successfully adopted. In many cases, the tribunal does not raise the issue of a potential human rights infringement in their reasoning and in those where it is raised the tribunal displays undue deference to the employer's perspective. Either the proportionality analysis is missing completely from the tribunal's assessment or it is applied in such a complacent manner that the tribunal offers no real protection for the individual's fundamental rights. Alternatively, we could remove human rights cases from the scope of the standard fairness assessment. Cases with a human rights element could be dealt with at the prior stage of the reason for the dismissal: if the reason for the dismissal amount to an infringement of the claimant's human rights that cannot be justified by the employer, then the dismissal could be considered automatically unfair. Protection of the exercise of fundamental rights already occurs to some degree through this mechanism, although channelling all human rights cases through the automatically unfair route may add complexity to the law of unfair dismissal.

I. Strasbourg's proportionality analysis

In order to demonstrate the deficiencies of the law of unfair dismissal in scrutinizing employer's decisions, we must first build an account of the standard of review as it is applied in Strasbourg. An employer can only offer a justification for infringing conduct if it is provided for by the Convention's text. Articles 8, 9, 10 and 11 are qualified rights which permit of limitation in accordance with their terms. Once the Court establishes that a dismissal amounts to an infringement of an ECHR right, the employer must satisfy the Court of three main elements of justification:

> 1. That the interference was 'prescribed by law'. In most cases, the interference is in accordance with the terms of the domestic labour code, although it may be authorised by a consistent line of authority from the courts regarding the particular type of conduct.[2]
>
> 2. That the interference pursued a 'legitimate aim' as listed by the Convention. In employment cases that arise in the private sector, the employer relies upon the

[2] *Köpke v Germany* (2011) 53 EHRR SE26, [44].

> 'protection of the rights and freedoms of others'. This may include the protection of their customers rights, the employer's interest in running their business or their public reputation.[3]
>
> 3. That the interference was 'necessary in a democratic society'. This final stage is usually determinative of the case and requires more detailed elaboration.

In order to establish whether the infringement was necessary, the Court asks several questions. First, the Court asks whether the infringement answered a 'pressing social need'.[4] It may also consider whether the reasons adduced where 'relevant and sufficient'[5] and, in cases in which the Court considers the infringement was particularly serious, the government must provide a very weight justification that is sufficiently strong to outweigh the infringement that has occurred.[6] The Court will also investigate whether the infringement was necessary to achieve the pressing aim sought by the employer. This question involves examining the proportionality of the infringement, comparing the harm caused to the claimant to the need to pursue an important societal goal. The Court may also assess whether the aim could be achieved by some less invasive means that would have had a lesser impact on the individual's human rights. This consideration can be particularly important in an employment law case, where dismissal is perceived as a most serious sanction and the employer has an array of other disciplinary measures that are less drastic that they might have employed. By answering these questions, the Court can give strong indications of what *should* be done and set standards of behaviour for governments and, by extension, employers. Instructing employers to consider whether their aim, for instance protecting their reputation, could be achieved without dismissing an employee is a particularly powerful stipulation and this issue is neglected in the domestic courts' analysis.

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[3] See Ladele's case and Eweida's case in *Eweida and others v United Kingdom* (2013) 57 EHRR 8 and *Heinisch v Germany* (2014) 58 EHRR 31, [49] respectively.

[4] See *Vogt v Germany* (1996) 21 EHRR 205, [52].

[5] Ibid.

[6] *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, [94].

The assessment of necessity and proportionality is fact-sensitive and the Court takes into account a wide range of features of the case. In an early case, *Vogt v Germany*, the applicant was dismissed from her teaching post because she ran as a candidate for the Communism party. She was dismissed on the grounds that she had failed to adhere to the duty of political loyalty to the constitution to which all civil servants were subject. The main issue before the Court was whether her employer could justify the interference under Article 10(2). The factors that entered the ECtHR's deliberations were that Mrs Vogt had been deprived of her 'calling', noting that dismissal is a 'very severe measure' in light of the loss of reputation and livelihood that it entails and that 'teachers in this situation may find it well nigh impossible to find another job as a teacher'.[7] Further, it considered the fact that teaching German and French in a secondary school did not disclose any security risks nor had Mrs Vogt been accused of attempting to indoctrinate her students, despite extensive investigation.[8] The Court concluded that the government had failed to justify the dismissal – the sanction imposed was disproportionate to the aim it was pursuing.[9] *Vogt* shows the sensitivity of the ECtHR to the particular situation faced by the individual and the specific impacts upon them of the interference with their rights.

What factors are consistently important in the Court's deliberations? In *Vogt*, the ECtHR rightly considered dismissal to be a 'very serious measure'.[10] Linked to this is the concurrent loss of livelihood, which the Court considers to be particularly serious where the individual has acquired special skills or training to carry out their calling[11] or where it will be challenging for the claimant to find and adjust to another job.[12] The loss of an

[7] *Vogt v Germany* (n 4) [60].

[8] Ibid.

[9] Ibid [61].

[10] Ibid [60].

[11] Ibid; *Schüth v Germany* (2011) 52 EHRR 32, [73].

[12] *Smith and Grady v United Kingdom* (n 6) [92]; *Schüth v Germany* (n 11) [73].

individual's reputation and the wider impact on their private and home life is also relevant to the proportionality of a dismissal.[13] More generally, the ECtHR makes an assessment of the seriousness of the infringement: if the dismissal impacts upon the essence or core of the right, the infringer will have to plead a very serious reason for the infringement and produce strong evidence of its necessity.[14] On the other side of the balance (i.e. the arguments raised by employers), the ECtHR will take into account the duty of confidence and loyalty to the employer. This consideration assumes particular importance in cases involving sensitive professions such as the civil service[15] or where the nature of the employer's business means this duty is considered crucial to its operation, such as in religious organisations.[16] Further, the nature of the worker's role can be relevant: if it requires public trust or entails accompanying restrictions on the full exercise of one's rights, the Court considers this[17] – subject to the principle that one cannot waive one's fundamental rights by signing a contract of employment.[18]

The ECtHR considers the circumstances surrounding the events of the dismissal. Particularly in cases of freedom of expression, the ECtHR is concerned that there may be a 'chilling effect' on others.[19] It seems to be relevant whether or not the claimant attempted to reach a compromise with the employer on how they might exercise their fundamental rights whilst minimising the impact on the employer's business.[20] Collins and Mantouvalou have speculated that a failure to compromise may be the crucial reason that one claimant

[13] *Schüth v Germany* (n 11) [67]; *Martínez v Spain* (2015) 60 EHRR 3, [145].

[14] *Smith and Grady v United Kingdom* (n 6) [90].

[15] *Vogt v Germany* (n 4) [58]; *Guja v Moldova* (2011) 53 EHRR 16, [70]-[71].

[16] *Martínez v Spain* (n 13) [131].

[17] *Guja v Moldova* (n 1) [70]-[71] and *Pay v United Kingdom (Admissibility Decision)* (2009) 48 EHRR SE2, 25.

[18] *Markin v Russia* (2013) 56 EHRR 8, [136].

[19] *Heinisch v Germany* (n 3) [91].

[20] *Pay v United Kingdom* (n 17) 26.

from the UK lost his case.[21] Voorhoof and Humblett have commented that the context can be highly relevant:[22] whether the claimant's actions were spontaneous,[23] whether they were otherwise lawful[24] and if there was any additional public interest in the claimant exercising their human rights.[25] Finally the extent of public knowledge regarding the issues that could damage the employer's reputation have been considered relevant. In *Schüth*, the fact that the claimant had not made his home life public knowledge or taken a public stance against the Church's doctrines was a factor in the Court's proportionality assessment.[26] It is, however, not considered consistently: in *Pay v UK*,[27] there was no proof that the applicant's BDSM activities were public knowledge at the time of dismissal. The ECtHR decision did not discuss this fact, nor attempt to assess the likelihood of actual damage to the employer's reputation.

Although the above demonstrates that the ECtHR is sensitive to the peculiarities of the employment context, there remains one troublesome issue. The Court is often quick to accept the existence of a pressing social need which could justify dismissal. This problem seems to arise particularly where the employer is justifying on grounds of self-protection in the sense of the risk of damage to their business interests, or their reputation or the reputation of a senior member of staff.[28] The Court does not yet routinely require the employer to produce evidence of the impending or actual harm or of the extent of its

[21] Hugh Collins and Virginia Mantouvalou, 'Private Life and Dismissal' (2009) 38 ILJ 133, 137-138.

[22] Dirk Voorhoof and Patrick Humblet, 'The Right to Freedom of Expression in the Workplace under Article 10 ECHR' in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing, 2013) 284.

[23] *Fuentes Bobo v Spain* (2001) 31 EHRR 50, [48].

[24] *Vogt v Germany* (n 4) [60].

[25] *Guja v Moldova* (n 15) [72]-[74].

[26] *Schüth v Germany* (n 11) [72].

[27] *Pay v United Kingdom* (n 17).

[28] See for example, ibid and *Sánchez v Spain* (2012) 54 EHRR 24, [64]-[68].

likelihood. This arguably excessive deference to supposed employer expertise and failure to subject decisions to dismiss to detailed scrutiny has led to some 'disappointing' ECtHR jurisprudence.[29] Voorhoof and Humblet have noted a similar tendency in cases relating to freedom of expression: 'It is accepted all too easily… that a dismissal of an employee … reflects a pressing social need and is a necessity in a democratic society'.[30] As dismissal is the most severe sanction available to employers, it is suggested that more substantial evidence should be required to establish a need to dismiss a worker. This aspect of the ECtHR's treatment of the dismissal context remains unsatisfactory.

II. From fairness to proportionality: the domestic standard of review

Does the standard of fairness in dismissal law reflect the style of reasoning adopted by Strasbourg? The first two stages of the 'reason for dismissal' enquiry under section 98 ERA 1996 are fairly straightforward. What was the reason, judged subjectively, that motivated the employer to dismiss?[31] Is that reason potentially fair within the statutory definition?[32] There are a group of automatically unfair reasons which, if proved to motivate a dismissal, will entitle the claimant to a verdict of unfairness. The potentially fair reasons are: capability or qualifications for the work, the conduct of the employee, redundancy or statutory prohibition.[33] The tribunal must establish the fairness of dismissing the employee for that reason in accordance with section 98(4):

> 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

[29] ACL Davies, 'Judicial self-restraint in labour law' (2009) 38 ILJ 278, 299-300.

[30] Voorhoof and Humblet (n 22) 285.

[31] See *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213.

[32] Employment Rights Act 1996, section 98(1)(b) and (2).

[33] Ibid, section 98(2).

> (b) shall be determined in accordance with equity and the substantial merits of the case.'[34]

The statutory language, however, is far from determinative in practice. The question in section 98(4)(a) has become whether the employer's decision to dismiss fell within a 'band' or 'range' of reasonable responses (RORR). In the words of Lord Denning,

> 'Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view'.[35]

The courts have affirmed and defended the application of the RORR since its inception.[36] Only recently has the Supreme Court indicated that it may be willing to hear arguments that would challenge its application.

There are a variety of ways in which the RORR is inadequate when contrasted with the Convention's proportionality analysis. In applying the 'range of reasonable responses' (RORR) test, the higher courts have been keen to emphasise that tribunals should not fall into the 'substitution mindset': 'the employment tribunal should not put themselves in the place of management to decide whether they, the employment tribunal members, would have dismissed the applicant or not'.[37] Cabrelli notes that the non-substitution principle deprives tribunals of the opportunity to 'articulate what ought to have been done by the employer'.[38] This is a key element of the proportionality assessment: the court's ability to indicate to decision-makers that, for example, a less severe measure would have been more appropriate in the circumstances, on the basis of their objective assessment of the facts. In

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[34] Ibid, section 98(4).

[35] *British Leyland UK Ltd v Swift* [1981] IRLR 91, 93 (Lord Denning MR).

[36] For a recent confirmation of the continuing applicability of the RORR, see *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] IRLR 558, although Lady Hale commented that she could see 'arguments on either side' of the issue: [33].

[37] *Beedell v West Ferry Printers* [2000] IRLR 650, 656. See also *Foley v Post Office, HSBC Bank plc v Madden* [2000] ICR 1283, [2000] IRLR 827.

[38] David Cabrelli, 'Rules and standards in the workplace: a perspective from the field of labour law' 31 LS 21, 29.

addition, the RORR clearly fails to take into account factors that would be important upon a human rights view.[39] For example, the RORR asks whether other employers would have acted in the same way but *not* whether a less severe measure could have been undertaken instead of dismissal. The application of the RORR focuses upon the reasons put forward by the employer and the employer's interpretation of the facts but no account is taken of the impact upon the claimant and whether the reasons provided are sufficient to outweigh that impact. Collins and Mantouvalou seriously doubt 'whether the weak test of fairness or reasonableness in the law of unfair dismissal is adequate to provide a suitable framework for the balancing exercise required under the ECHR.'[40] Upon this evidence, I would dispute Lord Justice Elias' musings that '[i]t may even be that the domestic band of reasonable responses test protects human rights more effectively'.[41]

The disparities between the two standards of review led claimants to believe that unfair dismissal law gave insufficient weight to their human rights. After the introduction of the HRA, employees had a tool with which they could argue that the RORR test should be modified to reflect ideas of necessity and proportionality and thereby give adequate recognition to the individual's fundamental rights. The Court of Appeal confronted the potential inadequacy of the RORR test for human rights purposes in *X v Y*.[42] The claimant worked for a charity providing support to young offenders. He received a caution from the police for a sex offence which occurred with another man in a public toilet. He decided not to disclose this to his employer. His employer dismissed him after discovering the caution when running standard checks six months later. The Employment Tribunal found that the dismissal was for gross misconduct: that he had committed a criminal offence and also

[39] Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909, 920-921.

[40] Ibid 921.

[41] *Turner v East Midlands Trains Ltd* (n 1).

[42] *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634.

failed to tell his employer, which undermined the employer's trust and confidence in him. The tribunal found it was within the range of reasonable responses to consider dismissal to be the appropriate sanction. The EAT agreed and dismissed the claimant's appeal.

Mummery LJ gave the leading judgment for the Court of Appeal. He commenced by acknowledging that there are positive obligations on states to protect Article 8, which includes one's sexual orientation and sexual life.[43] He confined his comments to the specific issue which was the applicability of ECHR rights such as Article 8, 9 and 10 on private law cases and giving guidance to tribunals on how to deal with such cases. His Lordship's 'short answer' was that Article 8 was not engaged upon the facts.[44] In his longer answer, he stated that if the dismissal was for reasons relating to 'private' conduct, Article 8 will be relevant to the section 98 claim. He directed as follows: 'it might be necessary for the employment tribunal then to consider whether there was a justification under article 8(2) for the particular interference'.[45] It is worth noting that his Lordship went on to say that tribunals should bear in mind that 'the employer, fellow employees and members of the public also have rights and freedoms under the Convention'.[46] Whilst this is undoubtedly true, this statement seeks to elevate the employer's right to manage their business onto the same plane as the worker's right to exercise their fundamental rights.[47] One could certainly question whether such an implication is legitimate in light of the widely accepted greater normative force and hierarchical status of human rights.[48]

His Lordship then expressed doubts as to whether Article 8 could have any real effect on section 98's application: it was 'not immediately obvious… as to how [section

[43] Ibid [38].

[44] Ibid [51].

[45] Ibid [56].

[46] Ibid.

[47] Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 MLR 619, 630.

[48] See Mantouvalou's comments: Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912, 930.

98(4)] could be incompatible with, or be applied so as to violate, article 8 and article 14' and its core concepts (fairness, the RORR and equity and substantial merits) should be 'sufficiently flexible' to give effect to ECHR rights without relying on s3 HRA's interpretative obligation.[49] But in circumstances where the application of the RORR test could reach a 'fair' outcome, but under Article 8 it would be an unjustified interference, Mummery LJ makes it clear that s3 HRA should be used to ensure the ERA's effects are compatible with Article 8.[50]

Lord Justice Mummery's recommended approach appears to rely on the range of reasonable responses as the primary standard of review. A proportionality assessment is added as a 'backstop' if the application of the RORR test reaches a completely indefensible result. This position is reinforced by his Lordship's clear belief that the RORR is sufficient alone and usually reaches the correct result in any event. This stance gives tribunal judges reason to continue to apply the standard of review that they are accustomed to – the RORR – and avoid the more challenging substantive questions that would be raised by a proportionality analysis. This problem is likely to be particularly evident if the claimant does not raise a human rights point before the tribunal, explicitly directing their attention towards the need to conduct a proportionality analysis. I would further argue that, given the entrenched deference to employers present at the core of the RORR test, adding an additional layer of analysis is unlikely to trigger a change in judicial attitudes in unfair dismissal cases. As Sanders has noted, there has been 'remarkable continuity' between pre-HRA cases and more recent judicial statements.[51] There is an ongoing reluctance to engage thoroughly with questions of human rights and disproportionate interferences.

[49] *X v Y* (n 42) [59].

[50] Ibid.

[51] Astrid Sanders, 'The law of unfair dismissal and behaviour outside work' (2014) 34 LS 328, 342.

III. The standard of review in practice

Although there are many cases that could be used to demonstrate some of the inadequacies of the RORR test as a standard of review in the human rights context, I will refer to two recent EAT decisions to give an overview of the issues.

A) The absence of human rights scrutiny in unfair dismissal cases

GM Packaging Ltd v Haslem concerned a small packaging company for whom the claimant had worked for 14 years before the events took place.[52] There were office rumours that Mr Haslem had been having a sexual relationship with a colleague, identified as LO. After a dispute between LO and the owner-manager of the company (GM), the manager saw the two parties engaged in sexual conduct on the company premises. These events occurred out of office hours. The next morning LO was dismissed. GM then challenged Mr Haslem about the incident and he admitted having an affair with LO, although he denied having sexual intercourse in the office. A recording also emerged later of Mr Haslem and LO speaking in derogatory terms about GM during the same incident. There was an investigatory meeting and GM consulted a human resources management company. Following this, Mr Haslem was dismissed. The Employment Tribunal considered that the principal reason for the dismissal was the sexual activity that took place on the company premises. Further it found that this reason could not be categorised as gross misconduct and that the dismissal fell outside the range of reasonable responses. The employer appealed to the Appeal Tribunal.

First, the EAT criticised the tribunal's finding that the sexual conduct between the two employees was the principal reason for dismissal. As the employer had consulted a human resources company, the EAT considered that it was the reasoning motivating these

[52] *GM Packaging (UK) Ltd v Haslem* (2014) UKEAT/0259/13/LA.

third parties that was relevant.[53] The reason for dismissal was the sexual activity between Mr Haslem and LO and the recorded conversation. This analysis seems somewhat unrealistic in an eight-person company where the manager-director was clearly, on the facts, driving the disciplinary process. Nonetheless, on the basis of this reasoning and using evidence of the sound procedural process used by the employer to support their opinion, the EAT concluded that 'this is a plain example of the ET impermissibly substituting their views for that of the employer'.[54] The dismissal fell within the range of reasonable responses open to the employer and was therefore fair.[55]

Haslem demonstrates a number of problematic points raised by the application of the RORR. First, the standard of review is simply inadequate when compared to the intensity of the ECtHR's scrutiny. This is particularly so once the claimant pursues an appeal against a tribunal's initial findings. Writing extra-judicially, Elias observed this flaw in the RORR: if two tribunals have different views on the same set of facts, as in *Haslem*, then so could two employers.[56] Thus applying RORR, the dismissal must be considered to be fair. This is also true in the reverse: if a worker wishes to appeal a finding of a fair dismissal from an ET, they must satisfy a 'double perversity test'[57] – in other words, that no reasonable tribunal could have assessed that no reasonable employer would have decided to dismiss on the relevant facts. This standard of review is weak even when compared to the most light-touch proportionality analysis.

Importantly for our purposes, *Haslem* shows how the RORR can be applied and yet completely miss that an infringement upon an individual's human rights has occurred.

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[53] Ibid [29].

[54] Ibid [30].

[55] Ibid [33].

[56] Patrick Elias, 'Fairness in Unfair Dismissal: Trends and Tensions' (1981) 10 ILJ 201, 207.

[57] Andy Freer, 'The Range of Reasonable Responses Test - From Guidelines to Statute' (1998) 27 ILJ 335, 345.

There are two separate Article 8 points that could have been raised. One reason that contributed to the dismissal was the sexual activities of Mr Haslem with LO. The ECtHR in *Pay v United Kingdom* made it clear that 'private life is a broad term not susceptible to exhaustive definition' but it includes one's sexual orientation and sexual life and one's right to establish relationships with other human beings and the outside world.[58] Further, the Court has stated that this protection for private life does not immediately cease upon entering a public space or working environment.[59] The EAT gives no indication that this consideration had entered its deliberation at all. Mr Haslem was therefore dismissed in a manner that amounted to a serious infringement of his Article 8 rights. No reason was offered to justify this infringement.

A more latent Article 8 point would be the issue of surveillance in the workplace. The ECtHR has found on multiple occasions that surveillance in the workplace also engages the right to respect for one's private life.[60] Only in the most obvious cases of extensive surveillance are the tribunals willing to examine the conduct in Article 8 terms. For example, in *City of Swansea v Gayle,*[61] the employer engaged in covert surveillance of the worker and filmed the claimant's activities regularly for two months. Because the EAT considered that the surveillance disclosed wrongdoing on behalf of the worker – he was engaging in personal activities whilst "on the clock" – it held that the extensive surveillance did not engage Article 8 at all.[62] In other cases, the surveillance is held to be justified by the need to investigate suspected wrongdoing.[63] Here, the worker did not raise the issue so it went unremarked upon by the tribunals. Nevertheless, there was a potential breach of his

[58] *Pay v United Kingdom* (n 17) 24.

[59] *Niemietz v Germany* (1993) 16 EHRR 97, [29] and *Pay v United Kingdom* (n 17) 24.

[60] *Halford v United Kingdom* (1997) 24 EHRR 523, 543; *Köpke v Germany* (n 2) [37]-[38].

[61] *City and County of Swansea v Gayle* (2013) UKEAT/0501/12/RN.

[62] Ibid [23].

[63] *McGowan v Scottish Water* [2005] IRLR 167.

Article 8 rights in the undisclosed recording of Mr Haslem and LO in discussion. The EAT did not examine at all whether the employer's use of this material in disciplinary proceedings was legitimate – particularly in light of the lack of prior warning of workplace surveillance.[64] Their conversation could have been within the scope of the right to freedom of expression under Article 10. Legitimate criticism of one's employer or manager is protected, as is negative or offensive expression.[65] The tribunals failed to recognise any of these potential interferences with Mr Haslem's human rights in their application of the RORR.

If the EAT had acknowledged the applicability of Article 8 or Article 10, it would have been compelled to conduct a proportionality analysis.[66] Applying the ECtHR's proportionality standard would have highlighted a variety of factors that the EAT disregarded. For example, the EAT failed to weigh in the balance that Mr Haslem had spent a significant part of his career at the company – 14 years – and had gained some seniority within the company. These factors made the dismissal a very severe sanction. The RORR test has been consistently criticised for failing to take into account adequately a worker's interest in continued employment or their job security.[67] Further, the EAT did not consider whether a lesser sanction, such as being issued with a written warning, could have achieved the same aim of ensuring the smooth running of the business. This deficit of reasoning has been criticised in light of the requirements of the proportionality analysis.[68]

Haslem is not an isolated incident of judicial oversight. Human rights are consistently neglected in the tribunal's analysis, particularly in cases related to social media. In *Plant v API,* the worker made irreverent comments on Facebook, not explicitly

[64] *Halford v United Kingdom* (n 60) 543.

[65] *Sánchez v Spain* (n 28) [72]-[76].

[66] See *X v Y* discussed above.

[67] Collins and Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (n 39) 921.

[68] Collins (n 47) 630-31 and Collins and Mantouvalou, 'Private Life and Dismissal' (n 21) 137.

referencing although related to managerial decisions made by her employer.[69] Her dismissal was found to be fair. The ET made no reference to her right to freedom of expression. Other instances in which tribunals have overlooked the freedom of expression element of dismissals relating to social media are *Gibson v Dundee City Council*[70] and *Greenwood v William Hill.*[71] A starker instance of the disregard of human rights occurred in *Gibbins v British Council.*[72] Ms Gibbins expressed her republican views of a thread of comments that happened to be attached to an image of Prince George, with an offensive caption attached. Her employer dismissed her. The tribunal failed to consider the dismissal in terms of either its interference with her freedom of expression or her freedom to hold her own beliefs. The deferential RORR test was applied without any concern for the proportionality of the infringement to the harm that the dismissal caused to the employee. Finally, during the argument in *Reilly v Sandwell MDC,*[73] Lady Hale queried why counsel for the claimant had not raised a human rights argument. A headteacher was dismissed as a result of her failure to disclose to her employers her friendship, outside of work, with an individual who had been convicted of sex offences. The case had progressed all the way to the Supreme Court before any party thought to raise a human rights point, despite the obvious connection to the claimant's rights under Article 8. As counsel had not prepared the point, the case was decided without consideration of the human rights issues.

B) Deference and disproportionality: lenient review in *Laws*

[69] *Plant v API Microelectronics Ltd* (2017) ET 3401454/2016.

[70] *Gibson v Dundee City Council* (2017) ET 4100314/2017.

[71] *Greenwood v William Hill Organisation Ltd* (2017) ET 2404408/2016.

[72] *Gibbins v British Council* (2017) ET 2200088/2017.

[73] *Reilly v Sandwell Metropolitan Borough Council* (n 36).

A different set of issues arose in *Game Retail v Laws*,[74] in a situation which has ever increasing relevance. The claimant was a risk investigator for the defendant retailer. As part of his duties, he created a Twitter account and formed online connections with accounts run by local Game Retail stores. His aim was to monitor any risks that may have been created from those accounts and the content they posted. Using the same account, he also formed Twitter connections with his own friends and acquaintances and communicated with them via Twitter outside of working hours. A year later, the employer received notification from another employee that the claimant had posted some offensive material on his Twitter account. During the investigation, the claimant voluntarily deleted his Twitter account. He was charged with gross misconduct on the grounds that his tweets were offensive, threatening and obscene and could be viewed by anyone, including the defendant's employees and customers. The company dismissed him summarily.

The ET found that the decision fell outside the range of reasonable responses. It considered that the primary purpose of the Twitter account was for Mr Laws to communicate outside of work on matters that did not relate to his work. He only used it in his own time and he had explained some of the offensive tweets further and their more innocuous meaning became clear. It also questioned the employer's assumptions that the public had accessed his Twitter account and linked the claimant to the company as he did not mention his work or the company in his comments. In addition, the tribunal considered that it was unclear whether the company's IT policies made it clear that inappropriate use of social media outside of working time could be considered gross misconduct.

Again, the EAT took a different view. Two factors were crucial. First, Mr Laws had not restricted his online settings so that only his acquaintances could see his comments – they were visible to anyone who looked at his account. Second, Mr Laws' account was connected with a large number of the company's Twitter accounts with the consequence

[74] *Game Retail Limited v Laws* (2014) UKEAT/0188/14/DA.

that his posts would be readily accessible to anyone using those accounts.[75] The EAT acknowledged that some balance must be drawn between an employer's desire to reduce reputational risk stemming from social media and the employee's right to freedom of expression.[76] Although the tribunal noted that this was a case regarding private use of Twitter outside of working time and despite the fact that Mr Laws had taken immediate steps to remove the reputational risk to the employer, the court clearly viewed this case as an easy one. The EAT criticised the ET for focusing on what *they* considered to be relevant, rather than the view that a reasonable employer could take.[77] The same conclusion was reached on whether there was any offence actually caused – the judge had impermissibly substituted his own view of whether anyone had been offended.[78] The case was remitted for another hearing.

Laws can be criticised on three grounds. The EAT readily accepted that Mr Laws' online activity posed an actual threat to the employer's reputation. As Wragg comments, 'the harm of the expression to the employer's interests is often either assumed or otherwise ignored, as if it were an apparently unimportant consideration'.[79] It is far from unimportant as it is only this harm (or a risk of it occurring) that could justify labelling Mr Laws' conduct as gross misconduct and form the legitimate aim of their infringement. Instead of making a genuine attempt to assess the likelihood of harm being caused to the reputation or interests of Game Retail,[80] the EAT accepted both the employer's classification of his conduct as gross misconduct and its assertion that his actions were sufficiently harmful to

[75] Ibid [45].

[76] Ibid [46].

[77] Ibid [47].

[78] Ibid [49].

[79] Paul Wragg, 'Free speech rights at work: resolving the differences between practice and liberal principle' (2015) 44 ILJ 1, 2.

[80] We can see that the Employment Tribunal did attempt to assess the likelihood of actual harm to the employer's interests but received criticism for doing so as it strayed into the 'substitution mindset': *Game Retail Limited v Laws* (n 74) [47].

justify the deprivation of Mr Laws' livelihood. These findings are a result of the judicial deference to the view of the employer at the centre of the RORR test. The tribunals have been deprived of the opportunity to make their own assessment of fairness in each case and to articulate the desired standard of fairness, including where a reason for dismissal was illegitimate in the circumstances.[81] The standard of fairness has thus become reflective of the lowest common denominator of current employer practice, rather than a detailed analysis of the legitimacy of the employer's reason to dismiss.

