

EMPLOYMENT CONTRACTS, CONDITIONS, AND THE RELATIONSHIP OF EMPLOYMENT

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1 INTRODUCTION

This article has two purposes. The first is to answer a simple question: where an employee refuses to accept a wrongful dismissal by their employer and decides to keep the contract open, why are they unable to sue in debt for their salary or wages, instead being limited to a claim for damages?¹ This is “one of the great unresolved questions of employment law”² and it was expressly left unresolved by the Supreme Court in *Geys v Société Générale*.³ That case rejected the “automatic theory”⁴ of termination and held that following an actual or anticipatory breach, a contract of employment can only be brought to an end at the election of the innocent party.⁵ But that then raises the question: “if the employee decides to keep the contract alive, why should [they] not be allowed to sue for [their] salary or wages”?⁶

The article argues that the answer is to be found in the conditions of an employee’s entitlement to claim a salary or wages (a “condition” here being used in the sense of a “condition precedent” or “concurrent condition”). An employer’s obligation to pay a salary or wages is subject to two conditions: (i) substantial performance of the employee’s obligations over the period in which the right to payment accrues; and (ii) the continuation of the *relationship* of employment—a legal relationship, rooted in a social fact, that is distinct from the *contract* of employment. It is the combined effect of these conditions that explains why a wrongfully dismissed employee who refuses to accept an employer’s repudiation cannot claim their salary or wages, even if the employee’s only obligation over the pay period is to remain ready, willing, and able to work.

However, the claim that there is a distinction between the contract of employment and the relationship of employment is itself controversial and so the second purpose of this article is to defend the distinction between the “contract of employment” and the “relationship of employment” and to reject the suggestion that “employment” should be understood solely in terms of the contract.

The article proceeds in four parts. Part 2 (“The ‘Conditions’ of an Employee’s Entitlement to be Paid”) begins by explaining the “two-tiered structure”⁷ of the contract of employment and the result that a dismissed employee cannot claim their salary or wages even if the employee “keeps the contract open”. Part 3 (“The ‘Contract of Employment’ and the ‘Relationship of Employment’”) defends the suggestion that there is a distinction between the employment contract and the employment relationship,

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¹ This rule is long-established: *Goodman v Pocock* (1850) 15 Q.B. 576 at 583–584; 117 E.R. 577 at 580; *French v Brookes* (1830) 6 Bing. 354; 130 E.R. 1316; *Fewings v Tisdal* (1847) 1 Exch. 295; 154 E.R. 125; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699 at 726; [1968] 3 All E.R. 513 at 524.

² *Cerberus Software Ltd v Rowley* [2001] EWCA Civ 78; [2001] I.C.R. 376 at [29].

³ [2012] UKSC 63, [2013] 1 A.C. 523 at [79]. See generally, A. Summers, “Termination and the Agreed Sum” in G. Virgo and S. Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017) 75 at pp.94–97.

⁴ This is the theory by which “a contract-breaker may in some circumstances by his breach unilaterally bring the contract to an end in law”: *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361 at 370; [1971] 2 All E.R. 216 at 223.

⁵ *Geys v Société Générale* [2013] 1 A.C. 523 at [18] (Lord Hope), [93]–[94] (Lord Wilson).

⁶ *Sunrise Brokers LLP v Rodgers* [2015] I.C.R. 272 at [58].

⁷ M. Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976) at p.20.

demonstrating that the latter is not just a social relationship but a legal relationship with incidents (such as the rules of vicarious liability) that depend on that relationship (and not on the contract). Part 4 (“The Impact of Statute”) then considers the pervasive impact of statute in this area, noting that certain concepts, even though premised on the contract of employment—such as the definition of “dismissal”⁸—inevitably fall back on the relationship of employment in their operation.⁹ This distinction also provides a lens through which to view and evaluate the recent divergent approaches taken by the Supreme Court¹⁰ and the High Court of Australia¹¹ to the classification of an individual’s employment status under employment protection legislation. Finally, Part 5 (“Returning to *Geys v Société Générale*”) examines *Geys*, which was concerned with the calculation of a “termination payment” rather than an entitlement to a salary or wages, to consider whether, in light of the distinction drawn in this article, the correct result was reached.

The issues examined by this article are doctrinal. But they are contemporary and important issues. The conditions of a contract of employment are not only crucial to determining whether a dismissed employee is entitled to a salary or wages, they also determine an employer’s ability to deduct pay for strikes or actions short of a strike.¹² And whether one focuses on the relationship of employment or the contract of employment is relevant to the difficulties created by the legal classification, and therefore the protection and the entitlements, of workers in the “gig economy”.¹³ What is more, doctrinal study of the contract of employment in recent times has become somewhat of a no-person’s land:¹⁴ generalist contract lawyers tend to see the contract of employment as belonging to the specialised field of employment law¹⁵ and “[h]istorically, doctrinal scholarship in labour law [has been] viewed with a degree of suspicion”.¹⁶ But as Professor Alan Bogg has observed, “[d]octrinal analysis is indispensable to the scholarly enterprise in labour law”.¹⁷ This article is written with this collaborative spirit in mind.

2 THE “CONDITIONS” OF AN EMPLOYEE’S ENTITLEMENT TO BE PAID

An important feature of a contract of employment is that it is a contract both (i) to pay a person a salary or wages at the end of a stipulated period, and (ii) to retain a person in the employer’s service.¹⁸ It is the addition of this second element that distinguishes a contract of employment from a mere contract for a service. As long ago as 1853 in *Emmens v Elderton*,¹⁹ Crompton J. said that “wherever there is a contract for

⁸ Employment Rights Act 1996 s.95(1).