The EAT's approach in *Laws* also confirms the 'dismissive treatment' of ECHR rights in dismissal cases.[82] In contrast to *Haslem*, the EAT mentioned Mr Laws' ECHR right to freedom of expression. This mention was not followed by an attempt at a proportionality analysis in light of the ECHR's requirements. The facts disclose a variety of considerations which could lead to the conclusion that the dismissal was a disproportionate interference with the claimant's Article 10 rights. There was very little evidence that the company had sustained damage to their reputation and Mr Laws closed his Twitter account immediately. This removed any continuing risk to the company as the content could not be viewed or recovered from that point. The courts could equally have taken into account the likely chilling effect on workplace and off-duty expression in light of such a severe sanction being meted out to a colleague. Once again, it is arguable that a less severe sanction may have been appropriate, but the operation of the RORR test does not allow tribunals to consider such questions.

The third observation is that the courts appear to struggle to deal appropriately with the social media context. It has been noted that both employers and courts have showed little regard for the peculiarities of the medium through which Mr Laws expressed

[81] Elias (n 56) 213 and Davies, 'Judicial self-restraint in labour law' (n 29) 293.

[82] Wragg (n 79) 7.

himself.[83] Social media offers the opportunity for spontaneous expression to a large audience, which has simultaneously increased the risk of emotional or rash statements or language that may appear offensive to the outside eye.[84] Although the ECtHR has clearly stated on a number of occasions that offensive expression is protected by the right to freedom of expression,[85] this has not yet translated into full protection of expression in the social media context. Courts at every level appear to be quick to accept that expression taking place outside of work has a sufficient impact on the employer's interest in running a business that it can justify dismissal. I would agree with Mantouvalou and Sanders, however, that more substantial and substantiated reasons should be required to justify a dismissal for conduct taking place outside the workplace.[86]

As above, it can be seen that there are other examples of deferential application of the proportionality analysis. In *Crisp v Apple*,[87] Mr Crisp made some negative comments on his Facebook page. They did not mention the employer's company specifically but made it clear that he was not enjoying his work and also made reference to one of the programmes made by the company. The claimant removed his posts as soon as he was asked about them by his manager. He was later dismissed as a result of these Facebook posts. The tribunal commented that a decision to dismiss in these circumstances may appear 'harsh' but, 'bearing in mind the importance of image to the Respondent's business', it was within the range of reasonable responses. The tribunal's analysis of the human rights element in the case was startlingly brief.[88] The tribunal admitted that he was exercising his right to freedom of expression but that the claimant was restricting that right in order to protect its

[83] Voorhoof and Humblet (n 22) 247.

[84] Ibid.

[85] *Sánchez v Spain* (n 28) [53].

[86] Mantouvalou (n 48) 933 and Sanders, 'The law of unfair dismissal and behaviour outside work' (n 51) 350.

[87] *Crisp v Apple Retail UK Ltd* [2011] ET 1500258/11.

[88] Ibid [46].

reputation. Without any detailed explanation, the tribunal stated that it found the dismissal proportionate. It held that 'the comments made by the Claimant were not the type of comment that are particularly important to free expression…and they were clearly potentially damaging to the Respondent's reputation.'[89] The employer was permitted to take any action that it deemed necessary in order to protect its reputation. The tribunal made no real attempt to assess either whether there was a genuine risk to the reputation from one employee's post to their friends on Facebook or whether less severe disciplinary measures could have been selected. The tribunal utterly failed in its responsibility to carry out a full proportionality analysis, as required by *X v Y* and the Human Rights Act. The claimant was left with no adequate protection of his rights.

The examples extend beyond the social media context. In *McGowan v Scottish Water*,[90] covert surveillance of the workers' home was used to establish whether he was submitting fraudulent timesheets. The court admitted that there was a 'strong presumption' that Mr McGowan's Article 8 rights had been breached by the invasiveness of the surveillance[91] and that there were less intrusive means by which the surveillance could have been carried out.[92] Nevertheless, the court found in the employer's favour. Finally, in *Pay v Lancashire Probation Service,*[93] Mr Pay was dismissed after his employers discovered he performed at a fetish club and ran a website selling BDSM products. Accepting that Article 10 was engaged upon the facts, the EAT did not engage in a structured assessment of the legitimate aim, necessity and proportionality of the employer's actions. Anne Davies rightly criticises the EAT for being 'highly deferential to the

[89] Ibid [46].

[90] *McGowan v Scottish Water* (n 63).

[91] Ibid [11].

[92] Ibid [13].

[93] *Pay v Lancashire Probation Service* [2004] ICR 187.

employer's perception of the situation' and failing to subject the employer's arguments to detailed scrutiny.[94]

I will recount one final example to demonstrate the reality of how the unfairness/proportionality standard is being applied by the tribunals. In *Preece v Wetherspoons*,[95] the claimant removed two customers from the pub that she managed. They later called the pub on the telephone and began abusing the claimant. The claimant posted some comments on her personal Facebook site, expressing anger towards the customers and making some offensive comments about them. It was reported to the employer and she was dismissed. The Tribunal considered the dismissal to be within the range of reasonable responses. It then went on to consider the dismissal in light of the Human Rights Act.[96] The tribunal held that Article 8 was not engaged because the claimant's comments were in the public domain. Article 10 was engaged, however. But the tribunal found the infringement to be justified. This conclusion was reached despite a revealing comment that, properly considered, the dismissal would have failed the proportionality test. The tribunal indicated that a lesser sanction could have been used: 'it is irrelevant for the consideration of whether or not the decision to dismiss fell within the band of reasonable responses, that this is a case where the Tribunal may have been more inclined to award a final written warning.'[97] The tribunal repeated the mantra that it was not permitted to substitute its own view and found the dismissal to be fair. *Preece* clearly shows that the proportionality test, when it is applied, has become infected with the deference that pervades the rest of unfair dismissal law. The tribunals restrain themselves from setting a proper standard of behaviour for employers. They fail to ensure that each dismissal was absolutely necessary

[94] Davies, 'Judicial self-restraint in labour law' (n 29) 299.

[95] *Preece v J D Wetherspoons* [2011] ET 2104806/10.

[96] Ibid [40].

[97] Ibid.

to achieve the goal pursued. This is very troubling and shows that unfair dismissal law is simply failing to protect the human rights of employees.

IV. An alternative approach: automatically unfair reasons

One way that an adequate standard of protection for victims of human rights infringements could be guaranteed is through the use of the automatically unfair reasons for dismissal. Some reasons are considered to be impermissible reasons for a dismissal. If the claimant is able to raise a suspicion that the employer has dismissed for one of these automatically unfair reasons, the RORR is never applied. Currently there is little rationale behind the group of reasons that have been deemed automatically unfair. Many are in place to ensure that the individual does not get dismissed as a result of exercising other rights to which they are entitled. This type of reason includes being dismissed because the worker has refused to work in excess of 48 hours per week or because the worker claims their minimum wage.[98] Collins and Mantouvalou have observed that another subset of automatically unfair reasons is connected with the individual's fundamental rights.[99] For example, it is automatically unfair to dismiss a worker because they have taken part in protected industrial action or participated in other union activities. Similarly, dismissing a whistleblower or a parent seeking maternity or paternity leave is automatically unfair. How could this mechanism be used to protect individuals from employers who would infringe their human rights?

It could be argued that any dismissal for a reason that constitutes an infringement upon the individual's human rights could be deemed automatically unfair.[100] For example, if the employer cited the individual's political activities as the reason for dismissal, they

[98] ERA 1996, sections 101A and 104A.

[99] Collins and Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (n 39) 915.

[100] Collins and Mantouvalou argue that the qualifying period must be removed for dismissals that infringe Convention rights, but not in favour of this specific method: ibid, 916.

would be entitled to a finding of unfairness and compensation. The same would occur if an employer dismissed a worker for refusing to remove their religious dress at work or for opinions that they have expressed out of work time on social media. There are a number of benefits to this route to protection. The RORR could be left as a single test, rather than applying an unmodified and a modified version of the test depending upon the facts of the case. By creating a separate category of cases that are examined differently, tailored rules could be introduced. For example, the statutory cap on compensation which will be discussed in the next chapter could be removed for these automatically unfair dismissals. The qualifying period could be disapplied, extending the exception carved out for political dismissals after *Redfearn v UK*.[101] These alterations would ensure that unfair dismissal law offers the most effective protection possible, diverging from the default rules where they do not adhere to human rights principles.

One difficulty would be incorporating the employer's opportunity to justify their infringing behaviour. Under the Convention, this opportunity must be provided. Although the solution is not elegant, it might be necessary for the automatically unfair reason to be phrased as 'any reason that amounts to a disproportionate infringement upon the employee's Convention rights'. This phrasing would allow the employer the opportunity to argue that their decision was justified by a legitimate aim. A secondary challenge is that this mode of protection would tackle cases where the substantive reason cited is in breach of the worker's human rights. It would not deal with cases where the employer takes the decision in a manner that is an infringement of human rights. Examples in this category might be where the evidence provided by the employer was discovered in a way that infringes the individual's rights. Covert surveillance or workplace monitoring of communication may lead to a finding of wrongdoing, but the evidence was obtained in breach of human rights. These cases do not fit squarely within the reason-based approach

[101] Enterprise and Regulatory Reform Act 2013, section 13.

to the problem set out above. The rights-related reason would have to be drafted in a broad manner in order to encompass these cases. This innovation could have the potential to entrench protection for human rights at the centre of unfair dismissal law and remove some complexity that it currently includes.

Summary

Throughout this chapter, it has been argued that the UK standard of review, and the manner in which it is applied, is inadequate once tested against ECtHR principles of proportionality. Judicial attempts to narrow the gap have been unsuccessful. Many academics have recommended a move towards a proportionality-style analysis.[102] Whilst this would be welcome, it has been argued that this may not be sufficient in light of the entrenched deference to the employer's perspective within unfair dismissal law. An alternative may be to include an infringement of Convention rights amongst the automatically unfair reasons to dismiss. This would make the claimant's case more straightforward, guaranteeing success where an unjustified breach of their rights has occurred. However, as chapter 6 will show, even a successful claimant may not receive an adequate remedy covering all aspects of the damage that a dismissal may cause. In order for unfair dismissal law to act as an effective vehicle for the vindication of an individual's human rights, the inadequacies of both the standard of scrutiny and its remedies must be addressed.

[102] See for example Mark Freedland and Hugh Collins, 'Finding the Right Direction for the 'Industrial Jury'' (2000) 29 ILJ 288 and Lucy Vickers, 'Unfair dismissal and human rights' (2004) 33 ILJ 52.

Chapter 6
The Remedies for an Unfair Dismissal

It is questionable whether the remedies available upon a successful unfair dismissal claim are satisfactory when compared to their counterparts in human rights law.[1] There are several possible disparities between the remedies granted by the ECtHR and those available under the ERA 1996. The relevant ECHR articles are Article 13, which requires an effective remedy before a national authority for a breach of a Convention right, and Article 41, under which the Court affords 'just satisfaction' for an infringement of a Convention right. It might be hoped that the jurisprudence of these two Articles could provide clear guidance on what domestic remedies should be provided or what they should aim to achieve. The reality is more complex.

I. Article 13 and Article 41 ECHR: Strasbourg's remedial principles

Despite the initial promise of the case-law and judicial statements on Article 13, commentators have noted that recent cases have been 'most noticeable for the limitations and glosses which were put on broad pronouncement[s]'.[2] Where a breach of another article has been established, the Court may not examine the Article 13 complaint at all.[3] In addition, Article 13 has been taken to apply to the aggregate of all the remedies available within the national legal system for the harm suffered.[4] For a dismissed employee, this

[1] See Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909, 921-922 and Hazel Oliver, 'Employment Law' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 358-359.

[2] Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, 2000) 318.

[3] See for example *Redfearn v United Kingdom* (2013) 57 EHRR 2, [61]-[63].

[4] *Klass v Germany* (1978) 2 EHRR 214, [71]-[72].

could include various tort or contract actions as well as employment law claims. If the aggregate falls within the member state's margin of discretion to implement an 'effective remedy', then an Article 13 complaint will fail.[5] It is unlikely, therefore, that Article 13 alone would require an overhaul of unfair dismissal's remedies – apart from in an unusual case where the claimant is left with no remedy available at all.

Further, the ECtHR declines to lay out firm principles under Article 41 that could be used as a model for domestic remedies. This is for two reasons. First, the primary responsibility for setting out and calculating the remedial package lies with the national authorities – the Court plays a subsidiary role with regard to remedies.[6] Second, the ECtHR does not use a doctrine of precedent in relation to its remedial awards. It frequently relies upon a broad, 'equitable assessment' which even a past President of the Court admits 'has made it even more difficult to extract clear criteria from the case-law'.[7] What is clear is that the main concern of the ECtHR is to return the complainant to the position they would have been in if the interference they suffered had not occurred.[8] As the measure of compensation in an unfair dismissal case echoes the tort measure of damages, rather than the contractual 'expectation' measure,[9] the aim of its remedies could be considered to be broadly the same. Beyond this common foundational principle, there are tensions between the remedies resulting from a successful unfair dismissal claim and any principles that can be discerned from the ECtHR's body of judgments.

II. The remedies of the Employment Rights Act

[5] *Silver and others v United Kingdom* (1983) 5 EHRR 347, [19].

[6] Luzius Wildhaber, 'Article 41 of the European Convention on Human Rights: Just Satisfaction under the European Convention on Human Rights' (2003) 3 Baltic Yearbook of International Law 1, 4.

[7] Ibid 6.

[8] *Smith and Grady v United Kingdom (Just Satisfaction)* (2001) 31 EHRR 24, [18].

[9] Hugh Collins, 'Compensation for dismissal: in search of principle' (2012) 41 ILJ 208, 209.

The ERA 1996 sets out two remedial options following a successful unfair dismissal claim against an employer. Intended to be the primary remedy for an unfair dismissal,[10] sections 114 and 115 set out the possibility of a tribunal ordering re-instatement of the claimant or re-engagement on similar terms with the same employer.[11] Reinstatement is the only remedy that would truly put the worker in the position they inhabited before the unjustified dismissal and the interference with their human rights. But this route is rarely pursued. The statutory provisions are narrowly drafted and have been interpreted restrictively, with a great deal of emphasis placed on the employer's view of whether it is 'practicable' to reinstate or reengage the employee.[12] In addition, due to the legal processes that precede a finding of an unfair dismissal, the relationship between the parties has usually broken down to such an extent that neither party wants to pursue this option.[13] Some have argued that reinstatement should be returned to a central role in the remedial package of unfair dismissal.[14] From a human rights perspective, this argument would be one more of principle than precedent as the ECtHR very rarely makes orders of this kind.[15]

In the domestic and international cases, the most common award is one of monetary compensation. Compensation under the ERA is comprised of two parts: a basic award and a compensatory award. The basic award is calculated according to the claimant's age, length of continuous service with their old employer and their weekly pay.[16] The amount is capped by both a maximum weekly pay and limit on the length of service that can be

[10] *O'Laoire v Jackel International Ltd* [1990] ICR 197, 200 (Lord Donaldson MR).

[11] Employment Rights Act 1996, sections 114 and 115.

[12] *Port of London Authority v Payne* [1994] ICR 555 and David Lewis, 'Re-Employment as a Remedy for Unfair Dismissal: How can the Culture be Changed?' (1999) 28 ILJ 183.

[13] Hugh Collins, Keith Ewing and A McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2012) 840. See for example *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680.

[14] See for example, Lewis (n 12) 184-185.

[15] *Volkov v Ukraine* (2013) 57 EHRR 1.

[16] ERA 1996, section 119.

considered. The current limit on the basic award is £15,240.[17] There are a variety of possible explanations for the incorporation of a basic award in the ERA's remedial structures. It compensates for loss of seniority and rights accrued by working continuously with the employer and other lost expectations that are difficult to measure, such as time investment in firm-specific training that will no longer be useful or loss of job satisfaction.[18] The basic award might even incorporate compensation for distress and other injury to feelings resulting from the employer's actions.[19] It also ensures that an individual who has been unfairly dismissed but suffered no demonstrable economic losses gets some compensation,[20] although it may not be a large sum. Under Article 41 ECHR, there is no comparative concept of an 'automatic' monetary award – if the declaration of the Court in favour of the complainant is sufficient for 'just satisfaction', no compensation will be awarded.[21]

The compensatory award is more substantial than the basic award. Section 123(1) ERA 1996 directs that:

> 'the amount of the compensatory award shall 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 is attributable to action taken by the employer.'[22]

The majority of the sum compensates the claimant for lost wages during the anticipated period of unemployment following the dismissal or if the claimant already has found a new job, the estimated time it will take them to reach their prior salary with the previous employer. The claimant is also entitled to recover 'any expenses reasonably incurred by

[17] Using the weekly pay figures set out in The Employment Rights (Increase of Limits) Order 2018, SI 2018/194.

[18] Collins, Ewing and McColgan (n 13) 845.

[19] Hugh Collins, 'Compensation for the manner of dismissal' (2004) 33 ILJ 152, 156.

[20] Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford University Press, 1992) 220.

[21] *Golder v United Kingdom* (1979) 1 EHRR 524, [46].

[22] ERA 1996, section 123(1).

the complainant in consequence of the dismissal' and any expected benefits they would have had but for the dismissal.[23] The ECtHR makes similar awards relating to past losses and loss of future earnings. For example, in *Smith and Grady v UK*, the first applicant received £59,000 in pecuniary damages: £30,000 in respect of past loss of earnings, £15,000 for future lost earnings, and £14,000 for the loss of the benefit of the service pension scheme.[24] As the ECtHR awards are made based on 'equitable assessment', it is difficult to discern precisely how the amount is calculated. It is likely that the ECtHR considers similar factors to the domestic tribunals in setting this amount, including if the manner of dismissal or consequent reputational damage increases the length of the anticipated period of unemployment. From this point, however, differences start to appear between the domestic and ECtHR approach to remedies.

III. The compensatory award: limits to remedial effectiveness

There are two issues that should be raised in relation to the compensatory award. The first is that it is subject, in most cases, to an absolute limit which currently stands at £83,682.[25] Collins and Mantouvalou have questioned whether this cap is compatible with effective protection of Convention rights[26] - particularly as there are no broadly phrased exceptions from the limit in cases where an unjustified infringement of the worker's human rights has been demonstrated. An analogy can be drawn with the ECJ's disapproval of a cap on compensation in relation to a discrimination complaint. In *Marshall v Southampton AHA,* the ECJ reasoned that it prevents victims of discrimination receiving full compensation for their losses and the damage sustained.[27] The ECJ's decision suggests that a limit on the

[23] Ibid section 123(2).

[24] *Smith and Grady v United Kingdom (Just Satisfaction)* (n 8) [25].

[25] The Employment Rights (Increase of Limits) Order 2018, SI 2018/194.

[26] Collins and Mantouvalou (n 1) 921.

[27] C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* [1993] 3 WLR 1054, [1994] QB 126, [30].

compensation available to a victim of an interference with their human rights – in this instance, the right not to be discriminated against – is impermissible. This reasoning could be extended to a cap on the compensation available to those who have suffered a breach of their ECHR rights. The awards made by the ECtHR under Article 41 have certainly exceeded the domestic cap on compensation at the time. For example, Ms Smith received a total of £78,000 in *Smith and Grady*.[28] At the time of Strasbourg's award, the domestic statutory limit on compensation was £50,000. Such a limit would not have allowed comparable monetary recovery. Although *Smith and Grady* was a case of a very serious interference with the complainant's right to private life, it signals that the ECtHR's concept of 'just satisfaction' may exceed the statutory limitation on the compensatory award. The cap on compensation does not affect the majority of claimants – the median award in a 2013 survey was £6,000.[29] But for those that it does affect, the cap operates as an arbitrary limit on the amount they can recover which is arguably not compatible with the ECtHR's remedial approach.

The second issue is the far-reaching ability of tribunals to reduce the amount awarded to a successful claimant. There are several mechanisms which enable tribunals to make such a reduction. A reduction of the compensatory award can be made by such a proportion as the tribunal believes is just and equitable where the claimant 'to any extent caused or contributed to' the decision to dismiss.[30] A related means by which the claimant can have their award reduced is a 'Polkey deduction': if a dismissal is considered unfair on procedural grounds, the compensatory award may be reduced to reflect the possibility that a fair dismissal would have occurred shortly after.[31] Collins has expressed concern about

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[28] *Smith and Grady v United Kingdom (Just Satisfaction)* (n 8) [13], [25].

[29] Department of Business, Innovation and Skills, *Findings from the Survey of Employment Tribunal Applications 2013* (Research Series No. 117, 2014) Table 5.9.

[30] ERA 1996, section 123(6).

[31] *Polkey v AE Dayton Services Ltd* [1987] 3 WLR 1153, [1988] AC 344 and *Thornett v Scope* [2006] EWCA Civ 1600, [2007] ICR 236, [34]-[36].

the *Polkey* deduction as it is 'no more than an unreliable estimation of risk' on the evidence which operates to undermine the importance of the employer following a fair procedure.[32] In particularly serious cases, the award can be reduced to zero.[33] Finally, the broad phrasing of s123(1) has allowed the courts to create a third alternative. In *Devis & Sons v Atkins*,[34] the House of Lords held that the statutory phrasing permits the compensatory award to be reduced to a nominal amount or nothing at all where gross misconduct is discovered after the dismissal. This decision was on the grounds that such a reduction is 'just and equitable' in those circumstances. Commentators in the UK have been critical of the readiness of the tribunals to reduce the compensatory award. For example, an early study of unfair dismissal remedies concluded that tribunals 'set a low price on the unfair deprivation of a job'.[35] Further, Collins argues that the UK courts are too quick to restrict the compensation available to workers and continue to 'chip away at the fundamental principle that compensation should cover all the losses resulting from the dismissal'.[36] Could this approach be problematic in the eyes of the ECtHR?

Again, the ECtHR's position has not been clearly stated. Under Article 41, the ECtHR occasionally refuses to grant any monetary compensation when it is sought by a complainant. The Court states that 'just satisfaction' is provided either by the judgment in their favour or the judgment combined with national remedies already received.[37] Wildhaber comments that the Court's approach adds nuance to its finding regarding the main complaint: a large award indicates a particularly serious violation, whereas no award

[32] Collins, 'Compensation for dismissal: in search of principle' (n 9) 224.

[33] *Fisher v California Cake & Cookie Ltd* [1997] IRLR 212.

[34] *W Devis & Sons Ltd v Atkins* [1977] 3 WLR 214, [1977] AC 931.

[35] Linda Dickens and others, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (Blackwell, 1985) 139.

[36] Collins, 'Compensation for dismissal: in search of principle' (n 9) 222.

[37] See *Golder v United Kingdom* (n 21) and *Dudgeon v United Kingdom (Just Satisfaction)* (1983) 5 EHRR 573, [14].

can express the Court's disapproval of the complainant's behaviour.[38] The possibility of the complainant receiving no monetary compensation at all or a nominal amount indicates that the Court may not object to reducing the award where the claimant has committed gross misconduct or acted extremely reprehensively in another way. More difficult to predict is the Court's reaction to the '*Polkey* deduction'. If a claimant had been dismissed in a manner that unjustifiably interferes with their human rights, would it be at all relevant to the Court's calculations that they may have theoretically been let go for another reason soon after? I would suspect it would not be.

One last arguable point of disparity concerns the refusal of the tribunals to award aggravated or exemplary damages against an employer whose behaviour was particularly capricious or unpleasant.[39] Matching the ECtHR's readiness to reduce the amount of 'just satisfaction' to reflect disapproval of the complainant's conduct, it is also willing to grant more generous awards to reflect the fact that the complainant has suffered a serious infringement.[40] This is another point on which the UK tribunals and the ECtHR are out of step.

IV. A gap in protection: the lack of non-pecuniary losses

Both the cap on compensation and potential for receiving a reduced amount of compensation pale when compared to the last remaining issue regarding unfair dismissal's remedies. The most senior UK courts continue to reject any remedial claim for 'pure' non-pecuniary losses:[41] where the events surrounding the dismissal – including the employer's conduct of the process – lead to an affront to the worker's dignity; or injury to their feelings;

[38] Wildhaber (n 6) 6, 12, 17.

[39] See Lord Steyn's comments at [19]: *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36, [2005] 1 AC 226.

[40] See, for example, *Smith and Grady v United Kingdom (Just Satisfaction)* (n 8).

[41] See *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45 and *Dunnachie v Kingston upon Hull City Council* (n 39).

or distress, humiliation or anxiety. Some of these aspects may be reflected in the basic award discussed above. Where stigma is attached to the dismissed employee or they suffer psychiatric harm which leads to a longer period of unemployment, this may be covered in the compensatory award as a form of pecuniary damage.[42] Non-pecuniary loss of any form as a stand-alone head for compensation for an unfair dismissal has been consistently resisted by the judiciary since 1972.

In contrast, the Law Commission commented that there 'appears to be no conceptual limit' on the categories of loss that the ECtHR is willing to recognise and include in a financial award under Article 41.[43] Again, these decisions are made on an 'equitable basis' without requiring full proof of each individual point. Awards for non-pecuniary harm are commonplace in employment law cases. They range from €2,000 for Mrs Eweida's anxiety, frustration and distress as a result of not being able to work whilst a discriminatory policy was in operation[44] to £19,000 each for Ms Smith and Mr Grady in light of the 'profoundly destabilising events' of having one's private life investigated as well as the continuing emotional and psychological impact of those events.[45] In some cases, the Court even declines to separate the pecuniary and non-pecuniary damages due to evidentiary difficulties: in *Fuentes Bobo*, the complainant received 1 million pesetas for all aspects of the harm he sustained.[46] All of the above cases, and many others relating to different forms of infringement, demonstrate that non-pecuniary damages are a crucial part of the ECtHR's remedial package. Further, it has been stated that the same is true under

[42] These possibilities have been mentioned in *Norton Tool Co Ltd v Tewson* (n 41) at 50 and *Vaughan v Weighpack Ltd* [1974] ICR 261, 265-66.

[43] Law Commission, *Damages Under the Human Rights Act 1998* (Law Com No 266, 2000) [3.26].

[44] *Eweida and others v United Kingdom* (2013) 57 EHRR 8, [114].

[45] *Smith and Grady v United Kingdom (Just Satisfaction)* (n 8) [13].

[46] *Fuentes Bobo v Spain* (2001) 31 EHRR 50, [57].

Article 13's right to an effective remedy.[47] Thus, it appears that the approach of the judiciary towards non-pecuniary damages in unfair dismissal law is incompatible with the ECHR's requirements.

Summary

The view from a human rights perspective can be added to the existing criticisms of the current principles regarding the calculation of the compensation available to a successful unfair dismissal complainant.[48] The overall remedial picture of unfair dismissal law is distinctly uneven: the claimant suffers from a raft of possible deductions, exclusions and limits but there is no corresponding increase in damages where the employer's behaviour is particularly harsh or irrational. With regards to the denial of non-pecuniary losses, a preferable model would be that of the Equality Act 2010. The Act clearly states that monetary compensation should include injury to feelings,[49] under which substantial damages are consistently awarded by the courts. This result could be achieved through a statutory re-interpretation using section 3 of the HRA 1998, although reliance on Article 13 would not be available as it is not included in the list of rights incorporated by the HRA 1998. Alternatively, the orthodoxy could be challenged through indirect horizontal effect – relying on the clear statements of the ECtHR regarding non-pecuniary damages as a stimulant for change.

Before moving away from the statutory cause of action in the next chapter, it may be useful to briefly summarise the arguments that have been made in relation to the law of unfair dismissal. First Chapter 4 examined its personal scope, finding a variety of restrictions upon an individual's entitlement to make a claim which are inconsistent with

[47] *Edwards v United Kingdom* (2002) 35 EHRR 19, [99].

[48] See Collins, 'Compensation for the manner of dismissal' (n 19) and Collins, 'Compensation for dismissal: in search of principle' (n 9).

[49] Equality Act 2010, section 119(4).

the ECtHR's principles which prioritise inclusivity. Specific to unfair dismissal law is the qualifying period of continuous employment, analysed by the Strasbourg Court in *Redfearn v UK* and found to be in breach of the UK's positive obligations. This prompted the removal of the qualifying period for "political dismissals" but it remains in force against claimants that may have suffered an infringement upon another human right. *Vining v Wandsworth LBC* may give some hope of a proactive judiciary willing to ignore obstacles such as personal scope restrictions where there is a human rights element to the case, but the judicial signals remain mixed. Other judges remain uncritical of the restrictions upon personal scope and are ready to enforce them in any case.

Chapter 5 discussed the standard of fairness - the 'range of reasonable responses'- and its modification to include questions of proportionality, enabled by the Human Rights Act. It observed two severe flaws in the operation of the standard of scrutiny. Firstly, tribunals may never examine a human rights infringement or consider its proportionality, despite the issue being evident upon the facts. Secondly, where a human rights argument is raised, the tribunals fail to engage in searching scrutiny of the justification for the infringement and accept the employer's perception of necessity and proportionality. These two shortcomings render unfair dismissal law an ineffective mechanism for the enforcement of human rights. Drastic changes in the standard of review and the judicial attitude towards applying it would be needed to transform it into an appropriate vehicle for human rights protection.

Finally, if the claimant is successful, there are numerous deficiencies in the remedial rules that may affect the award that they receive. The compensatory award is capped; it can be reduced due to the claimant's contributory fault or because they may have been dismissed in any event and there is no possibility of receiving exemplary damages where particularly vindictive behaviour has occurred. In addition, the courts have consistently resisted requests for non-pecuniary damages, resulting in a clear disparity

between the ECtHR's awards and awards under unfair dismissal law. The remedial aspects of unfair dismissal law disclose further deficiencies when contrasted with the loose principles that can be gleaned from the Strasbourg Court's just satisfaction awards. Overall, we must seriously question the capacity of the law of unfair dismissal to provide individuals with an effective mechanism through which to vindicate their Convention rights.

Chapter 7
The Common Law and Respect for Human Rights

In 2012, Briggs J demonstrated the potential of the common law of the contract of employment to uphold the human rights of an individual worker.[1] Mr Smith was employed by the Trafford Housing Trust as a Housing Manager. Outside of his working time, and on his personal Facebook page, he posted a link to a BBC article regarding the possibility that gay marriages may take place in churches for the first time. Alongside this link, he commented 'an equality too far'. When asked by a work colleague and Facebook friend to elaborate on his views, he responded mildly along the following lines: "I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church … if the state wants to offer civil marriage to same sex [couples] then that is up to the state; but the state shouldn't impose rules on places of faith and conscience." The comment was reported to his employer. The Trust considered Mr Smith's comments to be in breach of its Code of Conduct and Equal Opportunities Policy. Three charges of misconduct were laid against Mr Smith: bringing the Trust into disrepute, impermissibly promoting his religious or political views, and mistreating his fellow employees, which. Mr Smith was demoted from his managerial position and suffered a 40% reduction in his salary. Although he was out of time to raise an unfair dismissal complaint, Mr Smith pursued a breach of contract claim against the Trust. He argued that his demotion had been in breach of contract as he was not guilty of misconduct.

In an impressive judgment, Briggs J found in favour of Mr Smith. The claimant's counsel raised issues of freedom of expression and freedom of religion. In response, the

[1] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2012] All ER (D) 201.

judge stated that 'those rights of Mr Smith are undoubtedly relevant in the context of the interpretation of his employment contract with the Trust'.[2] He showed concern that an employee is entitled to understand, from reading their employer's codes and policies, the extent to which their obligations to their employer extend beyond the workplace and into their personal and social life.[3] First, Briggs J considered whether the 'reasonable reader' of Mr Smith's Facebook page would consider him to be speaking on Trust's behalf or whether a loss of reputation would arise as a result of the posts in a reasonable reader's view.[4] Notwithstanding a brief mention of his employer's identity, and upon a contextual reading of Mr Smith's Facebook page, Briggs J was not persuaded that a reasonable reader would believe him to be representing the views of the Trust. Further, he found that the posts were not such that they 'did, or even could, bring the Trust into disrepute.'[5] Briggs J further held that the employer's prohibition of promotion of religious or political beliefs only applied to activities that had a sufficiently work-related context. He held that, despite Mr Smith being connected to 45 work colleagues through Facebook, his page was 'inherently non-work related' and that Mr Smith was free to express his views, if he did so lawfully.[6] Finally, although Mr Smith's comments had upset one of his colleagues, Briggs J found such upset to be a 'necessary price to be paid for freedom of expression'. Applying the employer's Code of Practice to every interaction with a colleague, including those outside of work, 'would be to impose a fetter on the employee's freedom of speech in circumstances beyond those to which a reasonable reader of the Code and Policy would think they applied.'[7] As the employer failed to establish any misconduct on Mr Smith's behalf, his

[2] Ibid [8] although the judge did not make any further reference either to the Human Rights Act 1998 or the ECHR, which may be considered a point of legitimate criticism.

[3] Ibid [53].

[4] Ibid [57]-[64].

[5] Ibid [64].

[6] Ibid [75]-[79].

[7] Ibid [82].

demotion amounted to a breach of contract[8] and a wrongful dismissal.[9] He was entitled to recover the losses flowing from the wrongful dismissal.

Briggs J's judgment displays unusual sensitivity to the social media context. The judge demonstrated concern that the employee must understand the extent of their obligations and that those obligations should not impinge unnecessarily upon the individual's non-working time. Have other decisions based upon the common law demonstrated the same sensitivity to human rights concerns? If the answer is no, what other mechanisms could be relied upon to provide consistent protection for the human rights of workers? The terms implied into the contract of employment provide default rules that regulate the parties' behaviour. Implying a requirement that the employer must act in accordance with the human rights of their employees would provide a foundation of protection. If the employer breached the implied obligation, the employee would be able to claim damages in court or request an injunction to prevent ongoing conduct in breach of the obligation.[10] There are at least two possible routes that could lead to the application of such an obligation. First, the established obligation to maintain mutual trust and confidence could be expanded to encompass human rights concerns. An analysis of the existing case-law regarding the implied obligation can predict the likelihood of this occurring. Alternatively, the judiciary could be asked to create a new implied obligation, independent of the existing terms, that requires employers to respect the human rights of their workers.

I. A reading of the contractual terms that is sensitive to human rights

Cases brought on the basis of the contract of employment at common law are heard infrequently in comparison with unfair dismissal cases. There is therefore a limited

[8] Ibid [86].

[9] Ibid [94].

[10] See *Irani v Southampton and South West Hampshire HA* [1985] ICR 590 and *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] 1 All ER 943.

selection of cases to investigate whether the courts always interpret the contract of employment in a manner that reflects the individual's human rights. In *Smith v Trafford*,[11] the judge was sensitive to how his interpretation of the rules would affect Mr Smith's expression outside of working time. Briggs J was keen to preserve space free from the influence of the employer's Code of Conduct, implicitly giving priority to Mr Smith's freedom of expression. For the protection of human rights to be uniform, however, this method of interpreting contracts of employment must be shown to be adopted consistently.

A case that shows what I argue is a more typical approach to a similar pattern of facts is *Gibbins v British Council.*[12] Ms Gibbins worked for the British Council. She was a dedicated socialist, atheist and Republican. On Facebook, she became involved in discussions about the place of the Royal family in modern society. The claimant stated her wish that Britain should be a democracy with no monarchy. Unfortunately, the thread of conversation focused specifically around Prince George and his position of privilege and wealth. The claimant was very critical of this. The discussion had been prompted by a photo of the Prince who was described in colourful and offensive language by the original author. Adding comments to this photo put online by another Facebook user also meant that Ms Gibbins' comments were open to a wider audience, although she kept her own Facebook page very private. The Sun newspaper reported the story and the British Council became the centre of public outrage. After investigation, the employer decided that Ms Gibbins should be summarily dismissed. It considered that the claimant had shown recklessness in posting on Facebook in the manner that she had and also that her actions had done serious damage to the reputation of the Council. Particularly problematic was that the claimant had associated herself with abusive comments about a child. Ms Gibbins challenged her dismissal in the Employment Tribunal.

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[11] *Smith v Trafford Housing Trust* (n 1).

[12] *Gibbins v British Council* (2017) ET 2200088/2017.

The claimant launched a number of claims. She argued that the Council's policies regarding expression on social media amounted to indirect discrimination on the grounds of belief and also that she was unfairly dismissed. Her discrimination complaint failed on the ground that the employer was justified in maintaining a Code of Conduct in order to protect its public reputation.[13] She also made both unfair dismissal and wrongful dismissal claims. Although the tribunal did agree that other reasonable employers may have decided upon a lesser sanction, a clear indication that the dismissal was a disproportionate interference with her rights, the dismissal was held to be fair. The tribunal was not able to say that no reasonable employer would dismiss in these circumstances.[14] Finally, the tribunal considered her common law claim. Ms Gibbins argued that her actions did not amount to gross misconduct. She claimed that the employer's failure to provide her with notice was in breach of contract. The question for the tribunal was whether the claimant's conduct amounted to gross misconduct. The tribunal agreed with the employer, concluding that an instance of reckless lack of judgment that damaged the employer's reputation constituted gross misconduct.[15] All of Ms Gibbins' claims therefore failed.

How does the judgment in *Gibbins* compare with that of Briggs in *Smith?* No explicit reference was made by the tribunal to Ms Gibbins' fundamental rights. Her freedom of expression and her freedom of thought and belief were clearly infringed upon, as well as the employer reading her private, out-of-work communications in breach of her right to privacy. The tribunal did not consider the impact of the employer's decision upon her human rights. It did not attempt to read the Code of Conduct in a manner that would interfere least with Ms Gibbins' freedom of expression. The analysis of her wrongful dismissal was untouched by human rights concerns. The tribunal simply agreed with the

[13] Ibid [122].

[14] Ibid [141].

[15] Ibid [147].

employer's interpretation and application of the contract. Had it been considered, the tribunal's observation that other employers may have taken a less severe measure strongly indicates that the infringements with a number of Ms Gibbin's rights would have been disproportionate. The disregard for the claimant's human rights was similarly shown in the tribunal's consideration of her unfair dismissal complaint: no reference was made to the Human Rights Act, as would be demanded by *X v Y*.[16] Overall the tribunal showed no concern that the contract should have been read in the light of the claimant's human rights or that the tribunal should have reached an outcome that is in accordance with human rights principles. The statutory claim and the common law cause of action both failed to protect her human rights. *Gibbins* demonstrates that the courts do not always read contracts of employment in a manner sensitive to human rights considerations in common law cases. *Smith v Trafford Housing* is an exception, not the rule.

If *Gibbins* represents the courts' routine approach to interpreting contracts of employment, how does it compare to the ECtHR's approach to contract terms that interfere with an individual's human rights? Two cases provide insight into what the ECtHR would require of the UK courts. In *Pla v Andorra*,[17] the Andorran courts were asked to interpret a will. The question was whether an adopted son could inherit as a son of a 'lawful and canonical marriage'. The Andorran courts interpreted the provision narrowly and in accordance with the sense that it was likely intended when it was written in 1939. The adopted grandson made a complaint to the ECtHR of a violation of Article 14, read in conjunction with Article 8. The ECtHR argued that the national court's decision amounted to a deprivation of the adopted son's inheritance rights. Whilst the courts should endeavour to 'render the will effective', this should be done 'without overlooking the importance of

[16] *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634. See Chapter 5, Section II for further discussion.

[17] *Pla v Andorra* (2006) 42 EHRR 25.

interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case law.'[18]

In *Bărbulescu v Romania*,[19] Strasbourg went further. The employee had been dismissed for breaching an unambiguous rule that employees should not engage in private online activities during work time. The national courts concluded the individual's dismissal was lawful. The ECtHR held that this finding was in breach of the court's positive obligations to protect Mr Bărbulescu's Article 8 rights. Many of the Court's criticisms regarded the national court's failure to make findings on specific issues of fact, such as whether the individual was warned that the monitoring was going to take place or whether he understood that the employer could read the contents of his messages.[20] Despite the fact that the employer's rules clearly provided for dismissal in instances such as the one that arose, the ECtHR nevertheless held that the national courts' decisions amounted to an unjustified infringement upon Mr Bărbulescu's Article 8 rights. The effect of the Court's decision is that national courts must question rules that infringe upon the individual's rights, either disapplying them if necessary or interpreting them in a Convention-compliant manner. The national courts must not declare lawful a dismissal that amounts to a disproportionate infringement upon an employee's rights, even if that infringement is in accordance with the contract of employment and the employer's rules.

Pla indicates that where the national courts are faced with an ambiguous term, they must interpret it in a manner that coheres with the Convention's principles. Where an employer's rule, if interpreted broadly, would infringe upon an individual's exercise of their rights, that interpretation must be resisted. This approach was reflected in *Smith* by Briggs J. In *Gibbins*, the court did not consider whether the employer should be permitted

[18] Ibid [62].

[19] *Bărbulescu v Romania* [2016] IRLR 235.

[20] Ibid [77]-[78].

to classify private activities on Facebook expressing deeply held beliefs as gross misconduct. It did not question that the rules had been applied in a way that resulted in a serious infringement upon Ms Gibbins' fundamental rights. *Bărbulescu* appears to go further, requiring that even unambiguous rules or provisions be disapplied if their operation or application violates an individual's human rights. So, upon an approach in line with *Bărbulescu,* even if the British Council had a clear rule that Ms Gibbins' behaviour amounted to gross misconduct, she would still succeed in her claim. The judge would have to find a way to protect her fundamental rights in their reading and application of the contract. This proactive approach is well outside the routine methods of interpretation applied by the courts. I would doubt whether even Briggs J would have disapplied an express contract term if that was what was required in order to give effect to the Convention rights in the dispute. In almost all cases, the approach of the domestic courts and tribunals falls well short of what is required under the Convention, as demonstrated in *Pla* and *Bărbulescu.*

II. A new function for the implied obligation of mutual trust and confidence?

The tribunals do not systematically take human rights into account in their interpretation of contracts of employment. There is no express term contained in the contract requiring employers to act in accordance with the individual's human rights. The only remaining alternative is to imply a term into the contract of employment that requires the employer to respect the human rights of the employee. Hepple speculated that the introduction of the HRA may prompt the development of the existing implied terms in the direction of human rights.[21] Although his suggestion has been mentioned by a number of others,[22] its likelihood

[21] Bob Hepple, 'Human Rights and Employment Law' [1998] Amicus Curiae 19 and Bob Hepple, *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell, 2005) 56.

[22] Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 162; Hazel Oliver, 'Employment Law' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 350-1 and 356, and Hugh Collins and

has not been assessed in detail. Of the existing implied obligations, the implied term of mutual trust and confidence (IOMTAC) has been considered a likely prospect for giving effect to human rights. It is a broad term that regulates the parties' conduct towards each other. The obligation has been applied to a wide array of disputes and the open phrasing of the obligation leaves it open to ongoing adaptation as new demands are placed upon it. Could a guarantee of non-interference with human rights be offered through the evolution of the implied term of mutual trust and confidence?

The existence of the implied term of trust and confidence was confirmed by the House of Lords in *Malik v Bank of Credit and Commerce* in 1998.[23] The accepted formulation of the obligation is as follows:

> 'the employer will not, without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.[24]

The obligation is implied by law into all contracts of employment. The question of whether it may be stretched to cover circumstances in which the individual's human rights have been infringed upon must be answered by reference to the current focus and direction of the term. The case-law applying the obligation can be grouped into five broad themes, each tackling a particular type of misconduct. Examining each theme allows the observer to assess how close the implied obligation is currently to offering substantive human rights protection. A speculative assessment of the likelihood of the implied term evolving in the near future can be based on this account of its operation. Only in one of the areas to be discussed is there any real prospect of successfully arguing that human rights concerns could imminently become part of the implied obligation. The other themes either have little at all to do with human rights or could, at most, evolve into procedural protection reflective

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Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 205.

[23] *Malik v Bank of Credit and Commerce International S.A.* [1998] AC 20.

[24] Ibid 45 (Lord Steyn) with the correction added that has been accepted in later cases: *Amnesty International v Ahmed* [2009] ICR 1450 at note 12.

of the concerns of Article 6 ECHR. The only real possibility remaining is that a claimant could argue that the indirect horizontal effect of the Convention rights, via the HRA 1998, requires that the IOMTAC be developed in this direction. It is difficult to predict the decision that would be reached regarding such an argument. A factor that we might expect to be important is the extent to which the judiciary feel that the domestic system of employment law already protects an individual's Convention rights.

A) Arbitrary, capricious or irrational conduct

The first group of cases in which the courts have held the employer to be in breach of the IOMTAC is where it acted arbitrarily, capriciously or irrationally. A case that fits squarely within this category is *Transco v O'Brien.*[25] Mr O'Brien was initially hired by Transco as an agency worker and progressed onto a permanent contract with an annual salary. During his employment, a new remuneration package was offered to every other permanent employee. The new deal included a significant bonus and an enhanced redundancy package. As the company did not consider Mr O'Brien a permanent employee, he was not offered the enhanced package. The Court of Appeal held that '[t]o single out an employee on capricious grounds and refuse to offer him the same terms as were offered to the rest of the workforce is … a breach of the implied term of trust and confidence.'[26] The company's 'genuine and reasonable belief' regarding Mr O'Brien's employment status did not 'alter the character of the failure.'[27] This case demonstrates that capricious behaviour in the exercise of managerial functions amounts to a breach of the IOMTAC. There are similar

[25] *Transco Plc v O'brien* [2002] EWCA Civ 379, [2002] ICR 721. Another notable instance where rationally and perversity were used within the IOMTAC examination was *Abbey National Plc v Fairbrother* [2007] IRLR 320*,* although the approach taken in this case has since been overruled in *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, [2010] 4 All ER 186, [27]-[28].

[26] *Transco Plc v O'brien* (n 25) [17].

[27] Ibid [22].

cases regarding the irrational or arbitrary exercise of the employer's discretion in awarding bonuses or making decisions upon remuneration.[28]

The standards applied in this category of cases have much in common with tests used by the courts in administrative law.[29] One might argue that the other ideas traditionally associated with public law – such as human rights – could similarly be imported. Indeed, before the introduction of anti-discrimination law, the common law courts held that the exclusion of a female horse-trainer from the profession by the Jockey Club was capricious and therefore wrongful.[30] This decision may indicate a degree of overlap between the idea of capriciousness and a breach of the individual's human rights. But in modern public law, the requirement that public bodies must not act arbitrarily or capriciously has little to do with the safeguarding of human rights. New standards of scrutiny have been developed to fulfil this function.[31] The IOMTAC shows no signs of reflecting these more stringent standards nor does this line of jurisprudence appear to be developing in a direction protective of human rights.

B) Misuse of power

Linked to the category set out above are those cases regarding the IOMTAC that relate to an employer misusing their powers, either those set out in the employment contract or elsewhere. For example, in *United Bank v Akhtar,*[32] the United Bank sought to exercise

[28] *Clark v Nomura International Plc* [2000] IRLR 766 and *F C Gardner v Beresford* [1978] IRLR 63.

[29] See the comment of Burton J in *Clark v Nomura International Plc* (n 28) 775.

[30] *Nagle v Fielden* [1966] 2 QB 633.

[31] See Davies' comment that 'Burton J in Clark adopted the Wednesbury test in part because he regarded it as well established in public law. However, modern public law… has largely discarded Lord Greene's extreme formulation, so Burton J's attempt to align the two fields is based on a misapprehension.' ACL Davies, 'Judicial self-restraint in labour law' (2009) 38 ILJ 278, 297 and more generally, Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (Judicial review in a changing society, Hong Kong University, 14 April 2014).

[32] *United Bank Ltd v Akhtar* [1989] IRLR 507.

their right to relocate Mr Akhtar under a mobility clause in his contract. They gave him only three days of notice that he was expected to report to work in a different city and gave him no financial assistance. When Mr Akhtar did not arrive for work at the proscribed location, his pay was stopped. He resigned and claimed constructive unfair dismissal. The EAT held that actions that are in accordance with the employer's powers as set out in the contract are subject to an 'over-riding obligation' in the form of the IOMTAC.[33] By putting their employee in an 'impossible position' through the manner in which they exercised the mobility clause, the Bank breached the IOMTAC. In *Imperial Group Pension Trust v Imperial Tobacco,*[34] Sir Nicholas Browne-Wilkinson gave guidance on when the employer would be in breach of the implied term with regard to powers that it was granted under a pension trust's rules. He stated that the company would be in breach of their implied obligation if they exercised their powers 'for the collateral purpose of forcing the members to give up their accrued rights in the existing fund subject to this scheme.'[35] Similarly, a blanket refusal to ever consider an amendment to the fund would amount to a breach of the implied obligation.[36]

There are similarities between this aspect of the implied obligation's jurisprudence and public law.[37] Despite this similarity, the court does not focus its attention upon ensuring respect for the claimant's fundamental rights under the implied obligation. Rather, this branch of the IOMTAC jurisprudence centres around ensuring that employers do not apply their contractual power for an improper purpose or in a manner that renders it impossible for their employees to perform their duties. One might argue that an employer that acts

[33] Ibid [50].

[34] *Imperial Group Pension Trust Ltd. and Others v Imperial Tobacco Ltd. and Others* [1991] 1 WLR 589.

[35] Ibid 599.

[36] Ibid.

[37] Douglas Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 ILJ 84, 92.

with the purpose of breaching their workers' human rights would not be acting within the scope of a proper purpose, but this is yet to be tested before a court. This line of case-law is several steps away from developing anything that resembles substantive human rights protection.

C) Disregarding the requirements of natural justice

Paul Davies and Mark Freedland have noted that the jurisprudence of the implied obligation is partially concerned with 'procedural propriety'.[38] Issues within this theme include disregarding the requirements of natural justice, failing to give an employee a fair hearing or conducting inadequate investigations. For example, in *TSB v Harris*, the bank included information in a reference to a prospective employer about complaints against Miss Harris. She was not aware of the complaints nor was she given an opportunity to respond to their content. The tribunal found this conduct to be in breach of the IOMTAC.[39] In *Stevens v University of Birmingham*,[40] the university policy stated that only a union representative or colleague was permitted to accompany an employee to an investigatory meeting. Mr Stevens requested that a representative of a medical defence organisation be permitted to accompany him, as he was not a union member and he did not feel that his colleagues were suitable companions. The university refused his request. The High Court held that the rules did not afford Professor Stevens any practical procedural safeguards and forcing him to go to the meeting without any support would be a breach of the IOMTAC.[41] The court was anxious that 'equality of arms' was achieved as far as possible and that

[38] Paul Davies and Mark Freedland, 'The Impact of Public Law on Labour Law, 1972-1997' (1997) 26 ILJ 311, 325.

[39] *TSB Bank Plc v Harris* [2000] IRLR 157, 166.

[40] *Stevens v University of Birmingham* [2015] EWHC 2300 (QB), [2015] IRLR 899.

[41] Ibid 910.

Professor Stevens was given an opportunity to explain the situation with the benefit of appropriate assistance.

These cases demonstrate that one role of the implied obligation is to guarantee some procedural protection for employees, particularly where there are serious consequences for their future as a result of the employer's decisions. Cases like *Harris* and *Stevens* thus reflect the values that underpin Article 6 ECHR and the right to a fair hearing in the employment context. By bolstering the procedural rights of the claimants, the IOMTAC may indirectly improve the substantive treatment of workers but the potential of cases of this kind to develop into substantive human rights protection is limited.

D) Acting 'without reasonable and proper cause'

One might suggest that an obvious route to protection of human rights through the implied obligation is to hold that a 'proper cause' does not include a reason that constitutes a breach of the individual's human rights. Although there are a number of cases in which the lack of a 'reasonable and proper cause' for the employer's actions was crucial,[42] this potential way forward has not been tested. Two prominent demonstrations of how cause is used currently are *Gogay v Hertfordshire County Council*[43] and *Bliss v South East Thames RHA*.[44]

Mr Bliss was a surgeon who had suffered a breakdown in relationship with one of his colleagues. Whilst he was abroad, Mr Bliss's correspondence with this colleague was examined by an independent committee to determine whether it displayed signs of mental ill-health. They concluded it did not. Nevertheless, upon his return, Mr Bliss was asked to

[42] Conversely, in *Ahmed v Amnesty International*, a 'serious and genuine' reason for a racial discriminatory hiring decision was a significant factor in Underhill's decision that there was no breach of the IOMTAC: *Amnesty International v Ahmed* (n 24) [72].

[43] *Gogay v Hertfordshire County Council* [2000] IRLR 703.

[44] *Bliss v South East Thames Regional Health Trust* [1985] IRLR 308.

submit to a psychiatric examination. When he refused, he was suspended from his post. After an internal inquiry, the requirement of an examination was withdrawn and his suspension lifted. Mr Bliss later resigned, claiming his employer had committed a repudiatory breach of contract. A key consideration for the Court of Appeal was whether the employer had reasonable grounds to demand the examination.[45] In light of the conclusion reached by the independent committee that Mr Bliss was not suffering from mental illness, the Trust had no right to require an examination. Demanding that Mr Bliss do so, and suspending him when he refused, constituted a breach of the IOMTAC.[46] *Bliss* demonstrates that the IOMTAC can be used to ensure that employers take a reasonable view of the evidence before them and only apply sanctions where there is demonstrable cause to do so.

In *Gogay,* Ms Gogay worked in a residential care home for children. Whilst on sick leave, she was informed by a letter from her employer that she was suspended as a result of "an allegation of sexual abuse made by a young person in our care". Although the investigation found no wrongdoing and the suspension was lifted, Ms Gogay did not return to work and suffered from depression as a result of receiving the letter. Lady Justice Hale held that the IOMTAC had been breached. The allegation was of a sufficiently serious nature so as to break the mutual trust and confidence between the parties. The key issue was whether the employer had reasonable and proper cause to make the allegation.[47] Her Ladyship concluded that further inquiries should have been undertaken before the child's statement could be classified as an allegation, in light of the difficulty of assessing what the child was trying to communicate.[48] Lady Justice Hale also found that the employer

[45] Ibid 314.

[46] Ibid.

[47] *Gogay v Hertfordshire County Council* (n 43) [55].

[48] Ibid [56].

should have thought more carefully about how to deploy Ms Gogay: a short period of leave or temporary duties away from the child in question may have been alternative responses. She was entitled to a better standard of treatment than the 'knee-jerk' suspension letter that she received.[49] Although there are some elements of the judgment that go to treating Ms Gogay with an appropriate level of concern and respect, which will be discussed below, the thrust of the breach was taking hasty and severe action without a convincing and proven cause.

I would argue that these cases have a closer link with the issues outlined above regarding procedural propriety than moving towards strong substantive control of the reasons given by the employer for their conduct. The core of the wrong that breached the IOMTAC in these cases was a lack of investigation or taking insufficient care in evaluating and responding to the evidence that was available.[50] Lady Justice Hale's judgment did include some elements that reflect a concern for the proportionality of the decision taken – could less severe measures have been pursued in place of suspension? – but it is argued that this was not the most significant factor in her judgment. Focusing the courts' attention upon the reason offered by the employer has the potential to lead the IOMTAC towards substantive human rights protection. Thus far, however, the case-law shows limited progress in this direction.

E) Failing to treat an employee with respect and concern

The final group of cases relate to employer's conduct that breaches the IOMTAC by failing to treat the employee with respect and concern. Such conduct can take a variety of forms.

[49] Ibid.

[50] Mark Freedland comments, for example, that Lady Justice Hale's judgment 'reads exactly as if the court were engaged in judicial review of the way in which the employing local authority had exercised its power of suspension': Freedland (n 22) 161.

For example, in *Buckland v Bournemouth University*,[51] the claimant was a professor of Archaeology who had been responsible for marking a number of exam scripts. His marks were checked and confirmed by the board of examiners. Without permission from the board of examiners or Professor Buckland, another member of the faculty re-marked the papers which ultimately led to a number of the marks being increased. Despite a university inquiry finding in favour of Professor Buckland, he resigned from his post and claimed that he had been constructively dismissed by reason of the university's breach of the IOMTAC and that the dismissal was unfair under the statute. The ET, EAT and Court of Appeal agreed that the IOMTAC had been breached by the university's acceptance of the re-mark which amounted to 'an unequivocal affront to his integrity'.[52] Professor Buckland was entitled to resign in response to this fundamental breach of the contract. By failing to respect Professor Buckland's expertise and undermining his position within the university, the university had breached the implied obligation.

Other ways in which the employer may fail to treat their employee with respect include campaigns of unwanted or hostile behaviour. In *Horkulak v Cantor Fitzgerald,*[53] the chief executive of a financial brokerage company engaged in a sustain campaign of unpleasant behaviour towards Mr Horkulak, including outbursts in which the chief executive used 'foul and abusive language'. As Mr Horkulak was a managing director, this conduct also undermined his authority to manage other employees. The High Court judge found that this conduct amounted to a breach of the IOMTAC. *Reed v Stedman* regarded the employer's failure to investigate sexual harassment and bullying.[54] The wrongdoer was Ms Stedman's manager and she made it clear that his behaviour was unwelcome. Ms

[51] *Buckland v Bournemouth University Higher Education Corporation* (n 25).

[52] Ibid [12].

[53] *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942

[54] *Reed and Bull Information Systems v Stedman* [1999] IRLR 299.

Stedman complained informally to her colleagues about his behaviour and suffered from deteriorating health, which she considered to be caused by the harassment. Her ill-health resulted in Ms Stedman leaving her job. The repudiatory breach of the IOMTAC had two elements: first, the manager's course of behaviour and second, the company's failure to investigate the situation in light of the complaints made by Ms Stedman and her deterioration in health.[55] The employer in both *Horkulak* and *Stedman* failed to treat their employee with respect and concern, which made the individual's position with the company deeply uncomfortable and untenable in the future.