⁹ *Robert Cort & Son Ltd v Charman* [1981] I.C.R. 816; [1981] I.R.L.R. 437; *Stapp v The Shaftesbury Society* [1982] I.R.L.R. 326; *Rabess v London Fire and Emergency Planning Authority* [2016] EWCA Civ 1017; [2017] I.R.L.R. 147.

¹⁰ *Uber BV v Aslam* [2021] UKSC 5; [2021] 4 All E.R. 209.

¹¹ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 96 A.L.J.R. 89; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; (2022) 96 A.L.J.R. 144.

¹² D. Mead, “We’re Miles Apart: Disproportionate Deductions from Wages, Industrial Action and Human Rights” (2023) 52 I.L.J. (advance access) at 3–8; A. Bogg and M. Ford, “Striking, Pay Deductions, and Reasonable Orders: A Legal Analysis”, UK Labour Law Blog (6 October 2022) available at <<https://uklabourlawblog.com/2022/10/06/striking-pay-deductions-and-reasonable-orders-a-legal-analysis-by-alan-bogg-and-michael-ford-kc/>>.

¹³ A concept applicable to work obtained through platforms such as Uber, Deliveroo, and TaskRabbit, where the word “gig” evokes “the artist’s life in which each concert, or ‘gig’, is but a one-of task or transaction, without further commitments on either side”: J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford: Oxford University Press, 2018) at p.2.

¹⁴ Prominent exceptions being Freedland, *The Contract of Employment* (1976); M. Freedland, *The Personal Employment Contract*, p.b. edn (Oxford: Oxford University Press, 2005). See also G. Golding, “The Origins of Terms Implied by Law into English and Australian Employment Contracts” (2020) 20 O.U.C.L.J. 163.

¹⁵ Freedland, *The Contract of Employment* (1976) at p. 19 (“Writers upon contractual theory are very prone to concentrate upon general contractual principles rather than upon specific types of contract”).

¹⁶ A. Bogg, “Can We Trust the Courts in Labour Law? Stranded Between Frivolity and Despair” (2022) 38 Int.J.Comp.L.L.I.R. 103 at 133.

¹⁷ Bogg, “Can We Trust the Courts in Labour Law? Stranded Between Frivolity and Despair” (2022) 38 Int.J.Comp.L.L.I.R. 103 at 134.

¹⁸ *Emmens v Elderton* (1853) 4 H.L.C. 624; 10 E.R. 606.

¹⁹ (1853) 4 H.L.C. 624 at 644. See also at 668–669 (Parke B.).

... employment ... for a specified time, there is an engagement on the part of the employer to keep the employed in the relation in question during that time, and not merely to pay him wages for the services at the end”.²⁰

In his monograph, *The Contract of Employment*, Professor Mark Freedland described the contract of employment as having a “two-tiered structure” corresponding to the elements identified above.²¹ The first tier is commonly described as the “wage-work bargain”²² and involves the exchange of work for remuneration.²³ The second tier involves “the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment”.²⁴ As this section shows, these two aspects of employment contracts must be considered in order to understand an employee’s entitlement to be paid—both reflect the conditions of an employee’s entitlement to remuneration.

The wage-work bargain

The explanation often given for why a wrongfully dismissed employee who refuses to accept the employer’s repudiation cannot claim their salary or wages is that the employer, by their wrongful dismissal, can prevent the employee from completing their side of the wage-work bargain and satisfying the condition of payment.²⁵ “[T]here can be no wages without work”.²⁶ In *Browning v Crumlin Valley Collieries Ltd*,²⁷ Greer J. said that “[t]he consideration for work is wages, and the consideration for wages is work”, which simply means that the payment of wages is conditional on the doing (or more precisely, substantial performance)²⁸ of the work.²⁹ If an employee does not do the work then they are not entitled to be paid.³⁰ This is, of course, on the assumption that the actual doing of the work is the condition of payment, not simply (as is much more common today) simply being ready, willing, and able to do the work. The latter situation is discussed at the end of this sub-section.

The decision in *Miles v Wakefield*³¹ illustrates this. The House of Lords held that a superintendent registrar’s right to wages (by way of an analogy with an employment contract) depended on doing the work and thus the failure to work on Saturday mornings because of industrial action meant that he had not fulfilled the condition precedent to the right to be paid. Philip Sales, who wrote a note on the case, said: “[T]he proper approach is, first, to determine the period over which the employee must work before a right to receive pay

²⁰ See also T.W. Chitty, A.T. Denning, and C.P. Harvey, *A Selection of Leading Cases on Various Branches of the Law with Notes by John William Smith*, 13th edn (London: Sweet & Maxwell Ltd, 1929) Vol. II at p.47 (“an agreement by the parties to enter into the relationship of master and servant for the named period, together with a promise by the master to pay the servant the named wages on the servant’s performance of the consideration due from him”).

²¹ Freedland, *The Contract of Employment* (1976) at p.20. See also B.W. Napier, “Aspects of the Wage-Work Bargain” (1984) 43 C.L.J. 337 at 337 and P. Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 96–97, both developing this insight.

²² E.g., Napier, “Aspects of the Wage-Work Bargain” (1984) 43 C.L.J. 337.

²³ Freedland, *The Contract of Employment* (1976) at p.20.

²⁴ Freedland, *The Contract of Employment* (1976) at p.20.

²⁵ See *Decro-Wall* [1971] 1 W.L.R. 361 at 370; *Denmark Productions* [1969] 1 Q.B. 699 at 726.

²⁶ Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 102.

²⁷ [1926] 1 K.B. 522 at 528.

²⁸ *Hoening v Isaacs* [1952] 2 All E.R. 176; [1952] 1 T.L.R. 1360.

²⁹ “Consideration” here is being used in a particular sense deriving from the old law of “dependent” and “independent” promises, which asked whether the consideration was the other party’s “promise” (in which case the first party’s obligation to perform was independent of and unconditional on performance by the other party) or the “performance” (in which case the promise was dependent and conditional on performance by the other party). See generally J. English, “The Nature of Promissory Conditions” (2021) 137 L.Q.R. 630 at 631–633; Napier, “Aspects of the Wage-Work Bargain” (1984) 43 C.L.J. 337 at 339. For other examples of this language being used in this context see: *Hancock v BSA Tools Ltd* [1939] 4 All E.R. 538 at 539–540; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 C.L.R. 435 at 452–453.

³⁰ *Miles v Wakefield* [1987] A.C. 539 at 553 (Lord Brightman), 561 (Lord Templeman), 570 (Lord Oliver); [1987] 1 All E.R. 1089 at 1092, 1098, 1105–1106.

³¹ [1987] A.C. 539.

for that period accrues and, secondly, to determine whether or not he has substantially performed his obligations under the contract over that period.”³² The effect of s.2 and s.5 of the Apportionment Act 1870 is that this period will usually be a day.³³ As for the required performance, it is substantial performance—not exact and literal performance—over the period that is usually the condition of the entitlement to payment.³⁴

As *Miles v Wakefield* shows, an employee need not be “dismissed” to be disentitled to wages: “a refusal to work on the part of a servant, who neither leaves [their] master’s service nor is discharged, may disentitle [them] to wages for the period of the refusal. That is for non-fulfilment of the conditions by which wages are earned”.³⁵ Another example is illness: “[t]he relationship of master and servant is not determined by temporary illness or by an incapacity unless it is of such probable duration as to go to the root of that relationship”.³⁶ But this does not mean that, unless the contract otherwise provides, they are entitled to payment.³⁷ They must satisfy the condition of doing the work before they are entitled to be paid.

In many cases therefore—where the condition of being paid is the doing of the work—the effect of dismissal will be to prevent the employee from complying with this condition. If an employer can prevent the employee from doing the work by not providing it, or by preventing access to the facilities needed to do the work (changing the locks, computer access codes, and so on) then the employee cannot claim their salary or wages. In such cases, the contract is one that, practically speaking, requires cooperation between the parties for the employee to do the work required to earn their remuneration and such cooperation cannot be compelled because generally a court will not order specific performance of a contract of employment.³⁸

At an early point in the law’s development, it was thought that a wrongfully dismissed employee, who refused to accept the repudiation and remained ready, willing, and able to work, could claim their salary or wages by asserting a fiction that the work could be treated as having been done by their “constructive service”.³⁹ But this doctrine has since been rejected,⁴⁰ and its rejection aligns with the position found in contract law generally. English contract law does not recognise the doctrine of the fictional fulfilment of conditions that is found in some civilian jurisdictions.⁴¹ And while it does recognise a doctrine of waiver of

³² P. Sales, “Contract and Restitution in the Employment Relationship: No Work, No Pay” (1988) 8 O.J.L.S. 301 at 305.

³³ *Sim v Rotherham Metropolitan Borough Council* [1987] Ch. 216 at 254–255; *Hartley v King Edward VI College* [2017] UKSC 39; [2017] 1 W.L.R. 2110. See Sales, “Contract and Restitution in the Employment Relationship: No Work, No Pay” (1988) 8 O.J.L.S. 301 at 305–306.

³⁴ *Boone v Eyre* (1777) 1 H. Bl. 273n; 126 E.R. 160n; *Hoening* [1952] 2 All E.R. 176. This is despite some suggestions to the contrary in this context: *Sim v Rotherham Metropolitan Borough Council* [1987] Ch. 216 at 254; [1986] 3 All ER 387 at 409; *Wiluszynski v Tower Hamlets London Borough Council* [1989] I.C.R. 493 at 499; [1989] I.R.L.R. 259 at 262.

³⁵ *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 466 (Dixon J.).

³⁶ Chitty, Denning, and Harvey, *A Selection of Leading Cases on Various Branches of the Law with Notes by John William Smith* (1929) Vol. II at p.49, citing *Poussard v Spiers & Ponds Ltd* (1876) 1 QBD 410.

³⁷ *O’Grady v M Saper Ltd* [1940] 2 K.B. 469 at 473–474; [1940] 3 All E.R. 527 at 529.

³⁸ *De Francesco v Barnum* (1890) 45 Ch. D. 430.

³⁹ *Gandell v Pontigny* (1816) 4 Camp. 375; 171 E.R. 119. See generally Chitty, Denning, and Harvey, *A Selection of Leading Cases on Various Branches of the Law with Notes by John William Smith* (1929) Vol. II at pp.51–55; Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 106–107.