Alan Bogg has argued that dignity is a key value underlying the IOMTAC, using *Stedman* as a specific example.[56] I would offer a different interpretation of these cases, as indicated by the heading above - failing to treat an employee with respect and concern – and argue that a violation of the employee's dignity was not the obvious tipping point into breach of contract in the cases outlined above. In *Buckland,* the university's actions amounted to an affront to his academic integrity. In *Horkulak*, the chief executive undermined Mr Horkulak's authority as a manager. In *Stedman,* her manager's conduct certainly injured her dignity, but the company's wrong lay in failing to demonstrate concern for her situation by embarking upon an investigation. Although the sample of cases here is necessarily limited, it demonstrates that some conduct that breaches the IOMTAC does not involve a substantial injury to the dignity of the employee. By concentrating on the impact of the employer's conduct upon the claimant, this line of cases moves closest to a human rights focus. This potential to protect fundamental rights however remains unrealised.

F) Divergence between the IOMTAC and human rights protection

[55] Ibid [19].

[56] Alan Bogg, 'Bournemouth University Higher Education Corporation v Buckland: re-establishing orthodoxy at the expense of coherence?' (2010) 39 ILJ 408, 414-5.

One might note that *Reed v Stedman* displays an overlap between conduct that breaches the implied term and conduct that is discriminatory. This observation might lead to the belief that the route to protecting other human rights via the implied term is wide open. But, in *Amnesty International v Ahmed*,[57] the overlap was proved to be incomplete. In addition, references to objectively-judged ideas of dignity operated to the disadvantage of the claimant.

Ms Ahmed, an Amnesty International employee, applied for a research role which related to the country of her own ethnic origin. Amnesty International refused to offer her the role in accordance with its policy, on the grounds that her employment may lead others to question the impartiality of the organisation and also her ethnicity may place her at an increased security risk in the field. Ms Ahmed was successful in her claim for direct discrimination on the grounds of ethnic origin[58] but her claim for constructive unfair dismissal was rejected. The EAT concluded that the employer's conduct was not sufficient to breach the IOMTAC.[59] Unlawful discrimination does not 'inevitably' breach the term and the reasons given were not prejudiced or offensive towards the claimant. Nor did the discriminatory conduct violate the claimant's dignity, as Amnesty's reasoning was not prejudiced and 'could not reasonably be regarded as offensive to the claimant as an individual.'[60] Ms Ahmed may have felt hurt but, viewed objectively, the court was of the view that the relationship with Amnesty was not destroyed or seriously damaged as required by the phrasing of the implied obligation.

Other cases illustrate the disconnect between the scope of the IOMTAC and a breach of a fundamental right occurring. In *Grant v South-West Trains Ltd*, the company

[57] *Amnesty International v Ahmed* (n 24).

[58] Ibid [57].

[59] Ibid [72].

[60] Ibid [72].

refused to extend a work-related benefit to Ms Grant's same-sex partner as their policy extended the entitlement only to a spouse or common-law spouse of the opposite sex. The High Court rejected the claimant's argument that the employer's discriminatory conduct amounted to a breach of the implied obligation.[61] Such actions, and the employer's policies on the distribution of work-related benefits, would now be recognised as contrary to the Equality Act 2010, and an infringement of Ms Grant's Article 8 and Article 14 ECHR rights, yet were not considered sufficiently serious that they could be 'fairly be said to destroy or seriously damage the relationship between employer and employee'.[62]

A final example, *Omilaju v Waltham Forest DC*, confirms the divergence between human rights concerns and the IOMTAC. The claimant was the subject of harsh management practices, including threats of disciplinary action. As a result, he made a number of unsuccessful tribunal applications. His employer provided a partially negative reference to a prospective employer, which was unexplained and had little foundation. Further, Waltham Forest refused to pay him for the days which he had been attending the tribunal in connection with his earlier claims. Mr Omilaju brought a constructive dismissal claim based upon a breach of the IOMTAC. The court considered the management practices unacceptable and that the giving of an unjustified negative reference made out a claim of victimisation in anti-discrimination law. Despite these two findings, the Court of Appeal confirmed the Tribunal's decision that no breach of the implied obligation had occurred.[63] This outcome was because the final straw was – the non-payment of wages whilst at tribunal hearings – 'perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the applicant's contract'.[64]

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[61] *Grant v South-West Trains Ltd* [1998] IRLR 188, [18].

[62] Ibid.

[63] *Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493, [2005] ICR 481, [30].

[64] Ibid [10], quoting from the Tribunal's reasoning.

These cases bring to the fore a number of issues. First, there is clear divergence between the conduct that breaches the implied obligation, as it currently stands, and conduct that would amount to an infringement of a worker's human rights. This deviation is demonstrated by the difference between the IOMTAC and anti-discrimination law. Second, the objective test for a breach of contract and the focus upon whether a reasonable person would have considered the implied obligation to be breached[65] is a major cause of this divergence. In human rights litigation, the focus is on the impact of the infringer's actions on the particular claimant. No mention is made of whether the reasonable person would have felt their rights were infringed. Finally, the test for a breach of the IOMTAC is a 'severe one.'[66] Underhill J, whilst he was President of the EAT, emphasised in two separate cases that 'the phrases 'without reasonable and proper cause' and 'destroy or seriously damage' must be given their full weight.'[67] These concepts have no role to play in substantive human rights protection, further distancing the implied obligation from this potential role.

G) Human rights as a 'mandatory influence'[68] upon the implied obligation?

Even in face of the limited overlap between the IOMTAC and substantive human rights protection, the provisions of the Human Rights Act 1998 might be considered to compel the judges to develop the IOMTAC in this direction. Hepple argued that,

> 'since the court must act compatibly with convention rights, the duty of trust and confidence also embodies a duty to respect the Convention rights of an employee.

[65] This was confirmed in *Malik v BCCI* by Lord Steyn at 47: '"In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Moreover, the impact will be assessed objectively."'

[66] *Gogay v Hertfordshire County Council* (n 43) [55].

[67] *Ministry of Justice v Sarfraz* [2011] IRLR 562, [34] and *Amnesty International v Ahmed* (n 24) [72].

[68] Mayo Moran, 'The Mutually Constitutive Nature of Public and Private Law' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart Publishing, 2009) 20.

> This may be regarded as horizontal enforcement of the Convention by the backdoor, but it seems to me altogether legitimate and strongly arguable.'[69]

This position is reinforced by the ECtHR's doctrine of positive obligations, which requires member states to protect private parties from breach of their fundamental rights by other private parties.[70] There are two particularly relevant aspects of the state's positive obligations. First, the requirement that member states provide a legal forum, accessible to all potential claimants, in which a judge can rule on whether an infringement with the individual's human rights is justified.[71] The second element is the instruction issued by the ECtHR in *Pla v Andorra* to national courts that, in interpreting legal documents, they must not overlook the importance of interpreting the document 'in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.'[72] The open texture of the IOMTAC makes it an obvious mechanism through which the contract of employment could be influenced by the ECtHR's jurisprudence.[73] Although its protection is far from universal,[74] the IOMTAC could make a contribution to the fulfilment of these positive duties within the employment context. It could be argued that, in order to fulfil the UK's obligations under the ECHR, strong indirect horizontal effect of fundamental rights upon the IOMTAC is necessary.

There may be a strong theoretical argument for the mandatory reshaping of the implied obligation in order to protect the human rights of workers. In practice, however, I would argue that the chance of this modification occurring is slim. This is for two separate reasons. The first factor that may hold the judiciary back is the argument that the

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[69] Hepple, 'Human Rights and Employment Law' (n 21) 22-23.

[70] See Chapters 2 and 3 above.

[71] *Redfearn v United Kingdom* (2013) 57 EHRR 2.

[72] *Pla v Andorra* (n 17) [62].

[73] See Hugh Beale, *Chitty on Contracts* (32nd edn, Sweet & Maxwell, 2015) [1-089].

[74] See the discussion of the distinction between contracts of employment and contracts for services in Chapter 4, Section III above.

development outlined above is not necessary to fulfil the positive obligations of the UK with regard to employees. Proponents for this argument would point to the development of a human rights framework within unfair dismissal law in *X v Y*[75] and claim that this framework puts the UK well within its margin of appreciation for protecting the human rights of workers, and that overlapping common law protection would be extraneous. It can be seen in tort law, in particular, that strong indirect effect is only applied where there is a lack of protection for a particular right across the whole system of law and this was perceived as a deficiency *before* the influence of the HRA had to be considered.[76] If there are other claims that are seen to offer equivalent protection, the judiciary are extremely reluctant to develop existing causes of action to cover the same ground.[77] In employment law, this reasoning would result in a refusal to restyle the IOMTAC into an obligation to respect the human rights of workers.

One might undermine this reasoning by observing that the framework in *X v Y* has been little used and offers inadequate protection of an individual's human rights in numerous ways. Although neither unfair or wrongful dismissal law protect those without a contract of employment, a claim at common law is not dependent upon completing a qualifying period of service.[78] Unfair dismissal law does not protect those who remain in employment. The cause of action has been applied in a way that is unduly deferential to the employer.[79] It may be that some judges would be convinced by this counter-argument

[75] *X v Y* (n 16).

[76] See the discussion of breach of confidence: Lord Toulson, 'Fundamental Rights and the Common Law' (The Fundamental Rights Conference, London, 10 October 2015): 'This was an area about which judges said that they considered the law to be defective but that its remedy lay with Parliament… Parliament dealt with the matter in an oblique way by incorporating article 8 into domestic law. The courts responded by incorporating certain aspects of privacy within the law of confidentiality.'

[77] See *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732, [125] (Lord Toulson).

[78] As required by the ECtHR in *Redfearn v United Kingdom* (n 71): see Chapter 4, Section IV.

[79] For further development of other issues with the application of human rights scrutiny in unfair dismissal cases, see Chapter 5, Section III.

and yet be troubled by a second reason that could be given to stay the development of the common law. It could be argued that developing a duty to respect the human rights of workers under the auspices of the IOMTAC goes beyond an incremental step in the progress of the common law. This reasoning has been found to be persuasive elsewhere in the common law development of the implied term of mutual trust, notably in Lord Hoffman's judgment in *Johnson v Unisys*.[80] In the light of the reluctance demonstrated by the senior judiciary to push the boundaries of the implied term that will be discussed in the next section of this chapter, I would agree with Brodie that 'it is by no means inevitable that the domestic courts' will follow the path set out by Hepple and develop the implied term into a wide-ranging obligation to respect the human rights of one's workforce.[81]

III. The implication of a new obligation to respect an employee's human rights

Lord Bridge in *Scally v Southern Health* adopted a distinction between 'the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship.'[82] Although it is possible that an implied term in fact, of the first kind, might be used in particular instances,[83] here I focus upon the possibility of an implied term in law. The process of acceptance of a new implied term in law, within the second category set out by Lord Bridge, is somewhat ill-defined. The first stage is to identify the 'definable category of contractual relationship' into which the term

[80] *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, 541 (Lord Hoffman).

[81] Douglas Brodie, 'Mutual trust and confidence: catalysts, constraints and commonality' (2008) 37 ILJ 329, 335.

[82] *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, [1991] 3 WLR 778, 307.

[83] Although this argument failed in *Grant v South-West Trains Ltd* (n 61) with regard to the company's Equal Opportunity Policy: 'Second, accepting for the purposes of this case, that the court will readily give business efficacy to such a contract of employment as is here under examination, I see no foundation for the second head of the plaintiffs argument. I do not consider that I would be giving 'business efficacy' of any kind to this contract by implying such a term into it.'

would be defined. The court may then consider whether the term is a necessary element of that type of contract.[84] There may be a third stage, or a part of the second stage, in which 'the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert.'[85] What conclusions might the courts reach if presented with a claimant arguing for the development of a new term to protect their human rights in the workplace? Guidance will be taken in this section from a very useful article by Elizabeth Peden on the process of implication in law[86] and the *dicta* of the House of Lords in *Malik v BCCI* as the leading English authority on the implication of terms into the contract of employment.[87] The flexibility and openness of the test for implication may be exploited by a judiciary determined to reach a particular conclusion: the 'reasonableness' standard is likely to be much more permissive when compared to a 'necessity' standard.

The first stage is easily satisfied. The courts and tribunals are well-used to categorising contracts as contracts of employment. A new obligation could be implied alongside the existing obligations of mutual trust and confidence, obedience and loyalty and so forth. Once the implication of a human rights term has been accepted, an extension into other contracts for work – "limb (b) worker" contracts or the Equality Act contracts personally to do work – might be advocated for. In the light of the arguments made above regarding the wide scope of the Convention's protection, this would certainly be justified. However, this chapter will focus on the possibility of implication into all contracts of employment as a starting point.

[84] *Scally v Southern Health and Social Services Board* (n 82) 307.

[85] *Liverpool City Council v Irwin and Another* [1976] 2 WLR 562, [1977] AC 239, 258.

[86] Elizabeth Peden, 'Policy concerns behind implication of terms in law' (2001) 117 LQR 459.

[87] *Malik v BCCI* (n 23).

There are a number of ways in which the term could be phrased. Hugh Collins and Virginia Mantouvalou mention that a possible mechanism for protecting the human rights of employees is an implied term requiring that employers respect their autonomy and dignity.[88] The generality of the IOMTAC itself demonstrates that this is a possibility.[89] Although such an implied term would encompass human rights obligations, I would argue that a more concrete and narrowly defined implied obligation would be more likely to be judicially accepted after a consideration of the policy factors that will be outlined below.[90] A phrasing along the lines of an obligation upon the employer not to unjustifiably infringe the human rights of their workers might be suitable for implication. Much of the discussion below, however, would apply to any formulation of an implied term motivated by human rights concerns. In general, it must be noted that the courts tend to take restrictive approach to the implication of a new term in law, possibly due to the judges' 'preference for rules rather than policy'.[91]

A) Is the new implied term a 'necessary incident' of a contract for work?

The test commonly cited test for determining whether a new obligation should be implied into a particular category of contract is necessity. However, as observed in *Chitty*, in fact, 'the courts do not confine themselves to a narrow test of necessity but instead can draw upon a broader range of factors, such as the reasonableness of the term, its fairness and a

[88] Collins and Mantouvalou (n 22) 205.

[89] See the comments of Rideout regarding the lack of particularity of the IOMTAC in Roger Rideout, 'Implied Terms in the Employment Relationship' in Roger Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth Publishing, 1996) 124.

[90] For a contrasting view, see ibid, 125: 'the application of a test of reasonableness is precisely the same whether the formulation is general or particular.' I would argue that the increased breadth of a term and the uncertainty that is consequent upon that would lead to increased judicial reluctance to imply it.

[91] Peden (n 86) 466.

range of competing policy considerations'.[92] One might easily dismiss the necessity of implication on the grounds that piecemeal protection for human rights has been in place for a number of years and employment relationships appear to continue to function globally.[93]

A number of counter-arguments can be made to undermine this stance. Firstly, we would not expect a worker to continue to work for an employer who has committed an unjustified breach of their human rights. An implied term that the employer must not act in this way is, in Lord Nicholls' words, 'the necessary corollary of the employee's right to leave at once'.[94] It was established above that a human rights obligation is unlikely to emerge from the jurisprudence of the IOMTAC. Without some contractual recognition of an obligation to respect the human rights of a worker, they have no grounds on which to repudiate the contract and the worker would be in breach of their own obligation to provide notice and perform work for the employer if they resigned without cause. Second, workers that are secure in the knowledge that their employer is required by law to respect their human rights may be more likely to invest in their employment relationship and in the business as a whole.[95] Finally, it could be argued that an implied term of this kind is a necessary incident of contracts of employment by reason of the UK's obligations under the ECHR. *Redfearn v UK* requires that a claimant be able to access a court capable of balancing their rights against an employer's in each particular case.[96] *Pla v Andorra* placed

[92] Beale, *Chitty* (n 73) [14-004]. See, for example, *Scally v Southern Health and Social Services Board* (n 82) 307.

[93] Beale, *Chitty* (n 73) [1-088]: 'even under a test for the implication of such terms that they are necessary as well as reasonable, and where neither party to the contract is a public authority, it is difficult to see the genuine necessity of the implication of such a term.'

[94] *Malik v BCCI* (n 23) 34.

[95] As Brodie comments, '[m]utual trust enjoins the parties to behave well towards one another and if they actually do so their relationship is likely to be a stronger one.' Brodie, 'Mutual Trust and the Values of the Employment Contract' (n 37) 100.

[96] *Redfearn v United Kingdom* (n 71) discussed in Chapter 4.

an obligation upon the domestic courts to read contracts in a manner that closely corresponds to the Convention.[97] A new implied obligation would offer a forum to some individuals, like Mr Redfearn, who would otherwise fall through the cracks within the existing legislative framework.

From the judgment of Lord Steyn in *Malik*, hints of further factors that may be relevant to the court's assessment of necessity can be gleaned although they must be considered with caution. Elizabeth Peden observes that

> '[t]he factors listed … are all policy concerns that the courts appear quietly to balance in coming to a decision on whether or not to imply a term in law. There are no guidelines as to what weight should be given to different factors nor as to how this should be done.'[98]

Andrew Phang argues that this leads to 'excessive unpredictability and uncertainty' and further that judges should be 'extremely reluctant' to imply new terms in law.[99] Such reluctance has been demonstrated in cases regarding implied terms in the employment sphere, particularly where the proposed terms are broad in scope.[100]

Does the proposed term complement the current 'legal culture' regarding the working relationship?

Lord Steyn in *Malik* recounted the history of the implied term of trust and confidence, noting that '[i]t was the change in legal culture which made possible the evolution of the implied term of trust and confidence.'[101] The 'change' to which his Lordship referred was the rendering obsolete the notion of master and servant and the imposition, by the legislature and by judicial decision, of far greater duties upon employers to care for their

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[97] *Pla v Andorra* (n 17) discussed in Chapter 3.

[98] Peden (n 86) 475.

[99] ABL Phang, 'Implied Terms Revisited' [1990] JBL 394, 408.

[100] See *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] ICR 1615 in which the Court of Appeal rejected an implied obligation that employers should take reasonable care for their employee's economic wellbeing. Dyson LJ commented at [45] that 'this is an area where the court should be astute only to imply a precise term in carefully circumscribed circumstances.'

[101] *Malik v BCCI* (n 23) 46.

employees' welfare.[102] What is the current legal culture around the pursuit of human rights in employment law?

Here, we might detect a divide between the senior courts and the lower courts and tribunals. In a recent dismissal case, Baroness Hale specifically noted the absence of arguments regarding the human rights implications of the lower courts' decisions.[103] Similarly, in *Vining v Wandsworth LBC*,[104] the Court of Appeal sought a result that was in accordance with the workers' freedom of association and allowed their union to make a claim on their behalf. This decision was despite the fact that a previous Court of Appeal had found that workers in the same occupation were excluded from the ERA 1996's protection. Similarly, in *Mba v Merton LBC,*[105] the Court of Appeal disapplied one aspect of the statutory test for indirect discrimination to ensure that the claimant's Article 9 rights were made fully effective. These decisions in which the courts actively seek to promote and protect the human rights of workers cohere well with the idea of implying a new term to respect those rights. The legal culture represented by these judgments would be complemented by the creation of such a term. But this enthusiasm towards the incorporation of human rights ideas into judicial reasoning is far from universal. In *Smith v Carillion*,[106] an outrageous breach of Mr Smith's human rights was left unremedied because the court was unwilling to alter the common law rule that contracts will only be implied when it is strictly necessary. The lower tribunals also consistently neglect human rights concerns, failing to provide adequate scrutiny were a clear infringement has

[102] Ibid.

[103] See her Ladyship's comments during oral argument in *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] IRLR 558.

[104] *Vining and others v London Borough of Wandsworth* [2017] EWCA Civ 1092, [2017] IRLR 1140.

[105] *Mba v Merton London Borough Council* [2013] EWCA Civ 1562, [2014] 1 WLR 1501.

[106] *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467.

occurred.[107] An argument that an innovative implied term should be considered in order to ensure respect for human rights may not be welcomed by a court with an attitude less positive towards human rights.

Does the term fit with its surrounding context?

An implied term, if it is to be created, must not disrupt the operation of its neighbouring legal principles. The term should be consistent with the other aspects of the legal regime. Peden notes that the fit of the proposed term with existing law is a concern that influences the judiciary in deciding cases regarding new implied terms in law.[108] In the application of the existing implied term of mutual trust and confidence, the courts have been particularly concerned with the relationship between the common law implied terms and the statutory regulation of the law of unfair dismissal. In *Johnson v Unisys* and *Eastwood v Magnox*, the senior courts were anxious that the common law should not undermine the regulatory decisions that had been made by Parliament.[109] It is likely that that this set of issues would be important in an assessment of the necessity of a new implied term that would protect the human rights of workers. However, the effect that this factor will have on the decision is difficult to predict. In different judicial hands, a decision could go in either direction.

As the other prominent implied term in law of the contract of employment, the fit with the IOMTAC would be considered. It was observed above the implied obligation does not overlap with substantive human rights protection and in fact diverges from it at a number of points. This could be used by claimants to point out a gap in protection. The interrelationship between the proposed term and the surrounding legislative regime is more complex. On one hand, Peden notes that 'the existence of legislation that covers the issue

[107] See Chapter 5, Section III.

[108] Peden (n 86) 468-471.

[109] Most notably in the judgments of Lord Hoffman in *Johnson v Unisys Ltd* and Lord Dyson in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* [2011] UKSC 58, [2012] 2 AC 22.

may often exclude the implication of a term, even where the legislative provision seems deficient.'[110] Here, one could point to the overlap of the scope of this potential obligation with unfair dismissal law but also with the Equality Act 2010, the legislative protection for whistleblowers and TULR(C)A 1992 which protects trade union members from detriment on the grounds of that membership. As legislative enactments that cover aspects of Article 14, Article 9, Article 10 and Article 11 to varying degrees,[111] it could be argued that the existence of a new implied term would amount to duplication. The term's operation may interfere or overlap with the pre-existing legislative provisions. It is possible that in this instance the 'fit' would be considered too close and extensive overlap between the common law and Parliament's statutory intervention undesirable.

On the other hand, Peden observes that the courts do not consistently read the existence of prior legislation in this manner: 'courts have used legislation to justify analogous implied terms.'[112] In his reasons regarding the available remedies for a breach of the IOMTAC, for example, Lord Steyn stated that in the search for the correct common law principle 'one is not compelled to ignore the analogical force of the statutory dispensation'.[113] Here, we might argue that Parliament evinces a continuing intention to offer protection for the human rights of workers through the statutory interventions of the EqA 2010, TULR(C)A 1992, PIDA 1998 and the DPA 1998. Arguing by analogy to these interventions, one might believe that the common law should fill in any remaining gaps between those statutes and protect any fundamental rights that have been missed. This argument could be bolstered by making reference to the provisions of the Human Rights Act 1998, the court's duty to develop the law compatibly with the Convention and the way

[110] Peden (n 86) 470-1. Exemplified in *Crossley v Faithful & Gould Holdings Ltd* (n 100) [45]: Lord Dyson approved a 'very cautious approach to this issue'.

[111] See Chapter 3.

[112] Peden (n 86) 471.

[113] *Malik v BCCI* (n 23) 52-53.

in which they have been interpreted to require the development of the common law in areas where the existing protection of human rights is perceived to be inadequate.[114] Overall, the issue of fit with existing law may not give a conclusive answer. There are well-balanced arguments on either side.

Would the term be 'a workable principle in practice'?

One reason that Lord Steyn approved of the development of the IOMTAC was because '[i]t has proved a workable principle in practice.'[115] At the time of *Malik*, the IOMTAC had been welcomed judicially and academically, which his Lordship noted with approval. He further stated that the implied obligation '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.'[116] The difficulty with drawing on *Malik* directly here is that Lord Steyn had the benefit of 15 years of case-law that tried and tested the implied obligation and found it to be workable in practice. Yet *Malik* and other cases on implying terms into the contract of employment may indicate what the judges would consider important with regards to 'workability' of the new implied obligation.

An obligation not to unjustifiably interfere with a worker's human rights would be applicable to a broad range of behaviour. Strasbourg case-law gives guidance on many different circumstances and whether particular conduct should be considered to be in breach of a Convention right. This body of law should be taken into account in a decision regarding the new implied term, in the same way that Strasbourg decisions must be taken into account under the HRA 1998.[117] Similarly, the courts could draw on both domestic

[114] See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[115] *Malik v BCCI* (n 23) 46.

[116] Ibid.

[117] Under Human Rights Act 1998, section 2(1).

and ECtHR cases that use principles of proportionality to assess whether the conduct in question was justified by a legitimate aim.

Would the implied term be apt to strike a balance between the employer's and worker's interests in a particular case? In other jurisprudence on implied terms, the judiciary are aware of the need to avoid imposing 'unfair and unreasonable burdens on employers'.[118] Peden reads this as the courts ensuring that the 'obligation will only be so onerous as the party can fairly be expected to bear in all the circumstances.'[119] In this instance, the size of the obligation is managed by the giving the employer an opportunity to justify their conduct.[120] This mechanism limits the burden placed on the employer. Overall, I would argue that the new implied obligation could be considered a 'workable principle in practice.'

B) Would the implied obligation be a 'sound development' of the common law?

Lord Steyn's final conclusion with regard to the IOMTAC was that its emergence was a 'sound development'.[121] Is the implication of a term protecting human rights a 'sound development' in the usual style of the common law? What conclusions might the courts reach when asked to imply a term of this kind? Several factors could be considered in favour of the argument that an implied term of the suggested kind is simply an evolution of the existing common law on implied terms in contracts for work. Other terms have been implied into the contract of employment in the recent past without raising the objection that they are creating a new cause of action. In 1992, the House of Lords implied a term that employers should make employees aware of valuable rights that they are entitled to,

[118] *Crossley v Faithful & Gould Holdings Ltd* (n 100) [43].

[119] Peden (n 86) 473.

[120] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 197-8.

[121] *Malik v BCCI* (n 23) 46.

where no other way of discovering the right exists.[122] The implied term of mutual trust and confidence was confirmed by the House of Lords in *Malik* in 1998.[123] The implied obligation similarly amounted to a general standard of behaviour, of a kind that had not been imposed on employers before in their dealings with their staff. It could be argued that these terms that have been more recently implied show that the law of the contract of employment is still evolving. In addition, there is no clear judicial resistance to the implication of a term protective of human rights. There is no statement that the common law does not protect the human rights of workers. A statement of this kind – that the law did not contain a tort of invasion of privacy[124] – held back developments in line with Article 8 in the breach of confidence tort. On the contrary, the statutory law surrounding contracts for work is influenced by, and reflective of, human rights concerns[125] and themes that could develop into a concern for human rights have been seen already in the IOMTAC.[126] Furthermore, the implication of a term of this kind would be considered 'sound' on the ground that it contributes towards the fulfilment of the UK's positive obligations under the Convention.[127] This factor may weigh particularly heavily on the courts if the claimant before them has no other opportunity to be heard by a court. This perspective would see the suggested implied term as closer to a common law incremental step than a new cause of action.

Despite these arguments, I would argue that it is unrealistic to expect the courts to imply a new term in law in order to protect human rights. This assessment is based upon two main reasons. First, I anticipate that the courts would believe that there is no need to

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[122] *Scally v Southern Health and Social Services Board* (n 82).

[123] *Malik v BCCI* (n 23).

[124] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [35].

[125] See Chapter 3, Section II.

[126] See Chapter 7, Section I.

[127] In particular, it would be a straightforward way to comply with the judgment in *Pla v Andorra* (n 17) discussed above.

create a new implied term. The judges may believe that the implied term would add nothing to the existing statutory framework, such as TULR(C)A 1992 and the Equality Act 2010, once combined with the framework read into unfair dismissal law by Lord Justice Mummery in *X v Y.* The courts would be likely to take the stance that the law of unfair dismissal provides a sufficient remedy for any infringement that has occurred. On this view, a new implied term is not 'necessary' or 'reasonable' or 'fair'.[128] The claimant might argue that the statutory cap, or other limiting factors within unfair dismissal law, means that they need a second route to damages through the common law. But the courts are particularly reluctant to engage in implication of terms where the burden upon employers is perceived as 'unreasonable'.[129] Holding employers liable for further sums on top of the £83,000 available in unfair dismissal law would be perceived as overly onerous and excessive. Unless the facts of the case were clearly outside the scope of unfair dismissal law's protection, the claimant would have a very difficult task in convincing the courts that the implication of a new obligation was justified.

The second factor is that the courts are unlikely to perceive the implied term as an incremental development of the common law. Whilst the implied term of mutual trust and confidence might be cited as an example of a significant development for the common law in this area, two further points should be noted regarding this implied obligation. First, it was generated in response to a unique interaction between the statutory and common law regimes of dismissal protection. The statutory concept of constructive dismissal was held to require a breach of contract by the employer.[130] Very few express terms regulated the employer's managerial behaviour, so an implied term was required in order for the employee to be able to resign and claim unfair dismissal law's protection. In essence, its

[128] *Crossley v Faithful & Gould Holdings Ltd* (n 100) [36].