⁴⁰ *Elderton v Emmens* (1848) 6 C.B. 160 at 178; 136 E.R. 1213 at 1219–1220; *Goodman* (1850) 15 Q.B. 576 at 583–584; *Denmark Productions* [1969] 1 Q.B. 699 at 726; *Geys* [2013] 1 A.C. 523 at [78]–[79]. See also *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 476.

⁴¹ *Litte v Courage* (1995) 70 P. & C.R. 469 at 474; [1995] C.L.C. 164 at 167; *Thompson v ASDA-MFI Group plc* [1988] Ch. 241 at 266; [1988] 2 All E.R. 722 at 741; E. Peel, *The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020) at p.74. See, e.g., German Bürgerliches Gesetzbuch, s.162(1); French Code Civil, Art.1304-3.

conditions by prevention,⁴² this is subject to an important limitation that a condition cannot be waived where the condition constitutes the consideration for the counter-promise.⁴³ The result is that in a contract of employment, as in all contracts, the consideration must be “executed” before an employee can claim their wages or salary.⁴⁴

As noted above, the foregoing discussion relies on the assumption that the doing of the work is the consideration for and the condition of payment.⁴⁵ If the employer can prevent the employee from doing the work, then the employee cannot satisfy the condition of payment and cannot claim a salary or wages. But it is always a question of construction whether the condition of payment is the doing of the work, or simply being ready, willing, and able to work.⁴⁶ And it will not always, or even normally, be the case that the consideration for, and condition of, payment is the doing of the work. As Sir Patrick Elias has pointed out, “[s]urely the consideration for most employees is not the actual doing of the work but being ready and willing to work.”⁴⁷

That at least sometimes the condition of payment is not the doing of the work, but being ready, willing, and able to do it, means that the wage-work condition alone cannot explain why a wrongfully dismissed employee cannot claim a salary or wages.⁴⁸ If a wrongfully dismissed employee refuses to accept the employer’s repudiation and remains ready, willing, and able to work, and that is the only condition of payment, the employee has satisfied the condition and should be able to bring an action for the agreed sum for their salary or wages. But this they cannot do. A different justification is needed.

The employment relationship

As outlined at the beginning of this section, what distinguishes a contract of employment from a mere contract to provide services is that it has a two-tiered structure: the employer promises not only to pay the employee for services rendered, but also to retain the employee in their service—that is, to establish a “relationship of employment”. And generally, the obligation to pay a salary or wages is conditional on the continuation of this relationship (in addition to substantial performance of the employee’s obligations): “The wages are incident to the subsisting relationship of master and servant”.⁴⁹

⁴² *Hotbam v East India Co* (1787) 1 Term Rep. 638; 99 E.R. 1295; *Giles v Giles* (1846) 9 Q.B. 164; 115 E.R. 1237; *Mackay v Dick* (1881) 6 App. Cas. 251 at 264 (Lord Blackburn) and compare 270 (Lord Watson); (1881) 8 R. (H.L.) 37 at 41, 45; *Colley v Overseas Exporters* [1921] 3 K.B. 302 at 308–309; [1921] All E.R. Rep. 596 at 599–600; *Tiberghien Draperie SaRL v Greenerg & Sons (Mantles) Ltd* [1953] 2 Lloyd’s Rep. 739; *Compagnie Noga d’Importation et d’Exportation SA v Abacha (No 3)* [2002] C.L.C. 207 at [94]–[108]. For the distinction between “waiver” and “fictional fulfilment”, see the discussion of *Mackay v Dick* (1881) 6 App. Cas. 251 in J. English, *Discharge of Contractual Obligations* (DPhil Thesis, University of Oxford 2022) s.4.6.

⁴³ *Laird v Pim* (1841) 7 M. & W. 474; 151 E.R. 852. See English, *Discharge of Contractual Obligations* (2022) s 4.7.2.2.

⁴⁴ F. Dawson, “Metaphors and Anticipatory Breach of Contract” [1981] C.L.J. 83 at 95–96.

⁴⁵ “Consideration” here being used in the sense explained in n. 29 above.

⁴⁶ *Petrie v Mac Fisheries Ltd* [1940] 1 K.B. 258 at 269–270; [1939] 4 All E.R. 281 at 290–291; *O’Grady v M Saper Ltd* [1940] 2 K.B. 469 at 473; *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 452 (Latham C.J.; dissenting but not on this point). See further Chitty, Denning, and Harvey, *A Selection of Leading Cases on Various Branches of the Law with Notes by John William Smith* (1929) Vol. II at p.49.

⁴⁷ Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 102. Dixon J. has noted, for example, that “[i]t is... possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service”: *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 465. However, he went on to observe that “to say the least, it is not usual” (at 465). This statement is likely a product of its time: Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 102–103.

⁴⁸ Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 104. See also *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 449.

⁴⁹ *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 466 (Dixon J.).

Support for this view can be found in the observations of Brightman L.J. in *Gunton v Richmond-upon-Thames London Borough Council*:

“I do not think it follows, however, from the rupture of the status of master and servant... that the contract of service... has been terminated by the wrongful act of the master ... What has been determined is only the status or relationship. So in the result the servant cannot sue in debt for his wages, which he is wrongfully deprived of the opportunity to earn... An obligation which is not of necessity dependent on the existence of the relationship of master and servant may well survive...”⁵⁰

And in *Delaney v Staples (t/a De Montfort Recruitment)*,⁵¹ Lord Browne-Wilkinson, speaking for the House of Lords, said: “[T]he summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment”.