[129] Ibid [43].

[130] *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761.

origins were unusual - its existence does not demonstrate a general rule that the courts will readily imply generalised obligations into all contracts of employment. Secondly, the operation of the implied term has been stymied recently by conservative judicial decisions. In *Johnson v Unisys*, it was held by the House of Lords that, where the implied obligation was breached by the manner of dismissal, the damages at common law that the individual would otherwise have received will not be recoverable.[131] In Lord Hoffman's opinion, granting a remedy for a dismissal that amounted to a breach of an implied term would not be 'wise': '[i]t is not simply an incremental step from the duty of trust and confidence' and, as a result, such a step is 'better left to the legislature.'[132] The decision in *Johnson* led to other regressive decisions, depriving employees of the protection of express contractual terms in an unprecedented manner.[133] *Johnson* indicates that the senior courts are deeply cautious in developing the terms of the contract. If allowing a longstanding term to be actionable in damages in accordance with normal contractual principle is perceived as going beyond an 'incremental step' in the common law, I would seriously question the likelihood of the implication of an entirely new term that protects human rights.

The evidence gleaned from the operation of the IOMTAC is supported by other attempts to imply terms into the contract of employment. The courts' response is universally cautious. In *Crossley v Faithful & Gould,* the court refused to imply a term that the employer should take reasonable care of the financial well-being of their employees.[134] It was considered to impose an unfair burden on the employer and to lead to a variety of practical problems. In the cases where the claimant has been successful in arguing for implication, the courts have kept the obligation tightly defined and narrowly applicable to

[131] *Johnson v Unisys Ltd* (n 80).

[132] Ibid [47].

[133] See *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* (n 109).

[134] *Crossley v Faithful & Gould Holdings Ltd* (n 100).

a small sub-group of contracts of employment. In *Scally v Southern Health*, the court adopted the narrowest possible formulation of a term – limiting its implication to contracts that have been collectively negotiated and confer a valuable right that is contingent upon a particular action being taken by the employee, but which the employee cannot reasonably be expected to be aware of.[135] Only then will the employer have an obligation to take reasonable steps to bring that right to the employee's attention. In *Spring v Guardian Assurance*, the court chose to formulate an implied obligation that, in professions where references are required to obtain work, the employer will provide a full and frank reference in reasonable time.[136] This term could have been phrased as a more general duty to take reasonable care of the financial well-being of an employee,[137] but the courts refused to imply this broad duty. The courts appear to resist taking large steps by implying strong and generalised duties into wide subsets of the contract of employment.

How does this background information affect the probability of the courts accepting the implication of a new term demanding respect for an employee's human rights? I would argue that the probability is very small. It goes well beyond an incremental step in the common law in a number of ways. We might first examine whether the courts could minimise the gravity of the change by restricting its operation to a smaller subcategory of contracts of employment, as in *Spring* and *Scally*. This would be a nonsensical move as all individuals are entitled to the protection of human rights.[138] Any restrictive rule preventing all employees from gaining the term's protection would be liable to challenge. In terms of content, one might argue that employment law already recognises a number of human rights claims and therefore the implication of a similar term through the contract is a fairly

[135] *Scally v Southern Health and Social Services Board* (n 82) 781.

[136] *Spring v Guardian Assurance plc* [1994] ICR 596, 647.

[137] See the commentary of Lord Justice Dyson in *Crossley v Faithful & Gould Holdings Ltd* (n 100) [40].

[138] See Chapter 4.

minimal change. However, all of the protection referred to has been put in place by statutory mechanisms, leading to a reasonable belief that choosing the means to safeguard the employee's human rights at work might be most appropriately done by Parliament. In addition, cases such as *Ahmed v Amnesty International* and *Grant v South West Trains* show that there is deliberate divergence between the implied content of the contract of employment and human rights norms.[139] An implied term driven by human rights concerns would take the common law into new territory, recognising rights and interests that are currently alien to it. As a result, the implication of a new term along these lines might be considered to fall foul of the principle articulated by Baroness Hale when answering the question 'where should judges fear to tread?'

> 'Never say never, but I think that the judges are unlikely to create an entirely new cause of action… This they would now regard themselves as institutionally incompetent to do, even if they might on occasions have done so in the past, when Parliament was less active and there were no Law Commissions to show how it should be done.' [140]

Summary

Although the capacity of the courts to read contracts in a manner respectful of the individual's human rights has been proved, it is not exercised consistently. Whilst implied terms offer an alternative solution to the problem of how to protect human rights at work, the likelihood of this form of protection being developed is uncertain. With regard to the implied term of mutual trust and confidence, the current content of the term has little to do with providing substantive human rights protection. In addition, despite the potential for a claimant to put forward a strong argument under the HRA 1998 and the state's positive obligations under the Convention, it is likely that the courts would consider the existing range of protection for human rights at work sufficient to keep the UK within its margin of

[139] Discussed further in Section II(F) above.

[140] Baroness Hale, *Legislation or judicial law reform: where should judges fear to tread?* (Annual Society of Legal Scholars Conference, 7 September 2016) 17-18.

appreciation. Galvanising the courts into action under the existing obligation of mutual trust and confidence would thus be difficult.

An argument for the second route, implying a new term in law requiring that employers should not unjustifiably infringe the human rights of their workers, would be likely to be met with similar reasoning. The development would be considered neither sufficiently necessary or sufficiently incremental to be accepted by the courts. In addition, Chapter 8 will argue that contractual mechanisms are not best suited to offering strong protection for human rights. This analysis reinforces the argument that a new implied term would not be a sound development of the common law of the contract of employment. However, this conclusion must be subject to a significant caveat. If Parliament remains inactive in this area and individuals who have suffered an infringement of their human rights have no other opportunity to gain a remedy, then the courts have an obligation to develop the law. This evolution could occur through adding a further element to the existing implied obligation, through an interpretive exercise as in *Smith* or via the creation of a new specific obligation. This possibility was possibly recognised by Lord Hoffman in a cryptic comment in his famous judgment in *Johnson:*

> 'Employment law requires a balancing of the interests of employers and employees… *Subject to observance of fundamental human rights,* the point at which this balance should be struck is a matter for democratic decision.'[141]

[141] *Johnson v Unisys Ltd* (n 80) [37].

Chapter 8
Should Human Rights be protected through contractual means?

Even if contractual interpretation or implication could be used to protect the human rights of workers, questions remain whether this would be a desirable means to protect those rights. There are a number of benefits of using contractual means to protect human rights. One of the key benefits of this route to the protection is that protection of the common law extends beyond a dismissal to other forms of detriment that may also be in breach of contract. So, for example, Mr Smith was demoted and suffered a significant salary cut and Ms Ahmed was refused a particular role within Amnesty International for discriminatory reasons.[1] These individuals would fall outside the scope of the protection of unfair dismissal law. Similarly, unfair dismissal law excludes workers with under two years' service,[2] whereas the common law could provide protection from the commencement of the relationship. Another benefit of the common law is its remedial range. Although the most common remedy is damages, the common law courts are able to issue an injunction to prevent a breach if it is ongoing.[3] An injunction is not available in unfair dismissal law and it may be useful for claimants who wish to remain in their employment but are being subjected to disciplinary procedures in breach of contract. These benefits are significant and should not be dismissed. But problems remain. The common law gives protection from 'day one' but only to those who are employees under a contract of employment. This is a narrow category, particularly when contrasted with the universal and inclusive approach

[1] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2012] All ER (D) 201 and *Amnesty International v Ahmed* [2009] ICR 1450.

[2] Employment Rights Act 1996, section 108.

[3] *Irani v Southampton and South West Hampshire HA* [1985] ICR 590 and *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] 1 All ER 943.

taken by the Strasbourg Court, as explained in Chapter 4. Many vulnerable groups in need of human rights protection, such as casual workers and workers in the gig economy, do not benefit from the protection of the common law of the contract of employment.

Following recent Supreme Court authority with regard to the IOMTAC, one might also question the remedial effectiveness of the common law. The House of Lords held that the IOMTAC will not be actionable in damages if the dismissal constitutes the breach of the implied obligation.[4] If this applied to a human rights claim under the IOMTAC, it would severely hinder the capacity of the law to provide an effective remedy. The second and third section examine in more detail the relationship between the contractual context of the common law and principles of Convention law. There is very real prospect that employers would use their bargaining power to attempt to contract out of or waive their human rights duties under an implied term. This could be through the insertion of a contradictory express term or by avoiding the implication altogether by designing the arrangement so that it is not one of 'employment'. I predict that such efforts could be met with success in the domestic courts, but any contracting-out is unlikely to meet the high level of scrutiny currently used in Strasbourg with regard to waivers of Convention rights. Finally, there is the possibility that contractual terms or powers associated with the employment relationship would restrict the exercise of rights or infringe them directly. I observe that the ECtHR is usually alert to any such limitations and examines them thoroughly. In contrast, the domestic courts and tribunals often defer to the employer's assessment of the situation, in place of a full proportionality assessment, or fail to recognise that a human rights infringement has occurred at all. This chapter shows that the common law of implied terms is not an appropriate mechanism for safeguarding the human rights of workers.

[4] *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518

I. The limitations of mutual trust and confidence

Adapting a pre-existing mechanism for a new purpose brings challenges. Firstly, although a remote risk, one might be concerned that the implied obligation is *reciprocal* in its protection.[5] In theory, if the employee's protection is boosted, mutuality might demand that the employer's is increased to match. [6] In terms of remedies, the common law is not generous. Contractual damages entitle the claimant to the sum they would have had if the contract had been correctly performed. In cases of wrongful dismissal, the contract usually contains a short notice period, after which the employer could lawfully have terminated the contract. Successful claimants may therefore only be entitled to lost wages for a period of four weeks. It was the operation of this rule that resulted in Mr Smith receiving only £98 in damages:[7] the difference between his managerial salary and his reduced salary for a period of four weeks, after which the employer lawfully could have reduced his salary. In addition, *Addis v Gramophone* remains authority for the principle that damages for anxiety, frustration or disappointment as a result of the fact or manner of dismissal are not recoverable.[8] Although psychiatric injury is now recoverable,[9] mitigating the worst effects of this rule, this aspect of the common law is firmly out of line with Strasbourg. The ECtHR may award damages covering anxiety, humiliation or distress,[10] which goes well beyond the scope of the common law's remedial capacity.

More serious remedial limitations would be placed upon the common law's capacity to vindicate an individual's human rights by the *Johnson v Unisys*[11] decision and

[5] *Malik v Bank of Credit and Commerce International S.A.* [1998] AC 20, 45 (Lord Steyn).

[6] Douglas Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 ILJ 79, 102.

[7] *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch).

[8] *Addis v Gramophone Company Ltd* [1909] AC 488, 491.

[9] See *Gogay v Hertfordshire County Council* [2000] IRLR 703.

[10] See Chapter 6, Section IV.

[11] *Johnson v Unisys Ltd* (n 4).

its successors.[12] From these cases, a controversial set of principles arise regarding whether a claimant can recover any damages for a breach of the implied obligation. If it is the manner of dismissal that breached the IOMTAC, the claimant will not receive any damages.[13] This has been termed the '*Johnson* exclusion zone'. The majority of the court felt that allowing a claimant to recover unlimited damages at common law would permit them to circumvent the limitations placed upon the statutory claim by Parliament, amongst other reasons.[14] The subsequent case of *Eastwood v Magnox* confirmed, however, that causes of action that accrue before a dismissal takes place remain actionable.[15] So, for example, if a claimant sustained damage as a result of the manner of their suspension or other actions of the employer, they would still have an action for damages. However, if the employee were making a claim on the basis that an express term of the contract had been breached by the employer's conduct, this is not actionable in damages. This 'unique'[16] remedial rule was introduced by Lord Dyson in *Edwards v Chesterfield.*[17] The 'exclusion zone' created in *Johnson* also applies to constructive dismissals – instances where the employee repudiates the contract in response to a breach of contract by their employer. Lord Nicholls stated that '[t]he statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute.'[18] In order to get common

[12] *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 AC 503 and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* [2011] UKSC 58, [2012] 2 AC 22.

[13] *Johnson v Unisys Ltd* (n 4).

[14] Ibid 544 (Lord Hoffman).

[15] *Eastwood v Magnox Electric Plc* (n 12) 528.

[16] Alan Bogg and Hugh Collins, 'Lord Hoffman and the Law of Employment: The Notorious Episode of Johnson v Unisys Ltd' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffman* (Hart Publishing, 2015) 196.

[17] *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* (n 12).

[18] *Eastwood v Magnox Electric Plc* (n 12) 528.

law remedies for a breach of the implied term, an individual has two options: affirm the contract and make a claim whilst still employed or prove that the employer's actions were independent of the dismissal. Only in these two narrow situations would the common law offer any kind of effective remedy.

If the IOMTAC was extended in order to offer protection for the human rights of employees, these remedial limitations could seriously impinge upon its ability to offer any effective remedy to claimants. The claimant might be able to argue that an exception from the principles in *Johnson etc.* ought to be made to permit them to receive financial compensation. It is difficult to predict how this argument would be received by the courts. It may depend on whether the claimant has already received substantial financial compensation through an unfair dismissal claim, making their argument for an exception less urgent. In addition, the constitutional concerns that appear to underpin the developments thus far may be different once an additional public policy concern - the need to protect against human rights infringement and offer a remedy where they occur – is added to the courts' considerations. The outcome would turn upon whether the courts perceive Parliament as intending the law of unfair dismissal, with its in-built limitations, to be the sole vehicle for human rights claims, particularly when it is read in light of the Convention in accordance with section 3 HRA. If the courts followed this reasoning, the '*Johnson* exclusion zone' would be carried forward into and apply to the developing human rights elements. This would severely stunt the capacity of the common law to act as a vehicle for the full and effective vindication of the fundamental rights of the individual.

II. Contractual waivers of Convention rights and implied terms

Roger Rideout observed that '[t]he obvious weakness of any attempt to regulate contractual terms by the mechanism of contract is the existence of the veto which either party must be

able to exercise over that external control.'[19] It has been observed many times that, due to their superior bargaining power, the only effective veto is possessed by the employer. It is exercised by inserting terms that are inconsistent in content with the particular regulatory attempt. How does this point play out in the human rights context? Could employers successfully enforce a term that purports to exclude the operation of an implied obligation that is protective of human rights? This section commences with a discussion of how Strasbourg examines potential waivers of Convention rights and assesses both the derogability of the IOMTAC and the new implied term.

A) Strasbourg's principles regarding waiving a Convention right

The issue of waiving a Convention right mostly appears within the context of Article 6 and whether a criminal defendant has waived their right to claim an aspect of their fair trial rights.[20] In disputes regarding the employment context, the argument is raised rarely[21] and usually unsuccessfully. The Court has placed the threshold understandably high before it will agree that a right has been waived. In *DH v Czech Republic*, the applicants challenged the authorities' method of testing the learning needs of school children, which resulted in a disproportionate number of Roma children being placed in an alternative stream of education. These children were provided with a reduced curriculum and there was little chance that the children would join the mainstream system in the future. One of the government's arguments was that the Roma parents had consented to their child's placement into a special school. The Court reiterated its principles:

[19] Roger Rideout, 'Implied Terms in the Employment Relationship' in Roger Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth Publishing, 1996) 125.

[20] See, for example, *Jones v United Kingdom* (2003) 37 EHRR CD269 and *Pfeifer v Austria* (1992) 14 EHRR 692, [37]-[38].

[21] For example, in two other employment cases, *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 and *Martínez v Spain* (2015) 60 EHRR 3, the government might have argued that the applicants had waived aspects of their fundamental rights by signing a contract of employment. Waiver arguments were absent in both.

> 'In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify… a waiver of the right not to be discriminated against. However, under the Court's case law, the waiver of a right guaranteed by the Convention—in so far as such a waiver is permissible—must be *established in an unequivocal manner*, and be given *in full knowledge of the facts*, that is to say on the *basis of informed consent* and *without constraint*.'[22]

The Court expressed concern that informed consent had not been given by signing 'a pre-completed form that contained no information on the available alternatives', with incomplete information provided by the authorities and a lack of awareness of the consequences of their signature for their children's future.[23] On these grounds, the Court refused to accept that a waiver had taken place.

In the employment context, this reasoning would indicate that the employer would have to engage in an extensive explanation of the effects of and alternatives to signing a waiver before the Court would consider a waiver to be effective. Such an explanation may make the 'without constraint' criterion difficult to satisfy, particularly if the only other option is not accepting the job and becoming or remaining unemployed. Gillian Morris has argued that any threat of dismissal or other detriment because of a worker's refusal to waive a right would amount to constraint and a resultant waiver of a Convention right should not be considered effective.[24] Oliver agrees, discussing consent to surveillance in particular, arguing that if the privacy-invasive practices are part of the contractual package, '[n]ot only might employees thereby be encouraged to agree to practices which are not in either their own or society's best interests, but the dynamics of the employment relationship may mean that employees actually have no real choice but to agree in any event.'[25] If employees can be said to have 'no real choice' regarding whether or not to sign a contract, Convention

[22] *DH v Czech Republic* (2008) 47 EHRR 3, [202] (emphasis added).

[23] Ibid [203].

[24] Gillian Morris, 'Fundamental Rights: Exclusion by Agreement?' (2001) 30 ILJ 49, 54.

[25] Hazel Oliver, 'Email and internet monitoring in the workplace: information privacy and contracting-out' (2002) 31 ILJ 321, 333.

principles would dismiss any waiver included in a contract between employer and employee.

The Court's judgment in *Markin v Russia*[26] emphasised a further aspect of their considerations of a potential waiver of Convention rights. It was argued that a serviceman complaining of sex discrimination in the availability of parental leave in the military had waived his Article 14 rights. The Court stated that

> 'As regards the Government's argument that by signing a military contract the applicant had waived his right not to be discriminated against, the Court considers that, in view of the fundamental importance of the prohibition of discrimination on grounds of sex, no waiver of the right not to be subjected to discrimination on such grounds can be accepted as it would be *counter to an important public interest*.'[27]

Despite writing long before this case was decided, Morris made a similar argument: some rights are 'so fundamental to a democratic society that their application should not be susceptible to exclusion by agreement.'[28] *Markin* shows the ECtHR develop a similar line of argument and apply it to the right not to be discriminated against on the grounds of sex. The considerations set out here, and the Court's overall reluctance to find that a right has been waived, are also present in judgments regarding other Convention rights.[29] These decisions indicate that, in the national context, employers should not be permitted to require employees to contract out of their fundamental rights, as this runs contrary to an important public interest in retaining respect for those same rights.

B) Displacing the implied term of mutual trust and confidence

[26] *Markin v Russia* (2013) 56 EHRR 8.

[27] Ibid [150] (emphasis added).

[28] Morris (n 24) 55.

[29] See *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10, [146]; *Eweida and others v United Kingdom* (2013) 57 EHRR 8 in *Ladele* at [106] and *McFarlane* at [109] and *Schüth v Germany* (2011) 52 EHRR 32, [71].

Can employers completely displace the operation of the IOMTAC? Mark Freedland has observed that the answer to this lies in the source and nature of the implied obligation.[30] If the IOMTAC is a term like any other implied term, any expressly contradictory term would prevent its application in a particular case. For example, in a case decided in 1998, *Grant v South-West Trains*,[31] the contract contained an express provision defining 'common law spouse'. The High Court refused to enforce the employer's equal opportunities policy through the IOMTAC because it would 'override' the express provision in the contract.[32] This accords with what Lord Steyn termed the 'orthodox view' of the implied obligation: '[it] may be displaced or qualified but only by express agreement or necessary implication'.[33] This orthodox view was affirmed by the Privy Council in *Reda v Flag Ltd*, decided shortly after *Johnson*.[34] Lord Millett stated that the IOMTAC 'must yield to the express provisions of the contract.'[35] As a result, their Lordships held that an express contractual power to dismiss without cause could not be qualified by the implied obligation of trust and confidence.[36] If this is the prevailing view of the IOMTAC, then the implied obligation would be an unsuitable vehicle for human rights protection. Employers would be able to insert any term inconsistent with the application of the implied obligation in a given scenario, such as a disciplinary or grievance procedure. This insertion would displace the protection of the worker's human rights. In effect, it would operate as a waiver of the employee's Convention rights. Such a situation is contrary to all of the Convention principles laid out above: being established unequivocally, with informed consent of the

[30] Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 164.

[31] *Grant v South-West Trains Ltd* [1998] IRLR 188.

[32] Ibid [19], [20].

[33] *Johnson v Unisys Ltd* (n 4) 532.

[34] *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747, [44] onwards.

[35] Ibid [45].

[36] Ibid [52].

parties given without constraint and without running contrary to an important public interest.

Reda v Flag has not been warmly received in the English cases on the contract of employment.[37] The view that Lord Millett put forward has been challenged, using varying degrees of ambiguity, in other *dicta*. For example, in his dissent in *Johnson*, Lord Steyn stated that the IOMTAC 'requires *at least* express words or a necessary implication to displace it or to cut down its scope.'[38] Lord Steyn left it unsaid that, in some cases, even an express term will not be sufficient to displace the IOMTAC. Mark Freedland postulates that the *Johnson* decision may evidence that an alternative view of the implied obligations of mutual trust and confidence has come to the fore.[39] Freedland has argued that the preferable view of the implied obligation of mutual trust and confidence is that it is 'so inherent to the core concept of the contract of employment as to be incapable of exclusion from that contract.'[40] This view has found scholarly support,[41] but has not been explicitly judicially approved. If proved to be correct, this alternative view of the implied term would make it a more suitable mechanism for providing protection for human rights that cannot be straightforwardly waived or displaced.

Yet we must consider an alternative way that employers could easily avoid the obligation. Bob Hepple, in arguing that some principles should be non-derogable in the contract of employment, noted that any attempt to derogate from these basic principles would indicate that the contract was something other than a contract of employment.[42] If

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[37] In *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942, it was distinguished at [49]-[50]. *Reda* was not mentioned in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* (n 12).

[38] *Johnson v Unisys Ltd* (n 4) 536 (Lord Steyn) emphasis added.

[39] Freedland (n 30) 164.

[40] Ibid 166.

[41] See Brodie (n 6) 86.

[42] Bob Hepple, *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell, 2005) 62.

accepted, this idea is one that employers would almost certainly exploit in order to evade their obligations. More generally, the implied obligations of the contract of employment are only implied into contracts that are classified as ones of employment. As Brodie commented in 1998, employment practices that remove job security – and to this we might add other indicators of a contract of employment such as the personal service requirement – are 'rife' and 'constitute the most radical form of contracting-out of fundamental obligations.'[43] Although the courts are increasingly tackling sham contractual terms that attempt to falsely classify individuals as independent contractors,[44] some workers who need the protection of the implied terms may nevertheless remain unprotected. This mechanism of derogation is more pervasive and would be more threatening to the effective exercise of human rights in the workplace, going unexplained and unchallenged by many workers.

C) Would a new term be derogable?

If an independent term is implied by law to offer protection for the human rights of workers, a bold employer may attempt to insert a clause that excludes its operation. This is one benefit of the law of unfair dismissal. Express terms that attempt to deprive an employee of their right to claim unfair dismissal are void.[45] This feature of the law is certainly in accordance with the mandatory and non-negotiable nature of human rights. Ensuring that the implied terms that offer protection to the individual's human rights are similarly guaranteed would be a significant benefit. If the implied terms are straightforwardly excluded, this would undoubtedly amount to an attempt to waiver rights that would not be in accordance with the requirements set out in the Convention's case-law. In particular, as

[43] Brodie (n 6) 102.

[44] See *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745.

[45] ERA 1996, section 203(1).

mentioned above, one might question whether an employee can really appreciate without further explanation what it means to sign away their human rights in the employment relationship – therefore leading us to query their informed consent – and also whether they sign any employment contract without any constraint or sense of pressure upon them. If a new term was created judicially in order to protect human rights, could it be entrenched sufficiently that employers could not simply insert an exclusionary term into their contracts? The capacity of the term to be excluded would be a crucial to the standard of protection that it offers to individuals.

Although the argument has not been tested before a court, it appears that permitting the exclusion of an entitlement to human rights protection goes against public policy more generally. There is no general principle in contract law that terms contrary to public policy will not be enforced by the courts. However, there are pockets of cases motivated by this idea. In the US, the Supreme Court refused to give effect to a restrictive covenant that prohibited occupation by 'any person not of the Caucasian race'.[46] This covenant was held to be in breach of the constitutional guarantee of equal protection before the law and the court refused to enforce a term that ran against this fundamental right. Terms that amount to a restraint of trade will not be enforced. This is held up in *Treitel* as an instance of a contractual term being unenforceable for reasons of public policy.[47] If one considers the right to work in a chosen occupation as a fundamental right,[48] the doctrines tackling excessive restraint of trade are an instance in which the courts refuse to enforce a waiver of a fundamental right.[49] Elsewhere, the illegality defence is clearly driven by the public

[46] *Shelley v Kraemer* 334 US 1, 68 SCt 836 (1948).

[47] Edwin Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell, 2015) [11-032].

[48] The Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Article 15.

[49] This is how they are classified on the continent: see discussion of cases of this kind in Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International, 2008).

policy desire to maintain consistency across the legal system and to prevent individuals from profiting from their wrongdoing. Similarly, the courts will not enforce contracts that are contrary to the mandatory laws of another jurisdiction.[50] The courts have expressly stated that this principle is based upon public policy.[51] Implied obligations, such as the duty imposed upon employers to provide a safe place of work or that require employer and employee to maintain the trust and confidence of the other, might also be seen as a contractual reflection of public policy concerns. In addition, Douglas Brodie highlights Lord Denning's judgment in *Lee v Showmen's Guild*: '[a]lthough the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy.'[52] In particular, his Lordship referred to the need to ensure the principles of natural justice are followed. Douglas Brodie uses this case to support his suggestion that the courts should take an approach based directly upon public policy when considering whether employers should be permitted to contract out of implied terms.[53] Once created, I would argue that there are exceptionally strong reasons of public policy that dictate that the employer should not be allowed to exclude a term requiring that they respect the human rights of their employees. As in *Shelley v Kraemer,* the American case concerning a discriminatory restrictive covenant, the court's action in enforcing such a term would be in contravention of the Human Rights Act. Section 6 states that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Enforcing a deliberate evasion of a duty to respect an individual's Convention rights appears to me to be a serious breach of section 6 by a court.

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[50] *Foster v Driscoll* [1929] 1 KB 470.

[51] *Regazzoni v K. C. Sethia Ltd* [1958] AC 301, 318-9.

[52] *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

[53] Brodie (n 6) 84-5.

A specific method by which the courts could give effect to this public policy argument is by severing the exclusion term from the remainder of the contract. The exclusion term could then be deemed unenforceable. The authors of *Chitty on Contracts* deduce that there are two principles that guide the courts in severing a particular term and allowing a party to enforce the remaining contract.[54] The courts will not rewrite the parties' contract or alter its essential nature and they will not sever the unenforceable parts of the contract unless such a step is in accordance with public policy.[55] Severance of a term that denies respect for the worker's human rights would not change the character of the contract[56] – a wage-work bargain – and courts have consistently severed other unlawful aspects of contracts of employment without issue. For example, unlawful attempts to restrain the employee's exercise of their trade are separated consistently from the rest of the contract.[57] The rest of the contract remains capable of operation and its fundamental character is not altered. The second public policy requirement can be fulfilled. It would be against public policy to permit employers to deliberately derogate from human rights protection if it had been made available through the common law. Evidence that protection of human rights should be considered an important public policy factor can be found in *Hounga v Allen.*[58] The defence of illegality similarly 'rests on the foundation of public policy'.[59] Lord Wilson referenced the public policy in favour of the protection of victims of trafficking, in line with Article 4 ECHR, as the policy objection most relevant to the case.[60] But broader concerns regarding the protection of individuals' human rights should

[54] Hugh Beale, *Chitty on Contracts* (32nd edn, Sweet & Maxwell, 2015), [16-213].

[55] Ibid.

[56] *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388, [19].

[57] See, for example, ibid.

[58] *Hounga v Allen and another (Anti-Slavery International intervening)* [2014] UKSC 47, [2014] 1 WLR 2889.

[59] Ibid [42].

[60] Ibid [52].

be considered an important aspect of public policy that can be drawn upon in contract law disputes. This supports the argument that any term derogating from an individual's human rights should be severed on public policy grounds.

III. Shaping the exercise of fundamental rights via contract

The final issue that might lead one to question the desirability of contractual protection of human rights is the ability of employers to use a contract to restrict or otherwise shape the exercise of Convention rights in the workplace. Gillian Morris observes that 'contracts may contain obligations which have the effect in practice of preventing a particular individual's enjoyment of these rights.'[61] This section will present how the Strasbourg court approaches such attempts and contrast it with a domestic perspective on similar issues.

A) The Convention's approach to contractual restrictions

The contractual practices to which Morris refers are particularly prominent in relation to surveillance or monitoring in the workplace. In *Halford v UK,*[62] Ms Halford, an Assistant Chief Constable, brought proceedings against her employer for sex discrimination. During the course of those proceedings, she was provided with a phone in her office which she was told she could use for the purposes of her sex discrimination case. She later believed that her phone calls on this private phone were monitored and argued that this amounted to a breach of her Article 8 rights. Finding that there had indeed been an infringement, the ECtHR found that she would have had a 'reasonable expectation of privacy' regarding her calls.[63] She was not warned of the possibility of interception, the phone was for her private use and she was assured by her employer that she could use that phone for purposes relating

[61] Morris (n 24) 58, argument further developed by Hazel Oliver in Oliver (n 25) 330-331.

[62] *Halford v United Kingdom* (1997) 24 EHRR 523.

[63] Ibid [45].

to an ongoing discrimination case.[64] As a result of these factors, a reasonable expectation of privacy arose and the phone calls she made were within the scope of her private life and correspondence. Whilst the decision was beneficial to Ms Halford, the reasoning has the potential to cause problems for other workers. Hazel Oliver argues that 'if an employer makes it clear that such activities are not regarded as private, for example by implementing privacy-invasive policies and practices, any right of privacy in the workplace no longer exists as a result of simple exercise of management prerogative.'[65] This state of affairs could have resulted in a very narrow realm of privacy in the workplace being granted to employees.

In a recent case, the ECtHR appears to have reversed its position. In *Bărbulescu v Romania*, the Grand Chamber heard the complaint of a sales engineer who had been dismissed after the employer had monitored his communications during working time and found that he was using his computer for personal use. This use was contrary to the employer's regulations and a recent notice that was circulated around the office regarding the rules prohibiting personal use of computers. The notice also warned that monitoring may take place and that the sanctions for breaching the policy included dismissal. Mr Bărbulescu had signed the notice and also denied in a meeting that he had used the computer for personal use. He was subsequently told that his employer had monitored the content of his messages, which Mr Bărbulescu believed to be a criminal offence. The national courts held that his dismissal was lawful as the employer had a right to monitor the use of their computers and this monitoring had been drawn to the attention of the employees. Mr Bărbulescu made a complaint to Strasbourg that Romania had failed in its positive obligations under Article 8.

[64] Ibid [45], see Oliver (n 25) 336.

[65] Oliver (n 25) 336.

The important discussion for these purposes was in relation to whether the monitoring fell within the scope of Article 8. The government argued that Mr Bărbulescu had no reasonable expectation of privacy, as he had failed to tell the employer that some of his messages were personal during the internal proceedings and he had been informed of the company policies and of the ongoing monitoring.[66] The ECtHR held that an individual's reasonable expectation of privacy 'is a significant though *not necessarily conclusive* factor'.[67] Whilst Mr Bărbulescu had been informed of the ban on personal internet use, the Court held that it was not entirely clear that he had been informed of the monitoring before it began.[68] Finally, the Court found that he had not been told of the extent or nature of the monitoring or that the employer could access the content of his messages.[69] Concluding, the Court stated that

> '[i]t is open to question whether – and if so, to what extent – the employer's restrictive regulations left the applicant with a reasonable expectation of privacy. Be that as it may, an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary.'[70]

On this basis, the Court found that Article 8 was applicable to Mr Bărbulescu's claim. The ECtHR appears to have minimised the opportunity previously afforded to employers to reduce the breadth of their workers' right to privacy by putting in place restrictive policies and warning them about any future intrusions. This allays the anxieties set out above that arose after *Halford.* The analytical work and balancing of the employer's interests and the employee's right to privacy now takes place within the assessment of the necessity of the interference.[71]

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[66] *Bărbulescu v Romania* [2016] IRLR 235, [65].

[67] Ibid [73] (emphasis added).

[68] Ibid [77].

[69] Ibid [78].

[70] Ibid [81] emphasis added.

[71] See ibid [109]-[141].

How does the Court deal with contractual restrictions upon employees exercising their fundamental rights outside of the surveillance context? What factors may influence the Court in upholding or rejecting an employer's rules? Greater deference has been given to employers' policies that are in place to further the enjoyment of the fundamental rights of others. In the ECtHR's consideration of *McFarlane v Relate*,[72] a couples' counsellor was required to undertake sessions with homosexual couples as well as heterosexual couples, which he claimed went against his Christian beliefs. The most important factor in the Court's considerations was that the employer's rule regarding equal service provision was motivated by a desire to provide services without any discrimination.[73] The importance of the policy pursued by the contractual rules was similarly given weight in *Sindicatul "Păstorul cel Bun" v Romania* and *Martínez v Spain*, where the aim cited was the need to retain the autonomy of religious communities.[74] The Court does scrutinise whether the appeal to the legitimate aim is genuine and whether it is necessary to restrict the exercise of rights by the applicant. The ECtHR stated that

> 'a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient… It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy.' [75]

Another factor that the ECtHR has regard to within the justification framework is duties associated with the particular employment of the applicant. These duties range from the duty of civil servants of political loyalty to the national constitution[76] and the 'the

[72] Heard with three other cases in *Eweida and others v United Kingdom* (n 29).

[73] Ibid [109].

[74] *Sindicatul Păstorul cel Bun v Romania* (n 29) [136]-[138], [160] and *Martínez v Spain* (n 21) [127]-[130].

[75] See *Sindicatul Păstorul cel Bun v Romania* (n 29) [159].

[76] *Vogt v Germany* (1996) 21 EHRR 205.

heightened duty of loyalty imposed on [a Catholic priest] by ecclesiastical law'[77] to the duty of a probation officer to maintain the respect of the offenders he works with and the confidence of the public[78] and the restrictions that may be placed on the exercise of Convention rights where necessary for the 'proper functioning of an army'.[79] The Court does not uncritically accept assertions of such a duty, particularly where the infringement was of a serious nature. For example, in *Smith and Grady*, the Court held that the rules of the armed forces cannot be used to frustrate the exercise of rights by military personnel, who are just as entitled to fundamental rights as others and that 'assertions as to a risk to operational effectiveness must be "substantiated by specific examples".'[80] Similarly, in the context of religious autonomy, the Court requires that national courts conduct an in-depth analysis of whether (a) the risk is 'probable and substantial', (b) the inference does not go beyond what is necessary to eliminate that risk, (c) it does not serve any other purpose beyond preserving autonomy, and (d) the interference should not affect the substance of the right.[81] The Court has made it clear that non-clerical church employees, for example, should be distinguished from a clerical individual who is part of a Church's mission and signing a contract for employment of the former kind 'cannot be understood as an unequivocal personal obligation to live a life of abstinence in the event of a separation or divorce.'[82] Such an understanding would 'strike at the very heart' of the applicant's Article 8 rights.[83]

[77] *Martínez v Spain* (n 21) [119], [131], *Sindicatul Păstorul cel Bun v Romania* (n 29) [168], *Sánchez v Spain* (2012) 54 EHRR 24, [57], [74].

[78] *Pay v United Kingdom (Admissibility Decision)* (2009) 48 EHRR SE2, 25.

[79] *Smith and Grady v United Kingdom* (n 21) [89].

[80] Ibid [89].

[81] *Martínez v Spain* (n 21) [132].

[82] *Schüth v Germany* (n 29) [71].

[83] Ibid.

In most circumstances, the ECtHR pays close attention to restrictions that are understood to be in some way inherent to a particular role or office. Only occasionally could the Court be criticised for inadequate scrutiny of the national government's arguments regarding such duties or requirements. Such instances are usually where the decision is either an initial admissibility decision[84] or in circumstances where the member state is considered to have a wide margin of discretion and the national court made an adequate attempt to balance the various rights and interests.[85]

B) The domestic consideration of contractual restrictions and powers

The domestic courts' approach towards contractual terms that affect the exercise or enjoyment of human rights is deeply variable. Some high points, like *Smith v Trafford Housing Trust*,[86] can be contrasted with many other cases where the treatment of human rights in common law cases is deeply troubling. The case-law demonstrates three particular deficiencies. All three place the domestic approach in conflict with the Strasbourg Court's principles discussed above. First, the courts tend to accept unquestioningly restrictions placed upon the enjoyment of rights by the contract of employment. In *Bărbulescu,* Strasbourg made it clear that employers could not strip away completely their employees right to exercise their fundamental rights. But the UK courts accept this all too easily. Secondly, with echoes of the discussion of unfair dismissal law above, there is a similar tendency to analyse cases without any reference to the employee's human rights at all. Multiple infringements upon those rights thereby go unremarked upon. And finally, if the judge is prompted by argument from counsel, they will begrudgingly consider the claimant's human rights. The examination is never thorough, it never alters the ultimate

[84] *Pay v United Kingdom* (n 78).

[85] See *Martínez v Spain* (n 21) [125], [151].

[86] *Smith v Trafford Housing Trust* (n 1).

outcome of the case and the court almost always agrees with the employer's interpretation and application of the contractual terms. The courts fail to undertake an objective, detailed analysis of the infringement upon the individual's human rights.

Unquestioning acceptance of rights-removing terms

The first point can be demonstrated by reference to a statement by Langstaff J, then President of the EAT, in examining whether the summary dismissal of the claimant in *City and County of Swansea v Gayle* was justified.

> 'It is a feature of an employment contract that an employee is subject to the reasonable direction of his employer. An employer is thus entitled to know where someone is and what they are doing in the employer's time. An employee can have no reasonable expectation that he can keep those matters private and secret from his employer at such a time. To do so would be to run contrary to the contract he had entered with his employer.'[87]

This assertion runs contrary to the most recent consideration of the issue in *Bărbulescu*: 'be that as it may, an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary.'[88] In *Gayle*, the employer had a suspicion that the employee was engaging in leisure activities during working time. The employee was subject to covert surveillance by a private investigator, arranged by the employer, over the course of five weeks. This should have been sufficient to engage Article 8,[89] and therefore the tribunal should have conducted a proportionality analysis of the necessity of the infringement. Following the principles set out in *Bărbulescu*, this assessment should have included consideration of the absence of advanced notification, the intrusiveness of the monitoring, the consequences for the employee and whether there were

[87] *City and County of Swansea v Gayle* (2013) UKEAT/0501/12/RN, [15].

[88] *Bărbulescu v Romania* (n 66) [80].

[89] Contrast the EAT's finding at [23]: 'we do not accept that here there was any breach of art 8(1) so as to require the tribunal to consider the requirements of 8(2) at all' with the ECtHR's finding that covert video recording of an individual whilst at work falls within Article 8's scope and must be justified: *Köpke v Germany* (2011) 53 EHRR SE26, 9.

adequate safeguards in place to prevent abuse.[90] The EAT's attention was mostly upon supporting the employer in achieving the dual aims of crime prevention and protecting the interests of the employer 'whose money was at stake and who had contractual rights in agreement with the Claimant that he would behave in a way in which as it happened he did not.'[91] This approach to contractual issues of breach of contract shows no awareness of the proper scope of privacy protection under the Convention and demonstrates excessive concern for the preservation of the employer's interests.

In *Hamer v Kaltz Ltd*,[92] the claimant raised concerns internally that another employee was being short-changed regarding their pay during a period of absence. She was held to be unfairly dismissed by reason of making a protected disclosure. Her simultaneous wrongful dismissal claim was rejected by the Employment Tribunal because the employer's disciplinary rules stated that her actions were gross misconduct.[93] The tribunal therefore considered her to be lawfully dismissed according to the terms of her contract. As this finding was not appealed, the EAT was unable to reconsider the wrongful dismissal decision. However, the EAT observed that any contractual term that precluded the employee from making a protected disclosure would be void and it commented that 'it is not obvious why an honest, reasonable disclosure of a matter of concern to a line manager would be a repudiatory breach of contract in itself.'[94] Nonetheless, the decision had to be allowed to stand. *Hamer* further demonstrates the failure of ETs to critically assess the content of contractual terms imposed upon employees that have a negative impact on the exercise of the individual's human rights.

The courts' disregard for infringements upon human rights

[90] *Bărbulescu v Romania* (n 66) [121].

[91] *City and County of Swansea v Gayle* (n 87).

[92] *Hamer v Kaltz Ltd* (2014) UKEAT/0502/13, [2014] All ER (D) 136.

[93] Ibid [19].

[94] Ibid [20].

In *Williams v Leeds United,*[95] Mr Williams held a senior position within the football club. In 2013, the management of the Club decided to make him redundant. They simultaneously resolved to find a way not to pay Mr Williams' wages for the lengthy notice period to which he was contractually entitled. Around one month before Mr Williams was told he was going to be made redundant, the Club hired forensic investigators and gave them the task of finding evidence that would justify termination of the contract on the grounds of gross misconduct. This would disentitle Mr Williams from any remuneration during his notice period. The investigators were successful. Upon trawling through the correspondence on his work email account, they found that he had forwarded an email containing pornographic photographs to colleagues at other clubs and one internal member of staff. Mr Williams at the time had found these emails amusing and believed that his colleagues would do so too. The email at issue was sent 5 years and 4 months before the redundancy announcement. No complaints or offence had been caused by the email at the time nor had it been raised as an issue in the intervening period. The day after Mr Williams was informed of his redundancy, he was called into a disciplinary hearing and dismissed without notice on grounds of gross misconduct. Mr Williams brought a wrongful dismissal claim.

The main issue for the High Court was whether forwarding the email amounted to gross misconduct, constituting a fundamental breach of the IOMTAC that entitled the Club to dismiss summarily. The court found that the breach of the implied term was sufficiently serious to warrant summarily dismissal.[96] This finding was made even though the Club's Code of Conduct indicated that such behaviour would be a serious disciplinary matter, rather than gross misconduct. The court disregarded Mr Williams' argument that the employment relationship, having continued for more than 5 years after the incident, was

[95] *Williams v Leeds United Football Club* [2015] EWHC 376 (QB), [2015] IRLR 383.

[96] Ibid [55].

sufficiently robust to survive the discovery.[97] The employer's motives – the Club's prior decision to breach its own contractual obligation and search out a reason for dismissal in its own financial interests – were irrelevant in the court's consideration of whether they could rely on the repudiatory breach.[98] The unfairness and injustice of the situation did not affect the court's findings.[99]

Also failing to enter the court's deliberations was the serious breach of Mr Williams' Article 8 rights. It was established as early as 1993 in *Niemietz v Germany* that professional activities and correspondence are covered by the right to privacy.[100] In *Bărbulescu v Romania,* the Court confirmed that Article 8's privacy of correspondence is not qualified by limiting adjectives – all correspondence from the workplace (letters, telephone calls, information about internet use and emails) are covered by Article 8.[101] *Bărbulescu* also emphasised that member states, whilst exercising their discretion within the margin of appreciation, must ensure that monitoring measures by employers are accompanied by 'adequate and sufficient safeguards against abuse'.[102] This concern did not enter the domestic court's considerations. The same principles would apply to investigations of email communication and 'abuse' of the employer's power may be considered to include steps taken to deliberately deprive Mr Williams of his contractual right to payment in lieu of notice. The courts failed to protect Mr Williams from his employer's abuse of their power. This disregard for Article 8 ECHR has been reflected in

[97] Ibid [67], [68].

[98] Ibid [84].

[99] Ibid [84].

[100] *Niemietz v Germany* (1993) 16 EHRR 97.

[101] *Bărbulescu v Romania* (n 66) [72].

[102] Ibid [120].

other cases regarding intrusive investigations where the employee is suspected of misconduct.[103]

The courts' failure to scrutinize an infringement

Contrary to the principles set out in *Bărbulescu,* the common law courts often perceive the employer's understanding and application of the contract terms as determinative. Upon traditional contract law principles, the courts should adopt its own view of how the term should reasonably be interpreted and applied. Instead, the courts adopt the employer's view of what a contractual term means and fail to assess the proportionality of the infringement that the term permits.

In *McGowan v Scottish Water,*[104] the employer suspected that the employee was working unnecessary hours by generating false call-outs. The employers decided that, instead of putting cameras in the workplace to monitor Mr McGowan, they would hire private investigators to engage in covert surveillance of his home. Mr McGowan's counsel raised the issue of an infringement of his privacy but the EAT nevertheless found in the employer's favour. The court readily accepted the employer's interest in protecting their assets and did not question their choice of watching Mr McGowan rather than placing cameras in the place of work to record his activities.[105] In addition, the court took into consideration that the claimant was dismissed as a result of the surveillance. It has been suggested that taking account of this consideration 'suggests a principle of the "ends justifying the means".'[106] One further concern is that the court noted that the employee lived in a tied-house, owned by the employer, and stated that 'it could at least be argued

[103] See for example *Farnan v Sunderland* [2015] EWHC 3759 (QB), [2016] IRLR 185 at [48] where 28 allegations of misconduct (of which four were proved) were put forward 'each of which was backed by emails and other communications extracted from Mr Farnan's email account and phone.'

[104] *McGowan v Scottish Water* [2005] IRLR 167

[105] *City and County of Swansea v Gayle* (n 87) [23].

[106] Oliver (n 25) 358.

that the tied house was part of the workplace.'[107] This reasoning would leave the individual with no private space, at home or at work, leaving him completely exposed to the employer's powers. This type of reasoning should be rejected outright and would certainly be contrary to Convention principles, which are concerned to preserve the core of each right and protect it from infringement.

Overall, the court did not offer its own objective assessment of the facts and how the contract should have been interpreted and applied. Oliver argues that, in the decision in *McGowan,*

> 'It is far from clear that the test of proportionality, which requires a balance to be struck between the Convention rights of the individual and the interests of the other party involved, was applied in a sufficiently rigorous manner in this case. Although the employer's reasons for the surveillance in this case were not 'whimsical', there may be cases where the employer has good reasons for its actions, but nevertheless has acted in breach of Article 8 because the impact on the individual's privacy rights is too great.'[108]

Comparable instances of dismissive treatment have occurred elsewhere. In *Ministry of Justice v Sarfraz,*[109] the claimant's Facebook page was visited during the course of his disciplinary process. Underhill P passed comment upon the Article 8 arguments raised by the claimant, dismissively noting that 'I do not think it likely that the tribunal will find that any belief on the part of the claimant that this amounted to a breach of his Article 8 rights was reasonable.'[110] The lack of engagement with the necessity of the employer's conduct is very disappointing. In common law cases, the courts are failing to question the employer's judgment or examine the proportionality of any contractual terms that restrict the exercise of an employee's human rights. These cases cast serious doubts over the capacity of the common law to vindicate the human rights of an individual and to become an effective source of protection for the human rights of workers in the future.

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[107] *City and County of Swansea v Gayle* (n 87) 7.

[108] Oliver (n 25) 358.

[109] *Ministry of Justice v Sarfraz* [2011] IRLR 562.

[110] Ibid [41].

Summary

There are ways in which the operation of terms implied into the contract of employment could be adapted in order to provide an effective mechanism for the vindication of an employee's fundamental rights. If the IOMTAC is the source of protection, it could be conceived of as too central to the contract of employment to be excluded from the parties' deal. Similarly, if an independent term is implied, the courts may consider it contrary to public policy to exclude its operation. Finally, the courts – encouraged by the approach of the Strasbourg Court – may become vigilant in examining the content and application of terms that restrict the exercise of fundamental rights by an employee or permit the employer to interfere with those rights.

However, these developments and principles are speculative. The courts could go down a much more conservative and cautious path. The '*Johnson* exclusion zone' and other contractual principles may apply in order to prevent recovery of substantial damages for a breach of the IOMTAC. The implied obligations, even when they are operating in a manner that protects human rights, may be held to be straightforwardly ousted by exclusionary or inconsistent terms. This feature would render implied contractual obligations deeply inadequate as a mandatory safeguard for employees' human rights. In addition, the content of the term providing protection may be affected, restricted or deliberately narrowed by other contractual terms or arrangements between the employer and the employee. This would be particularly problematic if it was combined with the courts' currently deferential attitude towards employers' exercises of their prerogative. The domestic courts maintain, for the most part, an attitude towards contractual disputes that either ignores or dismisses human rights concerns without due consideration. The Strasbourg jurisprudence reveals a wide variety of factors that domestic tribunals should take into account in assessing a private employer's actions and yet their absence is conspicuous in most cases. Even *Smith v Trafford Housing Association,* the best example thus far of a sensitive human rights-based

approach, failed to directly reference ECHR case-law or the provisions of the Human Rights Act.

Chapter 9
A Proposal for Statutory Reform

The preceding chapters in this thesis have conducted a comprehensive review of the insufficiencies of dismissal law's protection of the human rights of workers. Although the initial chapters argued that safeguarding those rights is an important aim of employment law, victims face a series of obstacles in attempting to vindicate their fundamental rights. Chapter 4 exposed the narrow availability of employment law's protection. As a result, large groups of individuals who, whilst subject to the employer's power and prerogative in the same manner as the paradigm employee, are left without recourse to the courts. In Chapter 5 and 6, the current operation of the law of unfair dismissal was examined and found severely lacking. Whilst a framework for scrutinising the proportionality of a decision to dismiss has been established, in practice, it is either omitted completely or applied inadequately. For the few who are successful in their claim, the remedies are arbitrarily limited by the statutory cap and do not include recompense for non-pecuniary loss, an important aspect of the harm of a human rights infringement. Chapter 7 and 8 examined the common law alternative to a statutory claim. Finding that the implied term of mutual trust and confidence is a long distance away from providing human rights safeguards, it was observed that the likelihood of the addition of a new implied term alongside the established list is small. The courts could either see the new term as an unnecessary addition to the suite of existing rights or view it as tantamount to the judicial creation of a new cause of action. In addition, it was argued that this contractual, common law route to protection has a number of other possible drawbacks. The subordination of the implied term to the express term places this form of guarantee at risk of express or implied exclusion. Further the tribunals are ready to defer to the contractual obligations and duties

that place restrictions on the exercise of fundamental rights which would severely curtail the effectiveness of protection via the common law.

In the absence of adequate existing protection for the human rights of individuals in their working relationships, this chapter presents one possible solution to the issue. The chapter suggests the introduction of a Parliamentary Bill that would require employers to respect and act compatibly with their workers' human rights, giving that Bill a relatively detailed design and particularly focusing on how it would apply in practice and how its efficacy could be ensured. The suggestions here take inspiration from anti-discrimination law, employment law statutes and the Human Rights Act. In making these proposals, this chapter draws together many of the themes that have been present throughout this thesis and proposes a novel solution to the issues and inadequacies that have been explored above. At the heart of the statutory framework proposed would be a prohibition along the following lines:

> *'An employer shall not infringe the human rights of its workers, as defined by the European Convention on Human Rights, and in particular it must respect each worker's right to respect for their private and family life, their freedom of thought, conscience and religion, their freedom of expression and their freedom of assembly and association.*
>
> *In accordance with the principles set out in the Convention, where a qualified right has been breached, an infringement will only be justified if it satisfies the requirements set out in this Bill.'*

Importantly, this cause of action would be introduced alongside the existing regulation of the employment relationship. For example, an individual might have both a successful unfair dismissal claim *and* a claim under the Bill.[1]

The chapter will first defend the choice of suggesting a new framework set out in legislation, going on to add detail to the role of the courts and tribunals in interpreting and applying the Bill with a particular focus upon the link between the Bill's provision and the decisions of the Strasbourg Court. It will then present the types of conduct prohibited by

[1] The impact of this possible overlap on the damages available to the claimant will be discussed in Section V.C below.

the Bill, discussing in particular the justification process and other forms of prohibited conduct such as contractual practices that seek to limit or exclude the operation of the Bill. In section IV, the crucial issue of who should be considered to be an 'employer' and a 'worker' within the new statutory framework will be examined. Section V aspects of the operation of the Bill, such as which forum it should be directed to, the remedies that should be made available and the burden of proof, will be outlined.

I. The legitimacy of legislative action and the role of the courts

This section addresses the initial choices that affect the rest of the framework proposed. Before turning to the 'how', the 'what' must be briefly justified. One might wonder why this chapter embarks upon the elaboration of a new statutory framework rather than suggesting a simple amendment to the Human Rights Act that would make employers liable for infringements in the same way as public authorities under section 7. This is for one key reason. This thesis has not attempted to argue that employers should be made subject to all-encompassing duties in the same way as the state. Employers, however, pose such a significant threat to the enjoyment of those rights that they should have tailored and circumscribed duties imposed upon them. Employers' duties under human rights law are not all-encompassing and general.[2] Rather, employers owe duties to those individuals with whom they come into contact *as an employer*, rather than as a business partner or consumer for example. Similarly, the duty only bites where the entity is acting in its capacity as an employer. In contrast, the general rule under the HRA is that public authorities must act compatibly with the Convention at all times and any person may be 'directly affected' by an authority's decision, making them a 'victim' under the HRA.[3] The duties suggested here are therefore narrower in application, making the burden on the duty bearer lighter than

[2] This point draws upon Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 196-200.

[3] Human Rights Act 1998, section 7(1) and section 7(3) referring to European Convention on Human Rights, Article 34.

those that fall upon a public authority under the HRA. Amending the HRA would be an inappropriate method through which to give effect to the proposals made here. This section may now justify the choice of Parliamentary enactment and suggest that an Act of Parliament could be enhanced by a preamble setting out its aims and purpose.

A) A Parliamentary pursuit

To offer a comprehensive and democratically legitimate solution to the issues raised in the preceding chapters, remedial measures must be taken by Parliament rather than the courts. Courts or tribunals, ruling on narrow facts between two particular parties, are not able to enunciate a set of rights in a novel context and establish new mechanisms by which those rights should be enforced.[4] There are many different routes, methods and compromises that could be taken or made in order to protect the fundamental rights of workers. Each may have different benefits, drawbacks and consequences that must be reviewed and carefully taken into consideration. The likely judicial reluctance to reform from the bench would be well justified in this instance.

Enactment by primary legislation also has a number of other benefits. There would be symbolic and expressive importance to the introduction of a piece of primary legislation with the singular aim of providing protection for the fundamental rights of workers. It might be hoped that the process of consensus building around the protection of rights of workers would garner public and political support and encourage the participation of a wide cross-section of civil society groups in the enactment process. Introduction by primary legislation would also make the Bill more difficult for governments of the day to repeal or amend. The necessity of majority support for repeal, in addition to the moral urgency of the safeguards that the Act contains and the political controversy that would result from an

[4] For further discussion of why judicial law reform is undesirable, see Baroness Hale, *Legislation or judicial law reform: where should judges fear to tread?* (Annual Society of Legal Scholars Conference, 7 September 2016) 8-13.

attempt to dismantle them, may give the Act a very settled place within the domestic legal system. An analogy might be drawn with the recent debates about the position of the Equality Act 2010, which contains many EU-derived rights, in 'post-Brexit Britain'. The government has insisted that the Equality Act, as 'the cornerstone of domestic equality law', will continue to apply once the UK leaves the EU.[5] If the new Bill were to be seen as a key part of the domestic system of rights protection in a similar way, its position within the legal system would be relatively secure.

B) Guiding interpretation and application

Once the Bill has been drafted and enacted, how could its proponents and supporters ensure that it is interpreted and applied in the spirit in which it was intended? As Sandra Fredman observes, when important rights are codified and the judiciary granted a significant role in shaping the content of those rights, 'it is particularly important for Parliament to give appropriate democratic guidance to the courts, both by specifying the content and scope of human rights and by setting out the basic values and precepts of the society it serves.'[6] Here, it is suggested that a preamble or explanatory statement should be drafted indicating clearly Parliament's intention in enacting the Bill. The Bill may begin with a declamatory statement which is not intended to create legal rights but rather to define the purpose of the Bill and provide an overarching purpose to guide adjudicators, interpreters and amenders in their decisions.[7] The benefits of adopting a purposive approach to the application of a

[5] Department for Exiting the European Union, 'The Withdrawal Bill Factsheet 7: Workers' Rights' (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678334/Factsheet_7_-_workers__rights.pdf*) accessed 17 April 2018.

[6] Sandra Fredman, 'Scepticism under Scrutiny: Labour Law and Human Rights' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 204.

[7] A similar suggestion has been debated with regard to the Equality Act 2010, in light of the forthcoming removal of European supervision over its interpretation: Sandra Fredman and others, *The Impact of Brexit on Equality Law* (Oxford Human Rights Hub, 2017) 6.

statute have been demonstrated elsewhere in employment law,[8] although there may be a real concern that, by including a preamble, the legislators would introduce further complexity into the process of interpreting the Act once it is enacted.[9]

Broad declamatory provisions have been included in many human rights documents, notably the preamble and proclamation of the UN Declaration of Human Rights, the preamble to the EU Charter and the ECHR, and the brief statement preceding the Human Rights Act's provisions that it is '[a]n Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. Baroness Hale has observed that the 'further effect' preamble of the HRA has inspired the courts to take a purposive approach to the Act's practical implementation.[10] In this instance, the proposed Bill might commence:

> *'A Bill to ensure that all workers enjoy human rights in their working lives and to protect all workers from infringements upon their human rights by employing entities, in order to further develop broad-minded, tolerant and diverse workplaces in which all individuals are respected.'*

Such a declaration emphasises that the scope of the Bill's protection is broad, '*all* workers'. It also ties the Bill to a set of values[11] – of broadmindedness, tolerance and diversity – which could guide judicial decisions in the way that these values have guided the ECtHR.[12] In light of the concern of collective activists regarding the individualistic nature of rights discourse, one might also consider including a reference to ideals of solidarity and collective community. The declaration also underlines that the workers' rights are at the

[8] See *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745.