A wrongful dismissal in this context does not equate to the termination of the contract. All a wrongful dismissal affects, on its own, is the employment relationship. In *Automatic Fire Sprinklers Pty Ltd v Watson*,⁵² a decision of the High Court of Australia, Dixon J. put it this way: “[T]hat relationship may be ended by the servant forsaking the master or the master discharging the servant, although the act of the one or of the other amounts to a breach of contract”.⁵³ And in *Byrne v Australian Airlines Ltd*,⁵⁴ another decision of the High Court, Brennan C.J., Dawson J., and Toohey J. said: “It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation constituted by the wrongful dismissal and puts an end to the contract.”⁵⁵ Only if the repudiation is accepted by the employee will the contract be terminated.

It is because of this condition, together with the wage-work condition discussed above, that an employee who is wrongfully dismissed cannot claim their salary or wages. The employee’s entitlement to a salary or wages is generally conditional on *both* substantial performance of the employee’s obligations over the period in which the right to payment accrues and the continuation of the employment relationship. The employer’s wrongful dismissal brings an end to the employment relationship even if it does not bring an end to the contract. The employee is thus prevented from satisfying the condition (or conditions) of payment.

The key benefit of this two-tiered understanding is that it can explain the cases in which, on a proper construction of the contract, the doing of the work is not a condition of payment, but merely being ready, willing, and able to do the work is a condition of payment. The reason the employee cannot claim a salary or wages by being ready, willing, and able to perform over the pay period is that this only satisfies one condition of the entitlement to be paid. The other is the subsistence of the employment relationship, which has been brought to an end by the employer’s breach. The employee may be ready, willing, and able, to work but they cannot do that work pursuant to a subsisting employment relationship.

⁵⁰ *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch. 448 at 475; [1980] 3 All E.R. 577 at 594. See also *Micklefield v SAC Technology Ltd* [1990] 1 W.L.R. 1002 at 1006; [1991] 1 All E.R. 275 at 278–279; Summers, “Termination and the Agreed Sum” in *Commercial Remedies: Resolving Controversies* (2017) at p.96; Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 104.

⁵¹ [1992] 1 A.C. 687 at 692; [1992] 1 All E.R. 944 at 947.

⁵² (1946) 72 C.L.R. 435.

⁵³ *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 466.

⁵⁴ (1995) 185 C.L.R. 410 at 427.

⁵⁵ See also *Visccher v Giudice* [2009] HCA 34; (2009) 239 C.L.R. 361 at [53].

The “employment relationship” condition can also explain another example.⁵⁶ Suppose a university lecturer is wrongfully dismissed from the university and the lecturer’s salary is conditional on teaching a course. One way to explain why the lecturer cannot claim a salary is that the university can physically prevent the lecturer from teaching—they can lock the doors, shut out computer access, deactivate the lecturer’s university card, and so on. But suppose the lecturer manages to work around all this and to teach the students for several months online (the students being all too eager to learn). The lecturer has satisfied the condition of “doing the work” but can it really be said that they are entitled to payment? The answer must be “no”: the entitlement to a salary also depends on the lecturer retaining their status as an employee, i.e. it depends on the relationship of employment.

Again, this will always depend on the proper construction of the particular contract. But to take a contract of employment outside what one would ordinarily expect to be the position, there needs to be something “in the agreement which makes the payment of salary independent of actual service, or which would operate to give the employee a title to salary, notwithstanding that he had been discharged from the service of the companies, however wrongfully”.⁵⁷

3 THE “CONTRACT OF EMPLOYMENT” AND THE “RELATIONSHIP OF EMPLOYMENT”

The most controversial move made above was to suggest that there is a distinction between the contract of employment and the relationship of employment. This is not universally accepted.⁵⁸ In *Geys v Société Générale*,⁵⁹ Lord Wilson described the distinction between the two as “unhelpful, indeed confusing”. This section defends the distinction. The problem has been the tendency to assume that “where a contract of employment exists there exists also an employment relationship”.⁶⁰ This has induced another tendency: to look at the relationship of employment as being an exclusively contractual one.⁶¹

A simple example can illustrate the distinction between the contract of employment and the relationship of employment.⁶² Suppose that a university lecturer enters into a contract of employment on 1 January to start work on 1 October. There is clearly a contract of employment on 1 January but is there a relationship of employment before 1 October? “[W]e might readily accept that a contract has come into being between the employing entity and the worker; but it is more difficult to accept that employment has commenced.”⁶³ One argument might be that there is a contract of employment but the contract does not commence until the date work is scheduled to begin. But one can easily imagine scenarios in which this could not be true. For example, the contract could contain a non-compete or confidential information clause that is intended to operate from the moment of contracting irrespective of whether work has commenced.⁶⁴ In such a case,

⁵⁶ An example taken from the University of Oxford, Faculty of Law Commercial Remedies B.C.L./M.Jur. course.

⁵⁷ *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 466–467.

⁵⁸ B. Hough and A. Spowart-Taylor, “Theories of Termination in Contracts of Employment: The Scylla and Charybdis” (2003) 19 J.C.L. 134 at 144;

⁵⁹ [2013] 1 A.C. 523 at [82]. See also *Dietmann v Brent London Borough Council* [1987] I.C.R. 737 at 753; [1987] I.R.L.R. 259 at 266.

⁶⁰ S. Honeyball and D. Pearce, “Contract, Employment and the Contract of Employment” (2006) 35 I.L.J. 30 at 30.