[9] Fredman and others (n 7) 6.

[10] Baroness Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 Human Rights Law Review 65, 69.

[11] The promulgation of a set of values underlying a Bill of Rights was suggested by Sandra Fredman in order to guide judges in resolving controversial disputes: Fredman (n 6) 205.

[12] When the Court considers what might be justified as 'necessary in a democratic society', it highlights the characteristics of 'pluralism, tolerance and broadmindedness': see *Vogt v Germany* (1996) 21 EHRR 205, [52], *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, [87], *Fuentes Bobo v Spain* (2001) 31 EHRR 50, [43] and *Sánchez v Spain* (2012) 54 EHRR 24, [53].

centre of its purpose and that other agendas, such as flexicurity or regulating for competitiveness, should not be deployed to compromise the protection that the Bill offers. This focus upon the rights of workers would also act as a guiding precept in instances where the courts are called upon to resolve ambiguities in the statutory language or fill in regulatory space which may have been left by the Bill. Another issue that might be considered is the role of other important rights and documents within the suggested scheme. Reference to social and economic rights, such as the right to fair and just working conditions, the right to education and training or the right to limitation upon working hours, could inform the evolution of the concepts used in the Bill and offer valuable context for the disputes that come before the courts. In addition, the detailed guidance provided by international bodies such as the ILO could be taken into account in circumstances where Strasbourg's decisions offer insufficient guidance.[13]

II. The persuasiveness of Strasbourg's principles

This section considers the relationship between the Bill suggested and the case-law of the ECtHR. By tying the standard of protection to the Convention, the courts and tribunals would have the benefit of the rich and evolving body of case-law of the ECtHR when applying and interpreting the contents of the Bill. However, there are a number of potential pitfalls. Are Strasbourg's decisions the 'floor' or the 'ceiling' of the protection under the Bill? How should judges approach case-law that is cited before them in a private employment dispute but which was decided in the Convention's vertical context? What should the tribunals do when faced with a point that has not been decided or even considered by the ECtHR? In the interests of certainty and clarity, it would preferable for the Bill, or explanatory or guidance notes alongside it, to give answers to these questions.

[13] In accordance with the integrated approach suggested by Mantouvalou: Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529.

In constructing those answers, much can be learned from the experience of the courts in interpreting section 2 of the Human Rights Act 1998 and the benefits and drawbacks of the courts' approach that have been observed by commentators.

Section 2 of the Human Rights Act requires domestic courts to 'take into account' any relevant Strasbourg decisions.[14] This vague phrase left a great amount of detail regarding the relationship between domestic decisions and Convention case-law to be decided by the courts. The higher courts have offered guidance to the lower courts regarding the application of section 2.[15] Controversy remains. [16] An early iteration of how domestic courts should 'take into account' decisions of ECHR institutions was the so-called "mirror principle" .[17] Lord Bingham, in an important passage of *Ullah*, contended that courts should 'keep pace with the Strasbourg jurisprudence as it evolves over time'.[18] A key benefit of the "mirror principle" is that it ensures that the Convention standards, such as they can be discerned from the case-law, are not diluted or weakened by the domestic courts applying them.[19] Within the context of the Bill, it would prevent regression from

[14] HRA 1998, section 2(1).

[15] The most notable case that provides the initial interpretation of section 2 HRA is *R. (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

[16] See Roger Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' [2004] Public Law 725 and Roger Masterman, 'Deconstructing the Mirror Principle' in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights* (Oxford University Press, 2013) particularly 121-129; Jonathan Lewis, 'The European ceiling on human rights' [2007] Public Law 720; Francesca Klug and Helen Wildbore, 'Follow or lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 EHRLR 621 and Elizabeth Wicks, 'Taking Account Of Strasbourg? The British Judiciary's Approach To Interpreting Convention Rights' (2005) 11 European Public Law 405. For a contrasting academic viewpoint, see Jane Wright, 'Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' [2009] Public Law 595. For an insight into the differing judicial views, contrast the views of Lord Irvine of Lairg, 'A British interpretation of Convention rights' [2012] Public Law 237 with those of Philip Sales, 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine' [2012] Public Law 253.

[17] Lewis (n 16) 720 although it has been observed recently that the courts are 'consciously moving away from the *Ullah* principle': Richard Clayton, 'Should the Courts Mirror Strasbourg' in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing, 2015) 111.

[18] *R. (on the application of Ullah) v Special Adjudicator* (n 15) at [20] (Lord Bingham).

[19] Ibid.

established ECtHR positions regarding rights in the workplace. So, if a tribunal were bound by the "mirror principle", it would not be permissible for it to hold that a whistleblower is not protected under Article 10 from detriment by a private employer[20] or that an infringement with Article 9 is negated by the capacity of the claimant to resign from their job and find an alternative role which can accommodate their desire to manifest their religious beliefs.[21] 'Keeping pace' with Strasbourg in this way ensures that the domestic cause of action adheres to the 'floor' of protection as determined by the ECtHR, with the consequence that the UK fulfils its positive obligations under the Convention and is less likely to receive a ruling against it in Strasbourg for a deliberate contravention of the Convention.[22]

One difficulty of transplanting the entire "mirror principle" to the new suite of rights is that Lord Bingham went further, saying '*no more* but certainly no less.' [23] This raises two issues. The first is what tribunals should do when Strasbourg decisions do not give concrete or useful guidance. As Masterman comments, the "mirror principle" is premised on the assumption that Strasbourg rulings are 'suitable to be directly applied in a precedential manner' by the domestic courts.[24] It has been observed that Strasbourg's judgments declare a breach of the Convention but give limited direction to the national courts regarding how this infringement should be rectified.[25] This issue is particularly

[20] As in *Heinisch v Germany* (2014) 58 EHRR 31.

[21] As held in *Eweida and others v United Kingdom* (2013) 57 EHRR 8.

[22] The anxiety regarding a contradictory finding by the ECtHR animates the approach taken by the judiciary – see *R. (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [26] – and commentators: see Sales (n 16) 262 who supports the courts' current approach contrasting with Masterman's suggestion of a 'holistic' view of the Convention, Roger Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (2008) 54 International and Comparative Law Quarterly 907, 919-920.

[23] *R. (on the application of Ullah) v Special Adjudicator* (n 15) at [20] (emphasis added).

[24] Masterman, 'Deconstructing the Mirror Principle' (n 16) 125.

[25] David Harris and Michael O'Boyle et al, *The Law of the European Convention on Human Rights* (3rd edn, Oxford University Press, 2015) 29.

significant when faced with question of how Strasbourg's case-law should influence domestic courts when deciding cases in the employment context. Although a handful of ECtHR cases are against the state as an employer,[26] most of the Court's decisions are decided through a loose 'fair balance' assessment under the doctrine of positive obligations or under the obscuring influence of the margin of appreciation.[27] These principles of decision-making can cloud the Court's declarations regarding Convention rights in cases involving private parties. In some eyes, the 'no more' element of the "mirror principle" might preclude anything beyond amending the legal system as directed by the ECtHR in a case against the UK or applying 'directly relevant precedent' that has been decided by Strasbourg.[28] Where Strasbourg offers unclear guidance, or the decisions cited before a domestic court are not directly applicable to the case at hand, the "mirror principle" could lead to an inadequate standard of protection.

The second problem is how to deal with instances in which the Strasbourg institutions have taken a wrong turn in their jurisprudence and the domestic tribunals wish to offer a higher standard of protection under the Bill. The history of the Convention's application within working relationships has been chequered with a number of missteps and periods of reticence. For instance, the Court for a number of years resisted the inclusion of a right to collectively bargain or to strike as an element of Article 11's freedom of association.[29] In the context of individual rights, a notable instance where the UK courts

[26] For example, *Vogt v Germany* (n 12), *Smith and Grady v United Kingdom* (n 12) and *Markin v Russia* (2013) 56 EHRR 8.

[27] Masterman has expressed particular concern about the 'transferability' of decisions made under the margin of appreciation granted to one member state to other jurisdictions: Masterman, 'Deconstructing the Mirror Principle' (n 16) 126.

[28] Paul Mahoney, 'The relationship between the Strasbourg court and the national courts' (2014) 130 LQR 568, 577.

[29] *Schmidt and Dahlström v Sweden* (1979-80) 1 EHRR 632, [36] and *Swedish Engine Drivers' Union v Sweden* (1979-80) 1 EHRR 617, [36].

have struggled with a line of ECHR decisions was under Article 9.[30] The ECHR institutions held that there was no infringement with Article 9 if an individual voluntarily accepted a role (such as a particular job) and there were other alternatives available which would be compatible with the individual's observance.[31] In these instances, the 'no more' restraint would prevent the domestic courts from conducting an independent examination of the scope of the right. It would thwart any attempt to offer the claimant a more effective safeguard that would be available at the international level. A current instance where the ECtHR's application of Convention rights is unsatisfactory is its failure, upon occasion, to 'subject the employer's arguments to detailed critical scrutiny'.[32] For example, in *Pay v UK*, despite acknowledging that less severe measures could have achieved the same aim, the Court accepted the employer's arguments that a 'cautious approach' was justified due to the sensitive nature of Mr Pay's occupation.[33] The Bill should be devised in a manner that avoids the replication of Strasbourg's errors and permits the domestic tribunals to provide a higher standard of protection for the claimant's fundamental rights.

How might these two challenges be met in the drafting and application of the Bill? First, we might examine how the judges should treat Strasbourg judgments. Resisting the impulse to slot Convention case-law into the domestic system of precedent and apply it as if it were a binding decision of a higher UK court, a more nuanced approach should be taken whereby the tribunal assesses the appropriate weight to place upon a Strasbourg ruling. Masterman, with relation to section 2 of the Human Rights Act, has advocated for an approach in which the court considers two preliminary issues. First, the tribunal should

[30] See *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789, 31–39, 44–66 and *R. (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [24] (Lord Bingham) and [41] (Lord Nicholls), with whom Lady Hale agreed [93].

[31] *Ahmad v United Kingdom* (1982) 4 EHRR 126 and *Stedman v United Kingdom* (1997) 23 EHRR CD 168.

[32] ACL Davies, 'Judicial self-restraint in labour law' (2009) 38 ILJ 278, 300.

[33] *Pay v United Kingdom (Admissibility Decision)* (2009) 48 EHRR SE2, 26.

ask whether the Strasbourg decision is relevant. Was it decided sufficiently recently so as to represent the Court's current interpretation of the Convention? Does it rule on issues that are useful to the case before the tribunal? Are the findings of the court specific to the member state involved? Second it should consider whether the case or principle is practically applicable – did the Court give guidance that resolves the case? – before deciding whether and how to give effect to it.[34] Engaging in this kind of initial appraisal of the potentially relevant case-law would permit the domestic courts to place variable weight upon a Strasbourg decision.[35] For example, if a case was decided in different social conditions, or there are indications that Strasbourg has since changed its approach, the decision appeared to be a 'stray' Chamber decision[36] which has not been followed or the propositions that it sets out would be ill-suited for application to working relationships in the UK, these factors should be taken into account in assessing the influence of the ECtHR's decisions upon the tribunal in considering the point before it.

How should the tribunals give effect to the Convention in the cases before them? Often an ECtHR decision only resolves a narrow point that may not relate directly to the issue before the domestic court. In order to extract the most assistance from the Court's case-law, the Bill should direct adjudicators to examine ECtHR decisions with an eye to following their principles.[37] Strasbourg's cases should be regarded 'as a source of guidance as to the philosophy, values or considerations to be weighed in the balance by national

[34] Masterman, 'Deconstructing the Mirror Principle' (n 16) 126.

[35] For discussion of how domestic courts might attribute variable weight to Strasbourg decisions, see Keir Starmer, *European human rights law: the Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, 1999) 27.

[36] Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (n 10) 69.

[37] A similar principle-based approach is advocated by Masterman with relation to section 2 HRA: Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' (n 16) 735-737 and Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (n 22).

courts when applying their own domestic law.'[38] By reading the ECtHR's body of cases as indicating a broad set of principles, and carefully translating these principles to a form that is suitable for the employment context, the Bill could provide a high standard of protection whilst conforming to the UK's obligations under the ECHR. Particular principles that the UK courts would glean from Strasbourg's decisions would include that protection of human rights should be offered as widely as possible, that weighty reasons must be produced by the employer to justify an infringement with those rights and that, if the justification is to be successful, it must be no more than necessary in order to achieve the aims cited.

Once these principles and values have been drawn out from the Convention case-law, they can be applied in areas where Strasbourg has given less guidance: through a process of extrapolation, the courts might fill in gaps where the Court has given a wide margin of appreciation or only made brief admissibility decisions.[39] Baroness Hale observes that, where for example the ECtHR applies the margin of appreciation,

> '[the domestic courts] cannot then decline to decide the case on the basis that Strasbourg has not yet spoken. We have to make the best judgment we can about the balance between the competing interests [and]… do our best to interpret the Convention rights in accordance with British conditions and British values.'[40]

Another consequence of explicitly encouraging an independent domestic perspective is that the courts and tribunals would not have an obligation to follow a line of decisions if they considered it to be flawed. This does occur under the current phrasing of section 2(1), although the judges do not always consider themselves able to resist consistent authority in Strasbourg. For example, with regard to the unsatisfactory Article 9 jurisprudence mentioned above, the Court of Appeal in *Copsey* struggled with whether to follow it or

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[38] Paul Mahoney, 'Effect, Non-Compliance and Enforcement of Judgments of International/Supranational Courts: The European Court of Human Rights as a Case-Study' in Carl Baudenbacher (ed), *Dispute resolution*, vol III (German Law Publishers, 2009) 111.

[39] Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (n 22) 920-921.

[40] Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (n 10) 76.

take a different course.[41] Lord Justice Mummery followed the Convention authority, against his instincts.[42] In contrast, Lord Justice Rix refused to follow the case-law that 'without attempt at explanation applies a doctrine of voluntary acceptance of limitations of rights'.[43] Rix LJ's decision to forge a different path and make his own assessment of the ECHR principles offered greater protection to the human rights of the individual than they would have found in Strasbourg. Encouraging the courts and tribunals to adopt this proactive and critical approach where the ECtHR's guidance appears erroneous would be crucial. This autonomous assessment would be subject to the condition that the Bill must not offer a standard of protection below that of Strasbourg, in accordance with the idea of 'keeping pace' with the Court. It must be noted that the value of the principles enunciated in Strasbourg in terms of strengthening the overall standard of human rights protection far exceeds the number of missteps that the domestic courts may be called upon to correct. The link to the ECHR should be maintained.

The final aspect of the link with the Convention builds on this independent analysis of the standard of protection that the Bill should offer by incorporating what Klug and Wildbore have termed a 'dynamic approach'.[44] This approach builds upon the established "mirror principle" by emboldening the domestic courts to exceed the current level of protection set out in Strasbourg.[45] A dynamic approach would allow the Bill and the decisions that apply it to 'forge ahead'[46] in developing enhanced protection for human rights in the working relationship and draw conclusions where Strasbourg may be

[41] *Copsey v WBB Devon Clays Ltd* (n 30).

[42] Ibid [36].

[43] Ibid [65].

[44] Klug and Wildbore (n 16) 626.

[45] Ibid.

[46] Borrowed from Baroness Hale: 'There is no reason why either Strasbourg or the other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law. Indeed, there is good reason to think that they do not.' Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (n 10) 71.

constrained. To reinforce this process, it might be desirable to include in the Bill a provision equivalent those often included in EU instruments that 'Member States [here, national authorities] may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive [here, the ECHR].'[47] This would make it clear that the courts, the executive and employing institutions that apply, interpret and comply with the Bill are endorsed in going beyond the 'irreducible minimum' set out by Strasbourg.[48] The current state of the Convention's interpretation would not amount to a 'ceiling on human rights protection.'[49]

III. The prohibited conduct

This section adds detail to the proposed primary wrong under the Bill. It picks up the theme of adapting the approach taken under the Convention and making it suitable for the horizontal employment context. It also traces three other wrongs that could be included in the Bill to supplement its functioning and broaden its protection.

A) Prohibiting conduct that infringes a worker's human rights

The key prohibition contained in the Bill protects a worker from an infringement of their human rights, which the employer cannot satisfy the tribunal is justified:

> *'An employer shall not infringe the human rights of its workers, as defined by the European Convention on Human Rights, and in particular it must respect each worker's right to respect for their private and family life, their freedom of thought, conscience and religion, their freedom of expression and their freedom of assembly and association.*
>
> *In accordance with the principles set out in the Convention, where a qualified right has been breached, an infringement will only be justified if it satisfies the requirements set out in this Bill.'*

[47] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L-39/40, Article 27(1).

[48] Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, 2000) 20.

[49] Lewis (n 16) 726.

The proposed Bill would operate in a similar manner to the Equality Act 2010 in terms of burden and standard of proof. The details will be discussed further below. The discussion of unfair dismissal law in Chapter 5 show how crucial the courts' examination of the employer's justification is to the level of protection given to the claimant's human rights. In unfair dismissal law, the standard of fairness has been lenient upon employers. It is almost never supplemented with the required examination of the proportionality of an infringement, as required by human rights law. The justification process in the Bill must therefore balance two functions. First, ensuring the individual's human rights are not outweighed too readily and those rights remain central in the dispute. But secondly, the justification process is also the mechanism for weighing the employer's rights in the balance[50] and managing the size of the burden imposed upon employers by the Bill.[51] The detail, interpretation and application of the process of justification must be fine-tuned to adequately take into account legitimate employer concerns, but not to excuse employers on grounds that are insufficiently weighty. Unlike in unfair dismissal law, the standard for justification should be objectively determined by the court and applied rigorously to ensure adequate safeguarding of the worker's human rights.

The Strasbourg case-law focuses upon justifications produced by governments for an infringement. To maximise the clarity of the provision and the consistency of its application, all the requirements should be set out clearly in the legislative text.[52] The Convention first requires that an infringement must be 'in accordance with law'. In the employment context, this could be rewritten to cover a number of points. First, the infringement must be a lawful action, i.e. not in breach of any other regulation or rule of

[50] Hugh Collins, 'Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 269-270.

[51] Khaitan (n 2) 197-8.

[52] This is in contrast to the Convention where additional elements have been read into the text, such as the requirement for a 'pressing social need' and the proportionality test.

the domestic legal system. And second, the infringement must be in accordance with the employer's own rules and practices. This second aspect of the rule would have a number of effects. It could operate to ensure some procedural processes – warning, investigation, meeting and appeal – are followed before a decision is made, as usually disciplinary codes mandate such steps.[53] It would also have the benefit of providing an individual with certainty regarding their position when making a choice and weighing their options. For example, if an employer's rule book does not permit them to demote, suspend or dock pay for misconduct, the individual can be sure that they should not be punished in that way and, if they are, they will be entitled to a remedy under the Bill's provisions. The requirement that an infringement must be lawful and in accordance with the employer's internal "laws" brings predictability and certainty to the claimant's treatment.

The next demand within a justification analysis is that the infringement must be in pursuit of an aim that is legitimate within the Convention system. The stated aims contained in the Convention are tailored to state action, so the Bill would have to take an alternative approach. Anti-discrimination law relies on the courts to decide whether the declared aim is legitimate without the guidance of an enumerated list as a starting point.[54] On the whole, the courts have proceeded carefully in accepting legitimate aims in anti-discrimination law and have refused to accept commercial competitiveness[55] or cost savings, without other additional reasons,[56] as legitimate aims capable of justifying discrimination. But how best to ensure that this cautious approach and the reluctance to accept comparatively

[53] In accordance with the requirements of the Advisory, Conciliation and Arbitration Service, *Code of Practice on Disciplinary and Grievance Procedures* (TSO, 2015).

[54] See Equality Act 2010, section 19(2)(d) and Schedule 9, paragraph 1(1)(b).

[55] In *Ratcliffe v North Yorkshire CC* [1995] All ER 587, [1995] ICR 883, female catering assistants were paid less than their male comparators and the House of Lords held that this was not justified by the competitive pressure of a tendering process.

[56] See the CJEU's statement that budgetary considerations or the increased costs associated with avoiding discrimination could not justify indirect discrimination in C-187/00 *Kutz-Bauer v Freie Und Hansestadt Hamburg* [2003] IRLR 368, [60]-[61], confirmed in *Woodcock v Cumbria PCT* [2012] IRLR 491, [67].

unimportant commercial aims within the justification process is established under the Bill, whilst ensuring flexibility to take into account the wide range of circumstances that the tribunals might face?

The Bill could adopt the approach of unfair dismissal law, which sets out four 'potentially fair' reasons which the employer can point to (capacity/qualification needed to do the work, conduct, redundancy, statutory prohibition) and adds 'some other substantial reason of a kind such as to justify the dismissal of an employee…'[57] Each enumerated reason is identified by the legislator as being a legitimate aim that is sufficiently serious to justify a dismissal. The inclusion of 'some other substantial reason' can be interpreted as a 'safety valve, allowing a potentially fair dismissal in situation closely analogous to those listed.'[58] On Deakin and Morris' reading of the provision, implicit in the provision's phrasing is that the reason cited by the employer reaches the same level of seriousness or substance as the listed reasons, although the courts have not accepted this interpretation.[59] This style of drafting could be adopted by the Bill:

> *'A "legitimate aim" for the purpose of the Bill is limited to:*
>
> *(a) the protection or advancement of the employer's fundamental rights as defined by the ECHR, or*
>
> *(b) the protection or advancement of the fundamental rights of others as defined by the ECHR, or*
>
> *(c) some other similarly pressing and substantial aim.'*

Subsection (a) would include conduct intended to protect an employer from a serious and immediate risk to its reputation or its property, such as slanderous claims by an employee or theft, or choices that relate to the exercise of fundamental rights of those that the

[57] Employment Rights Act 1996, section 98(1) and (2).

[58] Simon Deakin and Gillian S Morris, *Labour Law* (6th edn, Hart Publishing 2012) 526.

[59] *RS Components v Irwin* [1974] 1 All ER 41, 56 and *Cobley v Forward Technology Industries Plc* [2003] EWCA Civ 646, [2003] ICR 1050, [22].

employer represents.[60] Subsection (b) would cover decisions by employers implemented in order to protect the rights of their other workers, customers or service users, such as policies that require equal treatment amongst service users or disciplinary action taken against an employee who attempts to convert their customers to a particular religion or belief and thereby steps outside the scope of their job description.

With regard to subsection (a), the courts must pay particular attention where the employer is alleging that the employee's conduct put their business at risk. Too deferential an attitude to this question can seriously damage the standard of protection given to the claimant. The employer must be required to prove that they were responding reasonably to a real risk to their business at the time of the infringement. For example, the ECtHR has emphasised that a 'mere allegation' of a threat to an employer's rights is insufficient: the risk to the employer must be 'real and substantial' and the interference must not serve any other purpose that is unrelated to the exercise of their fundamental rights.[61] The employer should have been responding to real and current risk at the time of the infringement. Decisions that were made unnecessarily after the risk has passed should not be considered to be justified. This rule would mean that Leeds United Football Club, for example, was not justified in dismissing Mr Williams in response to an incident that had occurred five years previously and had not produced any damage to the Club's reputation.[62]

The remaining aspects of the proportionality analysis have been stated clearly by the UK Supreme Court in *Bank Mellat v HM Treasury.* The court summarised the relevant questions as follows:

> '(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,

[60] For example, the employer may be an institution, such as a church group or political party, which is a collective through which others exercise their rights and this may entail infringements of the rights of others.

[61] *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10, [159].

[62] *Williams v Leeds United Football Club* [2015] EWHC 376 (QB), [2015] IRLR 383.

(2) whether the measure is rationally connected to the objective,

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

(4) … whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.'[63]

These elements of the proportionality assessment have been discussed and applied many times by both the ECtHR and the UK courts in public law cases. When considered fully, they strike a good balance between giving respect to the claimant's fundamental rights and permitting the defendant some scope to pursue other equally important aims. The proportionality assessment, particularly its final limb, may also provide an opportunity to consider the impact of the employer's conduct, and the tribunal's finding, upon society more broadly. So, for example, it may appear proportionate to permit one employer to ban religious and belief-related dress in its workplace, but the tribunal might question whether the pursuing the aim of a neutral corporate appearance is proportionate to the exclusionary effect of this type of rule once writ large across a company, a sector of the economy, or the labour market.[64]

B) Other forms of protection

There are other forms of protection that the Bill should include. Protection from retaliatory behaviour, including dismissal or any other type of detriment, on the grounds that a worker has launched a claim against an employer would be important. Protection from this kind of victimisation is common across employment law[65] and the protection should extend to

[63] *Bank Mellat v HM Treasury* [2013] UKSC 38, [2014] AC 700, 790 (Lord Reed).

[64] See the commentary following the CJEU's decision in C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] 3 CMLR 21 and C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme v Micropole SA* [2017] 3 CMLR 22, in particular Sarah Fraser Butlin, 'The CJEU confused over religion' (2017) 76 CLJ 246, 248 and Philippa Collins, 'Covering up? Client embarrassment, neutral intolerance and wearing headscarves at work' (2018) 134 LQR 31, 35.

[65] See in particular the group of automatically unfair dismissal reasons in the ERA 1996, section 43M onwards.

protection from Employer B where the claim has been launched against Employer A. In addition, safeguarding against bullying and harassment by colleagues, managers and customers might be warranted.

A broader cause of action might be introduced along the lines of a prohibition on the maintenance of a workplace hostile to or incompatible with the claimant's enjoyment and exercise of their human rights. This provision embodies Morris' suggestion of 'a mechanism for workers to challenge the propriety of contractual clauses which they consider violate a Convention right without having to await the imposition of a disciplinary sanction for breach of contract'.[66] It would extend beyond conduct that is targeted by the Equality Act's harassment provisions prohibiting unwanted conduct that creates 'an intimidating, hostile, degrading, humiliating or offensive environment' for an individual.[67] This wrong would tackle two types of rules or terms. Firstly, it would challenge rules that themselves constitute an interference with an individual's rights by, for example, providing the employer with the ability to read a worker's email messages and thereby breach their privacy rights. Secondly, it would call into question rules that implicitly prevent individuals from exercising their rights, either in the workplace or elsewhere. This second function is similar to that of indirect discrimination: although there is no overt infringement upon the human right, the effect of the rule or policy is such that the exercise of that right is negatively affected.

What conduct would be prohibited by this suggested provision? We might imagine a wide range of practices that have an adverse effect upon the claimant's ability to enjoy their Article 8 right to respect for their private and family life. Employment practices that demand extensive or unpredictable hours of work make it very difficult for workers to

[66] Gillian Morris, 'Fundamental Rights: Exclusion by Agreement?' (2001) 30 ILJ 49, 70.

[67] EqA 2010, section 26.

reconcile their personal or family life with their professional life.[68] Similarly a workplace that is managed in a way that prevents workers from developing relationships with their colleagues during working time or an employer that enforces computer and internet use policies that severely delimit their workforces' online privacy could be considered hostile to the exercise of Article 8. In contrast, within the realm of infringements with Article 8, the Equality Act only offers protection where the behaviour is linked to a protected characteristic such as sex, sexual orientation or gender reassignment[69] – a much narrower category of conduct. Similarly, this provision could offer safeguards to claimants who feel unable to express their beliefs or face adverse treatment at work as a result of expressing – whether during or outside working time – political or social viewpoints that would be protected under Article 10 but do not qualify as a religious or philosophical belief under the Equality Act 2010.[70] The most prominent example would be political opinions, such as support for political parties, which is not within the scope of the protected characteristic under the 2010 Act.[71] This additional cause of action would thus go beyond the scope of protection currently available under the Equality Act and would assist claimants, as individuals or possibly groups, who wish to challenge their working environment or the rules and practices of their employing entity.[72]

The introduction of a further wrong could combat contractual practices that undermine the purpose and provisions of the Bill. One of the main difficulties with using implied terms as a method of human rights protection was that any safeguards could be

[68] Deirdre McCann, 'Decent Working House as a Human Right: Intersections in the Regulation of Working Time' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 519-520.

[69] EqA 2010, section 26(5).

[70] Ibid section 10(2).

[71] See *Grainger Plc v Nicholson* [2010] 2 All ER 253, [28].