⁶¹ J. Gardner, “The Contractualisation of Labour Law” in H. Collins, G. Lester, and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) 33 at pp.38–42.

⁶² Freedland, *The Personal Employment Contract* (2005) at p.99; Honeyball and Pearce, “Contract, Employment and the Contract of Employment” (2006) 35 I.L.J. 30 at 31–39.

⁶³ Freedland, *The Personal Employment Contract* (2005) at p.99. The decision in *Sarker v South Tees Acute Hospitals NHS Trust* [1997] I.C.R. 673; [1997] I.R.L.R. 328, which reached the opposite conclusion for the purpose of unfair dismissal, is discussed in the next section.

⁶⁴ Honeyball and Pearce, “Contract, Employment and the Contract of Employment” (2006) 35 I.L.J. 30 at 38. Another consequence of this distinction is that a wrongfully dismissed employee, who has refused to accept the repudiation, and who persuades their

it can easily be said that there is a contract, which has commenced, but it cannot be said that employment has commenced.

Freedland has described the example of a contract made for employment to commence at a later date as one in which the employment contract exists in “*pre-employment mode*”.⁶⁵ He contrasts this to:

1. “*full employment mode*”, which refers to where the contract imposes obligations for the current provision of work and remuneration;
2. “*sub-employment mode*”, which refers to a period of time after work has ceased but where there is “still some degree of mutual obligation for the future resumption of employment”, or where other obligations continue, “such as those of mutual loyalty or confidence”; and
3. “*post-employment mode*”, which refers to the stage “after a period of contractual employment has ended and after there have ceased to be any mutual obligations regarding the resumption of employment”.⁶⁶

These four modes are presented by Freedland as “suggestions towards a scheme of analysis of the internal structure and continuity of personal employment contracts”.⁶⁷ In this respect, it is a useful analysis. But insofar as the analysis might be taken to suggest, on one reading, that the contract itself exists in different states or forms, care should be taken. There is only one contract and it can only be altered by a variation. What these four stages show is that the *operation* of the contract and the *relationships* established pursuant to it may vary over the lifecycle of the contract. In other words, the fact that the contract is in “pre-employment mode” is just one way of expressing the fundamental idea that the contract is in existence, but the relationship of employment has not yet come into being.

One reason for the tendency to focus on the contract of employment is the assumption that any other relationship must be a non-legal one. Thus, in the High Court of Australia decision in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,⁶⁸ Kiefel C.J., Keane J., and Edelman J. said: “The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or psychological concept like friendship”. While recognising that the employment relationship may consist partly in contract and partly in statute,⁶⁹ Kiefel C.J., Keane J., and Edelman J. appear to assume that where there is a contract entirely in writing and statute has not intervened, that contract *is* the relationship and no more.

It is no doubt true that the employment relationship must be a “legal relationship” if it is to matter for legal analysis. But there is no reason that a legal relationship cannot be one rooted in a social fact—the two are not mutually exclusive. The legal relationship of employment is a relationship that the law recognises and to which it gives, or assigns, legal effect. The fallacy, as the late Professor John Gardner argued, is the

employer to retract the dismissal, can resume service—that is, re-establish the relationship—without having to enter into a new contract: *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 466; *Visscher* (2009) 239 C.L.R. 361 at [59]; *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [111]. But admittedly this position also fits with the view that the employment relationship is co-extensive with the contract of employment, which remains extant while the repudiation has not been accepted.

⁶⁵ Freedland, *The Personal Employment Contract* (2005) at p.107.

⁶⁶ Freedland, *The Personal Employment Contract* (2005) at pp.107–108.

⁶⁷ Freedland, *The Personal Employment Contract* (2005) at p.106.

⁶⁸ (2022) 96 A.L.J.R. 89 at [44].

⁶⁹ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [41], [43].

assumption that “if an employment relationship exists in law, it must reside in the terms of the contract between employer and employee”.⁷⁰ While it is sometimes said that the relationship of employment has seen a shift from status to contract,⁷¹ “the transformation has not been so complete for it yet to have been said that the relationship between employer and employee has been subsumed within the law of contract”.⁷²

The argument being put forward here might be associated with the old idea of “status”—a legal classification affecting an individual’s rights, duties, powers, and disabilities that is imposed on them “irrespective of their own volition”.⁷³ But it is important to note that this is not what is being argued. To the extent that the employment relationship can be described as a “status”, it means a relation which, although the parties are free to enter into or to determine of their own volition, has legal consequences that are not the product of their agreement.⁷⁴ In particular, the employment relationship has legal incidents that do not depend solely on the contract of employment.

Nor is this article suggesting that the employment relationship itself necessarily gives rise to rights or duties that can be breached in the way that the contract of employment does. The claim here is much narrower—that often the employment relationship, and not the employment contract, is the social fact upon which certain legal rules depend. That the contract of employment itself makes the entitlement to be paid conditional upon the relationship of employment is just one example of a legal rule that depends upon the subsistence of the relationship and not the contract. Another is the rules on vicarious liability. Vicarious liability depends, in many cases, on the individual being an “employee” of the employer and acting in the course of “employment”. But just because a wrongful dismissal does not affect the contract of employment unless accepted, it does not follow that the employee remains in a relationship of employment with the employer: “there is nothing to prevent the employer from, effectively though wrongfully, withdrawing from the employee the legal right to act on his behalf in any respect”.⁷⁵ It seems unlikely that an employer would be liable for the acts of a wrongfully dismissed employee who, refusing to accept the repudiation, commits a tort while trying to fulfil their duties without the cooperation of the employer. They are no longer an “employee” nor acting in the course of “employment”, even if they keep open the “contract of employment”.

Moreover, the contract of employment is not the only contract that creates a relationship distinct from the contract. Agency is another example of this same phenomenon: “the common assumption that agency is essentially contractual is unsound... [I]t is true that in almost all cases a contract accompanies an agency, but there may be a complete agency without a contract”.⁷⁶ In *Gunton v Richmond-upon-Thames London Borough Council*,⁷⁷ Brightman L.J. thought that the same distinction between the contract and the relationship would apply to agency. He said: “If a two year agency contract is made between principal and agent, and the principal wrongfully repudiates the contract of agency after only one year, quite plainly the agent cannot hold himself out as still being the agent of the principal. He is not. The relationship of principal and agent

⁷⁰ Gardner, “The Contractualisation of Labour Law” in *Philosophical Foundations of Labour Law* (2018) p.42.

⁷¹ *Byrne v Australian Airlines Ltd* (1995) 185 C.L.R. 410 at 436. On this debate more generally, see R.H. Graveson, “The Movement from Status to Contract” (1941) 4 M.L.R. 261 at 270–271; R.W. Rideout, “The Contract of Employment” [1966] C.L.P. 111; O. Kahn-Freund, “A Note on Status and Contract in British Labour Law” (1967) 30 M.L.R. 635 at 635–42; Z. Adams, C. Barnard, S. Deakin, and S.F. Butlin, *Deakin and Morris’ Labour Law* 7th edn, (Oxford: Hart Publishing, 2021) at pp.99–105.

⁷² *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 C.L.R. 456 at 492 [113] (Gageler J).

⁷³ Kahn-Freund, “A Note on Status and Contract in British Labour Law” (1967) 30 M.L.R. 635 at 636.

⁷⁴ See Kahn-Freund, “A Note on Status and Contract in British Labour Law” (1967) 30 M.L.R. 635 at 640.

⁷⁵ *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 451.

⁷⁶ F.E. Dowrick, “The Relationship of Principal and Agent” (1954) 17 M.L.R. 24 at 26.

⁷⁷ [1981] Ch. 448.

has been broken.”⁷⁸ Brightman L.J. added that while the principal had determined the agency relationship, it did not follow that the contract of agency had been terminated by the principal’s repudiation.⁷⁹

All this has the benefit of not treating employment contracts as being at odds with the rest of contract law in areas such as the discharge of contractual obligations.⁸⁰ Contracts of employment are not sui generis contracts, capable of being brought to an end unilaterally by the actions of one party.⁸¹ Dismissal is not equivalent to the termination of the contract; it is the bringing to an end of the relationship of employment. It is the relationship that is unique. But, as seen above, the contract of employment is not the only contract that creates a relationship distinct from the contract.

Unfortunately, in *Geys v Société Générale* Lord Wilson did not embrace the distinction, instead giving it a rather perfunctory rejection in a single paragraph.⁸² It is possible to discern three reasons for its rejection. First, that the distinction was “no more than [a] convenient short-hand for the common law’s long rejection of a claim for wages or salary”.⁸³ Secondly, that it has been described by scholars as “deeply problematic”,⁸⁴ the reason—not actually explained by Lord Wilson but drawn from the article to which he refers—being that “it is the contract that constitutes and defines the employment relationship” and “there can be no employment relationship independent of a contract”.⁸⁵ And finally, that “[i]t has offered easy pickings for proponents of the automatic theory, whom it enables to argue, with superficial force, that, if the wrongful repudiation terminates the relationship, it must also then terminate the contract.”⁸⁶

The first reason mischaracterises the purpose of drawing the distinction: the distinction is not offered as a shorthand for some anomalous common law rule, but as an explanation of that rule—why a wrongfully dismissed employee generally cannot claim a salary or wages. The problem with the judgment in *Geys* is that it offers no plausible alternative explanation for the rule. References are made to “the Victorian work ethic”⁸⁷ and to the employee not being able “sit in the sun”,⁸⁸ and it is said that “[t]he law takes the view that it is better for the employee ... that [their] claim for loss of wages or salary should be confined to a claim for damages and therefore be subject to his duty to mitigate”.⁸⁹ But why the law denies the action for the agreed sum is not explained. And statements about Victorian work ethic and sitting in the sun appear more directed to questions of mitigation, which are not relevant to an action for the agreed sum,⁹⁰ so they do not advance the matter.

The second reason and the fallacy of assuming that if an employment relationship exists it must be found exclusively in the contractual relationship has already been touched on above. It is not a problem that is unique to employment law. Mark Wonnacott K.C. has recently lamented the entire “contractualization” of

⁷⁸ *Gunton* [1981] Ch. 448 at 474–475.

⁷⁹ *Gunton* [1981] Ch. 448 at 475.

⁸⁰ See *Geys* [2013] 1 A.C. 523 at [97] (“[W]e should keep the contract of employment firmly within the harbour which the common law has solidly constructed for the entire fleet of contracts in order to protect the innocent party, as far as practicable, from the consequences of the other’s breach”). Cf. Freedland, *The Contract of Employment* (1976) at p.6.

⁸¹ *Geys* [2013] 1 A.C. 523. Cf. *Vine v National Dock Labour Board* [1957] A.C. 488 at 500; [1956] 3 All E.R. 939 at 944; *Sanders v Ernest A Neale Ltd* [1974] I.C.R. 565 at 570–571; [1974] I.R.L.R. 236 at 238–239.