[72] This cause of action might be thought of as equivalent to the function of indirect discrimination – challenging practices that are operating to disadvantage specific groups and prevent full participation

ousted by express terms to the contrary. In order to avoid this problem occurring with regard to the statutory imposition of human rights protection, several deterrence mechanisms could be used. One element could be to alter the legal effect of a term that is contrary to the Bill and inserted into a contract. The Equality Act 2010 renders unenforceable against a person any term of a contract that 'constitutes, promotes or provides for' prohibited treatment against that person *or another person*.[73] The extension to 'or another person' prevents employers from demanding that employees engage in discriminatory, or in the case of the Bill, human rights-infringing behaviour towards others. A similar unenforceability rule also applies to any 'rule of an undertaking'[74] and non-contractual terms, where they amount to disability discrimination.[75] Adopting a similar provision in the Bill would render unenforceable any contractual terms or non-contractual rules that have the potential to interfere with the exercise of an individual's fundamental rights. The Bill might go further and state that such any such term is unenforceable by the employer at any time, including during the existence of the employment relationship. This provision would ensure that employees can insist on exercising their rights where a dispute arises, knowing that the employer cannot enforce the incompatible term.

In addition, and in order to reinforce the other provisions, the Bill might provide for a specific wrong of requiring a worker to sign a contract which is in breach of the Bill's provisions.[76] The remedy for this could be monetary, however, in the case of large employers with standard form contracts, the damages could run into the millions due to the large number workers potentially affected. A declaration that the wrongdoing occurred may be more appropriate. Finally, there should be specific protection for workers who refuse to

[73] EqA 2010, section 142(1).

[74] Ibid section 145(2).

[75] Ibid section 144.

[76] See Sullivan's discussion of the 2008 Colorado Wage Transparency Act in Charles A. Sullivan, 'The Puzzling Persistence of Unenforceable Contract Terms' (2009) 70 Ohio State LJ 1127, 1166.

waive their Convention rights or sign a contract containing terms inconsistent with those rights.[77]

IV. Bringing a claim: the parties

The focus of this section is upon who can bring a claim and against whom. Contrary to the current dominant approach taken to drafting employment statutes, it will be suggested that the Bill should define its application by reference to the role of the employer. It will add detail to this proposal and also examine the challenging issue of granting standing to challenge an employer in the absence of an identified claimant. A preliminary section will discuss how the Bill should deal with clauses that attempt to exclude the jurisdiction of the tribunals under the Bill and thereby contractually remove the claimant's entitlement to sue.

A) Excluding the operation of the Bill

This discussion here is the counterpart to Section III.B above regarding contractual arrangements that require or provide for behaviour that infringes upon human rights. A similarly strong and clear stance should be taken towards terms or provisions that attempt to exclude the jurisdiction of the tribunals under the Bill and every effort should be made to clarify the position of a potential claimant who is concerned about such a term.[78] Section 203(1) of the ERA 1996 provides that any provision in 'an agreement' is void in so far as it purports to '(a) exclude or limit the operation of any provision of this Act, or (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.'[79] Equivalently,[80] the Equality Act states that a term of a contract is unenforceable

[77] Morris (n 66) 70.

[78] It has been observed that the inclusion of an exclusionary term is likely to act as a deterrent or "chilling factor" in an individual's decision regarding whether to exercise their rights, see ibid 70. The Bill should use clear language that can be understood by a layman in order to counteract that deterrent.

[79] ERA 1996, section 203(1) ERA.

[80] The ERA declares such terms void, whilst the EqA states they are unenforceable, yet the labels appear to mean the same thing: that the term 'cannot be relied upon'. Schaefer observes that a

by a person in whose favour a term of a contract would operate in so far as it 'purports to exclude or limit a provision of or made under this Act.'[81] The approach suggested above of prohibiting exclusionary terms (*'The parties cannot include a term that attempts to exclude or limit the operation of any provision of this Bill…'*) could be combined with a clear statement that any such term is unenforceable (*'… and any term that attempts to exclude or limit the operation of any provision of this Bill is not enforceable by the employer.'*)

B) Defining the employer

Prescribing the personal scope of the Bill's protection – for whom and against whom – is an important task. Chapter 4 highlighted the narrowness of the scope of the existing protective mechanisms particularly when contrasted with the (near-)universality of human rights principles. Employment rights are made available to those who can satisfy the courts that they are dependent and subordinate employees, often requiring the court to look past the employer's attempts to obscure the true nature of the relationship. Even then, the employee may find that their contract of employment is unenforceable by reason of some other legal bar or that the particular right upon which they wish to rely is subject to a qualifying period of service which they may not satisfy. Employers have manipulated these legal hurdles and restrictions in order to distance themselves from their workforce and avoid the responsibilities of an employer. In face of this challenge, I advocate for a change in approach for the new statutory framework. I argue that, rather than circumscribing the scope of protecting according to the status of the individual, the Bill should focus upon which entities hold power over others, which actors might threaten the rights of an

functionalist approach to terms of this kind realises that 'void, voidable, and unenforceable are not separate ideas capable of being independently defined, but, rather, are different facets of the same, undivided concept': Jesse A. Schaefer, 'Beyond a Definition: Understanding the Nature of Void and Voidable Contracts' (2010) 33 Campbell LR 193, 208.

[81] EqA 2010, section 144.

individual in their working life.[82] In confronting directly 'the *complication* of the employing organisation'[83] and the many structures and arrangements through which a worker might provide work, it is hoped that the scheme would minimise the opportunity for entities to avoid the duties that the Bill places upon them. Such an approach would also provide distance from the existing employment legislation, preventing the transfer of unhelpful and scope-limiting concepts that have stymied previous legislative attempts to extend protection beyond the narrow employee class.[84] I would suggest two ways through which the legislative scheme could put its wide scope of protection into action.

The first step would be to offer a broad definition of the 'employer' under the statutory scheme. This definition could adopt a functional approach,[85] identifying actors in the working arrangement who hold power or control over the individual that could be deployed in a manner that breaches their human rights. The Bill should identify a wide range of employing functions because, as shown by the examples throughout this thesis, an employing entity can disadvantage, disincentive or dismiss an individual for reasons relating to the exercise of their human rights in numerous ways. The list might be left open-ended to allow the judiciary to reason by analogy and expand the list, in light of the purpose of the legislative scheme and as new ways of organising labour emerge. Particularly if the

[82] The focus upon viewing the relationship through the lens of the employer is shared with Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, 2015) and Paul Davies and Mark Freedland, 'The Complexities of the Employing Enterprise' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006).

[83] Davies and Freedland (n 82) 287.

[84] An ongoing instance of this blurring of boundaries and transfer of concepts is the transfer of 'mutuality of obligation' into the definition of worker in both the ERA 1996 (see *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667) and the Equality Act (see *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2017] 3 All ER 568).

[85] As in Prassl (n 82) particularly Chapter 5.

list of functions is left open, we can define the main functions of an employing entity with clarity and transparency, without need for technical terminology. Thus,[86]

> *'An 'employer' for the purposes of this Bill is an individual or entity which performs one or more of the following functions:*
>
> *(a) engaging a worker for the provision of work or terminating that engagement,*
>
> *(b) remunerating a worker or providing them with other benefits that are associated with the provision of work,*
>
> *(c) managing the working arrangement or the process of work,*
>
> *(d) using a worker's services in the process of production or service provision, and/or*
>
> *(e) performing any other function that is identified as one usually carried out by an employer.'*

This definition would include working arrangements that have challenged the existing organising concepts of employment law. Religious ministers, office holders, undocumented workers, agency workers, contractors who provide their work personally, workers that rely on new technologies to be allocated work, zero hours contract workers, and many more groups would be provided with a safeguard for their human rights under this provision. This could be reinforced by the specific inclusion of groups whose position might otherwise be ambiguous, explored in sub-section (C) below, and by the explicit recognition that a worker may have one or more employer. Alongside a wide definition of employer, it could be ensured that employers are held vicariously liable for the actions of their employees. This has been established in discrimination law,[87] and could usefully be transferred to the new cause of action.

In addition, and in line with the interpretation of the ECtHR's approach given in Chapter 4, the Bill could provide for a presumption that the defendant is the claimant's employer which the defendant may rebut by proof of an arms-length business relationship. This type of presumption has been suggested by Alan Bogg in the context of sham

[86] The functions listed here are adapted from Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 40.

[87] See *Jones v Tower Boot Co Ltd* (1997) IRLR 168.

contracting[88] and Hugh Collins in the identification of a contract of service.[89] As Collins notes, such a presumption would impose 'a high hurdle before the duties of an employer can be evaded.'[90] In a context where one party possesses most of the decision-making power, particularly regarding the organisation of the employing enterprise, such a presumption is justified. An alternative to this presumption approach would be to collapse the distinction between the entitlement and the substantive stages of the tribunal's enquiry. On this alternative approach, the claimant would have to discharge the burden of proof that an infringement with their human rights in breach of the Bill has occurred. The burden would then shift to the employer to prove one of the following: (1) they are not the claimant's employer under the provisions of the Bill, or (2) the infringement alleged did not occur, or (3) the infringement was justified. This integrated approach would be more radical but may reflect the informational asymmetry that often exists in working arrangements and minimise the burden on the claimant.

C) Who can bring a claim?

To correspond with the definition of 'employer' above, a worker entitled to make a claim would be defined as:

> *'A worker for the purposes of this Bill is an individual who provides work or services to an employer or a number of employers.'*

Unlike the entitlement to make an unfair dismissal claim,[91] the protection of the Bill would not be subject to a qualifying period of continuing employment. In the knowledge that the Bill would not anticipate every working arrangement that will come before the tribunals,

[88] Alan Bogg, 'Sham self-employment in the Supreme Court' (2012) 41 ILJ 328, 343.

[89] Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 Oxford Journal of Legal Studies 353, 379. Also endorsed by Freedland (n 86) 54-55.

[90] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (n 89).

[91] Discussed in Chapter 4 above.

this provision might be supplemented by a direction to tribunals to interpret and apply the definition of 'worker' as broadly as possible. For clarity, the Bill or related statutory instrumentation might enumerate specific groups that are entitled to the Bill's protection. Examples might be job applicants and workers in the post-employment phase, groups that are both protected by the Equality Act 2010.[92] The Bill might also consider expressly including individuals who provide their work through personal service companies and clearly stating that migration or visa status are irrelevant to an individual's right to make a claim, as these members of two groups have been shown to be vulnerable to maltreatment in the UK labour market. The definition of 'worker' above makes no mention of working in return for remuneration, which leaves the status of volunteers and interns open. In a 2010 survey, 37% of adults had volunteered in the last year.[93] Internships are now an established stage of many career paths but interns are not entitled to most forms of employment protection.[94] Debating the personal scope of the Bill's protection may provide an opportunity to reconsider the position of volunteers and interns within employment law.

Another significant decision would be whether actors other than individuals, or groups of individuals, should be permitted to bring claims to the tribunals. A less controversial step would be allowing representative actions by unions or NGOs who bring a claim on behalf of an individual or group and litigate the issues in their place. This would reduce the burden on an individual bringing the claim.[95] The possibility of representative actions should be seriously considered as a way to improve access to justice and the enforcement rate of the Bill. Alongside this option, it may be useful to the Equality and Human Rights Commission (EHRC) to possess more generalised enforcement and

[92] EqA 2010, section 39(1) and section 108.

[93] Department for Communities and Local Government, *Citizenship Survey: April–June 2010, England* (Cohesion Research, Statistic Release Number 13, 2010) 8.

[94] See *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, [2013] 1 All ER 1038.

[95] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press, 2011) 228.

investigatory powers of the kind currently provided for by anti-discrimination law. Under the Equality Act 2006, the Commission can conduct an investigation into any suspected wrongdoing, launch inquiries into any issue related to its remit, and apply to a court for an injunction where it suspects that an actor is likely to commit an unlawful Act.[96] Although these powers are deployed subject to resource constraints, it could aid the enforcement of the Bill in practice.

More controversially, the Bill could permit other bodies – such as unions, NGOs, public interest groups or institutions such the EHRC – to make a complaint to a tribunal without identifying an individual who has been affected by an infringement of their human rights. Such a choice would challenge the narrow view that the judiciary's role is 'to do no more than protect individuals who can point to personal detriment as a result of an alleged breach of a human right.'[97] The Human Rights Act has been criticized for denying standing to interested organisations that cannot find a suitable claimant or persuade an individual claimant to allow them to claim on their behalf.[98] This is a current issue in anti-discrimination law.[99] For example, in *Firma Feryn,*[100] the CGKR (a national equality body similar to the EHRC) brought a case against Firma Feryn. A director of the company had made a public statement that they were in need of applicants but would not recruit immigrants. He claimed that this was because the company's customers were reluctant to let immigrant tradesmen into their homes, which was a necessary aspect of the job. The

[96] Equality Act 2006, sections 16, 20, 24 and 25.

[97] Fredman, 'Scepticism under Scrutiny: Labour Law and Human Rights' (n 6) 212.

[98] Nathalie Lieven and Charlotte Kilroy, 'Access to the Court Under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance' in Jeffrey Jowell and Jonathan Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003) 121-4, 128-9.

[99] See C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn* [2008] 3 CMLR 22 and C-81/12 *Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminarii* [2013] 3 CMLR 26.

[100] *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn* (n 99).

claim was dismissed by the national court because of the lack of an individual applicant who had applied for a job and been dismissed because of their ethnic origin. The CJEU held that the facts could still demonstrate direct discrimination regarding recruitment and that the member states could provide for associations with an interest in the issue to bring proceedings without acting on behalf of a specific claimant.[101] Introducing non-representative litigation could be particularly useful in challenging practices and policies, as in *Firma Feryn,* that are preventing individuals from applying for a role at all in a particular company. However, this mechanism also carries a risk of encouraging strategic litigation in favour of interests that have strong financial backing.[102] This may lead to imbalances in the development and application of the Bill and the protection of some groups and interests being prioritised over others with less financial support. A compromise might be to retain a claimant-led model, but 'to enrich the process of deliberation by bringing to the notice of the judiciary expert information, perspectives, and arguments which a bipolar process could not bring to light' by allowing interventions and contributions by interest groups and experts in the litigation process.[103]

V. Implementing the Bill: practical and effective protection

The final section of this chapter adds some practical detail to the proposals and how they should be implemented. Before turning to issues such as the limitation period, the burden of proof, and the adjudicator's remedial powers, it is worth briefly considering a preliminary issue. The recent period in which significant fees were charged to bring a claim

[101] Ibid [27].

[102] For instance, see *District of Columbia v. Heller* 554 US 570 (2008) in which the National Rifle Association was extensively involved, in which the US Supreme Court held that the Second Amendment protects an individual's right to possess a firearm. In the UK context, see Stephen Sedley, 'Human rights: a twenty-first century agenda' [1995] Public Law 386, 396, in which he observes that freedom of speech 'is constantly at the head of the queue for rights adjudication' due to its financial value to the mass media.

[103] As envisaged by Fredman, 'Scepticism under Scrutiny: Labour Law and Human Rights' (n 6) 206.

before an employment tribunal highlighted serious problems with access to justice in employment law.[104] In addition, the reluctance of some groups of claimants – particularly migrant workers in the UK – to enforce their basic rights against their employers has been noted with great concern.[105] One particular issue for migrant workers is understanding the rights that they possess and how to enforce them.[106] The Bill should be drafted with these concerns in mind and could reflect them by, for example, making the rights comprehensible, offering guidance on the contents of the Bill[107] in a variety of languages and through different outlets and ensuring the process of launching a claim is as straightforward and affordable as possible. Similarly, to encourage enforcement, the Bill's implementation should be accompanied by a campaign of public education about the safeguards that it contains.

A) Launching a claim

Employment scholars are likely to consider the Employment Tribunal system to be the obvious choice to hear claims under the Bill. ETs have expertise regarding workplace disputes and experience applying similar claims, particularly anti-discrimination law. This choice would certainly be defensible, however, we could also consider whether the Administrative Courts may be well-placed to hear claims under the Bill. The daily work of

[104] See Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80 MLR 412 and House of Commons Justice Committee, *Courts and Tribunals Fees* (Second Report of Session 2016-17, HC 167, 2016) 25-30.

[105] See Catherine Barnard, 'Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals' in Catherine Costello and Mark Freedland (eds), *Migrants At Work* (Oxford University Press, 2014) and Catherine Barnard and Amy Ludlow, 'Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals' (2016) 45 ILJ 1.

[106] Barnard and Ludlow (n 105) 14.

[107] See, for reference, the 'Guidance for Workers' available from the EHRC on the contents and operation of the Equality Act: Equality and Human Rights Commission, 'Equality Act guidance' (20 October 2016) <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-guidance> accessed 3 July 2018 and the Citizens Advice Bureau's advice pages on whether to bring a ET claim: Citizens' Advice, 'Making an employment tribunal claim - is it worth it?' (2018) <https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals-from-29-july-2013/making-an-employment-tribunal-claim-is-it-worth-it/> accessed 3 July 2018.

the Administrative Courts involves hearing human rights cases and considering Strasbourg jurisprudence. In contrast, it was argued above that ETs have consistently failed to apply adequately human rights standards.[108] In addition, although the Bill's prohibited conduct does occur in the workplace, the definitions set out above of 'employer' and 'worker' are far broader than those that are used within employment law currently. No familiarity would therefore be required with the existing construct of 'employee' or 'worker'. An argument could be made that the Administrative Court would be a more appropriate forum to hear these claims, encouraging a clean break from the judicial attitude and limiting concepts that have developed in employment law to-date. This issue should be considered carefully albeit that a legislator may make the decision on the basis of cost and workload factors.

In terms of the practicalities of bringing a claim, if necessary at all, the fee for launching a claim should be minimal. Legal aid should be made available for claimants bringing proceedings who cannot afford to pay an advisor.[109] Similarly, to reduce the otherwise 'powerful disincentive on individuals to enforce the law through tribunals',[110] the claimant should be able to recover their costs from the employer if they are successful and the possibility of an unsuccessful claimant paying the employer's litigation costs should be minimal.[111] It might be considered desirable to incentivise an attempt, before the hearing takes place, to settle the claim or to conduct mediation or conciliation but this process must be carefully designed in order to avoid replicating the imbalance in information and resources between employer and employee.

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[108] See Chapter 5 and Chapter 8 particularly.

[109] This is not always the case in discrimination claims, despite evidence that legal representation improves the claimant's chance of success – see Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework* (Hart Publishing, 2000) 99.

[110] Fredman, *Discrimination Law* 283.

[111] For example, only where the judge considers that the claim was vexatious or the claimant behaved dishonestly or entirely unreasonably: see HM Courts and Tribunals Service, *The Employment Tribunals Rules of Procedure 2013* (2013), [76].

What time limit should apply to a claim under the Bill? The established model for Employment Tribunal claims is a three-month limitation period. A claim for unfair dismissal must be launched within three months of the 'effective date of termination', with the exception of cases where the tribunal 'is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.'[112] Although the question of whether a claim in time was reasonable practicable is one of fact, it has been observed that the test is difficult to satisfy, particularly if the claimant has consulted an advisor.[113] In contrast,[114] the Equality Act provides that a complaint must be brought to tribunal within a period of three months or 'such other period as the employment tribunal thinks just and equitable.'[115] The courts have found that Parliament intended to confer 'the widest possible discretion' to extend the limitation period under the Equality Act.[116] The Court of Appeal recently stated that it would be 'almost always' relevant to the exercise of this discretion the length and reason for the delay and whether the delay has prejudiced the respondent.[117] In discrimination cases, a wide range of factors – such as the claimants receiving inaccurate advice as to the law,[118] their state of mind with regard to their claim[119] and their health during the relevant period[120] - are taken into account in assessing whether an extension of time is 'just and equitable'. Applying the standard three-month limitation period with the addition of a wide, Equality Act-style discretion, which permits tribunals

[112] ERA 1996, section 111(2).

[113] Deakin and Morris (n 58) 84.

[114] That the approach should be different in a discrimination case to an unfair dismissal case was confirmed in *British Coal Corporation v Keeble* [1997] IRLR 336.

[115] EqA 2010, section 123(1).

[116] *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194, [18].

[117] Ibid [19].

[118] *British Coal Corporation v Keeble* (n 114) [10].

[119] *Department of Constitutional Affairs v Jones* [2008] IRLR 128, [53].

[120] *Abertawe Bro Morgannwg University Local Health Board v Morgan* (n 116) [21]-[22] and *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, [16], [18].

to consider any pertinent factors, would be an appropriate compromise between the parties' needs with regard to time limits.

B) The burden of proof

The alteration of the standard burden of proof rules is an important aspect of both EU[121] and domestic anti-discrimination law.[122] The ECtHR draws conclusions on the basis of a 'free evaluation of all evidence', which includes inferring from the facts and applying rebuttable presumptions of fact.[123] The Court can also require the member state to provide a 'satisfactory and convincing explanation' of the events if the events in question 'lie wholly, or in large part, within the exclusive knowledge of the authorities'.[124] In employment disputes, the employer usually holds most of the information and evidence about the events. In addition, particularly where the employer might be aware that they have infringed an important right of the worker, they are less likely to be honest regarding the true reasons for their decisions, leaving the claimant with little more than a suspicion of unlawfulness. In these circumstances, the claimant should not be required to provide evidence to the tribunal of all the aspects of the wrong, rather:

> *'If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.'*[125]

[121] See Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L-14/6, Article 4(1) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L-204/23, Article 19(1) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L-303/16, Article 10(1).

[122] EqA 2010, section 136(2).

[123] *Nachova v Bulgaria* (2006) 42 EHRR 43, [166].

[124] *DH v Czech Republic* (2008) 47 EHRR 3, [179].

[125] EqA 2010, section 136(2).

The defendant then has an opportunity to satisfy the tribunal that they have not contravened the legislative provisions.[126]

C) Remedying a wrong

The Bill should give the tribunal a range of remedial powers to respond to a successful claim. These powers should include the ability to 'modify or remove' terms in a contract or other provisions that regulate the working relationship that are inconsistent with the Bill,[127] ordering an employer to cease a particular form of conduct if it is ongoing and giving broader, enforceable recommendations regarding the employer's practices.[128] If the claimant wishes to return to their job, the tribunal should be able to make an order to that effect or ensure that the worker is offered an alternative role within the employing entity if a return to the same job is not possible or appropriate.[129] Although these options might be useful, individual workers are likely to consider financial compensation to be the primary remedial option.

Unfair dismissal law provides a reasonable model for the remedies that should be available to an individual successful in their claim. As with the EqA 2010[130] and the ERA 1996 regarding unfair dismissal,[131] the measure of compensation should be tortious and permit recovery for all losses flowing naturally from the wrong in order to put the claimant in the position they would have occupied had the infringement not occurred. This would

[126] Ibid section 136(3).

[127] Drawing upon the comparable power in section 143, Equality Act 2010.

[128] In the manner of the EqA 2010, section 124(3) as it was originally enacted: a recommendation that 'the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate (a) on the complainant; (b) on any other person.'

[129] Drawing upon the re-instatement and re-engagement remedies in the ERA, sections 114 and 115.

[130] EqA 2010, section 119(2)(a).

[131] Hugh Collins, 'Compensation for dismissal: in search of principle' (2012) 41 ILJ 208, 209 as discussed in Chapter 6, Section I.

include, for a dismissed worker, wages for periods spent out of work and potentially future loss of earnings as well as 'stigma damages' representing the increased difficulty to find a job as a result of bringing a claim against one's employer. There should be two major differences between the new cause of action and the remedies of unfair dismissal law. There should be no cap on the damages awarded to claimants, as this may prevent full recompense for the infringement. Secondly, damages for non-pecuniary loss, including the recognised psychiatric injury that is already available in unfair dismissal law, should be recoverable. This has been expressly provided for in the EqA 2010 and the tribunals have been given guidance in the appropriate amount that should be awarded under this heading. Similar guidance for the new statutory claim, along the same lines as the *'Vento* bands' may be useful. They state that

> 'a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.'[132]

A 'less serious case' is one in which the discrimination is an 'isolated or one-off occurrence' whereas the top band is for the most serious cases, such as a lengthy campaign of harassment.[133] Exemplary damages could also be available where the employer has acted in an oppressive or malicious manner towards the claimant.[134] There should be no cap on the damages that can be awarded to a worker after a successful claim.

Regarding the calculation of damages, it should be noted that the rule against double recovery would apply to compensation granted to a successful claimant. Although a claimant is likely to pursue a claim under the Bill's provisions if possible due to its

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[132] Brian Doyle and Shona Simon, *Presidential Guidance: Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction* (Tribunals Judiciary, 2017) [10].

[133] *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318, [65].

[134] Exemplary damages are available in discrimination cases, see *London Borough of Hackney v Sivanandan* (2011) UKEAT/0075/10/CEA, [32] and *Armitage v Johnson* [1997] IRLR 162, [40].

generous operation, a claim under the Equality Act, TULR(C)A, PIDA, the ERA or the common law could arise upon the same facts. If the claimant has sued successfully under two different causes of action and the defendant employer can prove that the claimant would be obtaining compensation twice for the same loss, such recovery would be precluded.[135] Similarly, in making awards in a particular claim, 'tribunals must be alert to the risk that what is essentially the same suffering may be being compensated twice under different heads.'[136] Finally, the drafters of the Bill would have to consider how multiple defendants should be treated with regard to the award for damages. They could be liable as joint wrongdoers, which would be desirable from the claimant's perspective as it makes it more likely that they will receive the full amount of their compensation, or independent wrongdoers only liable to the claimant to compensate for the proportion of damage that each caused.

Concluding comments

This chapter has given detail to the proposal that an Act of Parliament should enact specific, enforceable and horizontally effective human rights protection for workers against their employers. The design put forward here takes into account the many pitfalls and inadequacies that the previous chapters exposed within the existing mechanisms of domestic employment law. The suggestions are ambitious and aspirational. Sadly, it would be unrealistic to end on this high note. As Sir Stephen Sedley observed, human rights campaigners in the UK engage in debate and activism from a 'low and defensive base'.[137] The Human Rights Act itself is under threat of removal,[138] human rights law is

[135] *O'Laoire v Jackel International (No 2)* [1991] IRLR 170, [40].

[136] *HM Prison Service v Salmon* [2001] IRLR 425, [29].

[137] Stephen Sedley, 'Bringing rights home: time to start a family?' (2008) 28 Legal Studies 327, 332.

[138] See Theresa May's 2016 speech Theresa May, 'Home Secretary's speech on the UK, EU and our place in the world' (*Home Office, Speech Archives*, 2016) <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-

'unwelcome' and 'unwanted' in political debate[139] and is consistently attacked in the media.[140] As a result, public opinion on the human rights agenda and its implementation in the UK is deeply mixed.[141] One might hope that demonstrating the usefulness of Convention rights to all workers in Britain might lead to an increase in support for human rights more broadly, as well as highlighting to the British public one benefit amongst many that membership of the Council of Europe provides.

The sensible conclusion to draw, in the current political climate, is that the enactment of draft legislation of the kind proposed here is extremely unlikely. A consensus regarding its necessity and desirability would have to be built in a time where the UK faces a potential economic downturn and implementing human rights within an aspect of economic activity may be perceived as something that Britain simply cannot afford.[142] As Sir Stephen Sedley comments, the 'impetus of a constitutional moment' is necessary to galvanise any change 'beyond platitudes'.[143] The European Union has been the source of a floor of mandatorily maintained rights for three decades. As Britain leaves the European Union, we might ask what impact that constitutional shift will have on the position of

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in-the-world> accessed 10 July 2018: 'If we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court.'

[139] Institute for Human Rights and Business, *Written Evidence to Joint Comittee Inquiry on Business & Human Rights* (30 April 2009).

[140] For an insight into the nature and impact of tabloid reporting upon human rights cases, see David Mead, ''You Couldn't Make It Up': Some Narratives of the Media's Coverage of Human Rights' in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing, 2015).

[141] See a 2008 report's conclusion that '[t]he general public perception is that there is a need for a law to protect human rights in the UK, but that too many people – especially asylum seekers and immigrants – take advantage of the HRA' at iii: Ministry of Justice, *Human Rights Insight Project* (Ministry of Justice Research Series 1/08, January 2008) and similarly mixed views on whether some people take 'unfair advantage' in Kully Kaur-Ballagan and others, *Public perceptions of human rights* (Equality and Human Rights Commission Research Report Series, 2009) 16.

[142] For an indication of the government's approach to the issue of business and human rights: 'It still seems that many government ministers, and some senior civil servants, see the business and human rights agenda as a constraint to growth.' Institute for Human Rights and Business, *Written Evidence to Joint Committee* (n 139).

[143] Sedley, 'Bringing rights home: time to start a family?' (n 137) 335.

workers in the UK. The forecast is not optimistic. Without the minimum standards provided through membership of the EU, a concern that workers' rights will be gradually eroded, and workers exposed to managerial prerogative to a greater degree is justified.[144] In that context, a widespread desire to ensure that an individual's most basic rights – which include but certainly go beyond those included in this thesis – are visibly embedded within the legal system may well arise. The nonchalance towards the rights of workers which is prevalent in the public consciousness today may be disrupted sufficiently to gain popular and political momentum for campaigns in favour of fundamental rights at work.

[144] See for example the ministerial response to questioning about worker's rights by the JCHR at [76]-[77] and the Committee's concern that fundamental rights should not be repealed without full debate for reasons of 'expediency' at [92]: Joint Committee on Human Rights, *The human rights implications of Brexit* (Fifth Report of Session 2016–17, HL Paper 88, HC Paper 695, 19 December 2016).

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