⁸² *Geys* [2013] 1 A.C. 523 at [82].

⁸³ *Geys* [2013] 1 A.C. 523 at [82].

⁸⁴ *Geys* [2013] 1 A.C. 523 at [82].

⁸⁵ Hough and Spowart-Taylor, “Theories of Termination in Contracts of Employment: The Scylla and Charybdis” (2003) 19 J.C.L. 134 at 144; referred to in *Geys* [2013] 1 A.C. 523 at [82].

⁸⁶ *Geys* [2013] 1 A.C. 523 at [82].

⁸⁷ *Geys* [2013] 1 A.C. 523 at [78].

⁸⁸ *Geys* [2013] 1 A.C. 523 at [79], quoting *Denmark Productions* [1969] 1 Q.B. 699 at 726.

⁸⁹ *Geys* [2013] 1 A.C. 523 at [79].

⁹⁰ Elias, “The Structure of the Employment Contract” (1982) C.L.P. 95 at 104.

the lease, arguing that it has “corrupted the whole intellectual framework of the law of landlord and tenant”.⁹¹ He writes: “[W]e have come to think of the initial grant of the lease as the making of a contract containing particular terms—a contract for exclusive possession of land for a term, usually at a rent—and that contractualisation has produced some bizarre results.”⁹² Wonnacott gives the simple example of “I grant you a lease of Blackacre for a term of 10 years reserving to myself an annual rent of £10”, and says “[w]here is the “contract” in that? There is none.”⁹³ The reason the obligation to pay rent runs with the lease and binds third parties who acquire it, registration aside, is because it is an incorporeal hereditament reserved out of the grant.⁹⁴

The contractualisation of the employment relationship, like the contractualisation of leases, is a form of reductive reasoning that fails to recognise that a contract may bring another type of relationship into being. As Gardner explained:

“[This reasoning] fails to do justice to other relations, such as that between employer and employee, because it insists, reductively, that they are but types of contractual relations. ... A contractual relationship may be used to bring another relationship into existence, to crystallise or foreground some features of it, or to provide for a possible future in which it starts to break down. But notice that the contractual relationship here exists to facilitate or enable another relationship between the same parties.”⁹⁵

Moreover, that the contract of employment may constitute an important part of, or partly determine the scope of, the employment relationship does not mean that the contractual relationship *is* the employment relationship. “The contract may attempt or purport to capture the normative structure of the employment relationship; but the contractual relationship cannot actually *be* the employment relationship.”⁹⁶ A contract of employment, while it may be the basis of the consensus for bringing the employment relationship into being, is a contract obliging the employer and employee to maintain an employment relationship; it does not, on its own, constitute the entire relationship, even if the contract is wholly reduced to writing and statute has not intervened.⁹⁷

The final reason offered by Lord Wilson is not a reason against distinguishing between the contract of employment and the relationship of employment because, by his own admission, those who have deployed it to support an automatic theory of termination have only been able to do so “with superficial force”. Indeed, the whole point of drawing the distinction is to explain why the contract is not automatically terminated, despite the fact that the employee is no longer able to claim a salary or wages and is not obliged to continue to be ready, willing, and able to work.

To be clear, it is no part of the argument here that a contract is automatically terminated following a wrongful dismissal. By contrast, this was the argument of Lord Sumption in his dissenting judgment in *Geys*. He said:

“The only rational explanation of the rule that a wrongfully dismissed employee cannot sue for his wages is that once the employee has been dismissed, albeit wrongfully, there is no longer a contractual obligation to pay

⁹¹ Mark Wonnacott K.C., ‘Where the law went wrong’ (2021) 25 L. & T. Review 7 at 7.

⁹² Wonnacott, ‘Where the law went wrong’ (2021) 25 L. & T. Review 7 at 8.

⁹³ Wonnacott, ‘Where the law went wrong’ (2021) 25 L. & T. Review 7 at 7.

⁹⁴ Wonnacott, ‘Where the law went wrong’ (2021) 25 L. & T. Review 7 at 7.

⁹⁵ Gardner, “The Contractualisation of Labour Law” in *Philosophical Foundations of Labour Law* (2018) at p.41.

⁹⁶ Gardner, “The Contractualisation of Labour Law” in *Philosophical Foundations of Labour Law* (2018) at p.42.

⁹⁷ Cf *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [41] and see the text accompanying n.69.

the wages, and therefore no debt on which to sue. This can only be because the contract terminated upon the dismissal.”⁹⁸

As seen above, the explanation for the rule that a wrongfully dismissed employee cannot claim a salary or wages is that, generally, an employer’s obligation to pay a salary or wages is conditional on substantial performance of the employee’s obligations over the period in which the right to payment accrues *and* the continuation of the employment relationship. In cases where the employee’s only obligation is to remain ready, willing, and able to work—and thus the first condition is satisfied—it is the determination of the employment relationship that explains why the employee cannot claim remuneration, not the termination of the contract. Lord Sumption was therefore wrong to say that this can only be because the contract is terminated. Indeed, this explanation based on the conditionality of the obligation to pay a salary or wages is even compatible with the view that “termination” is an unnecessary add-on to contract law and that the discharge of contractual obligations can be explained solely by the conditional nature of the parties’ respective obligations to perform.⁹⁹

4 THE IMPACT OF STATUTE

So far little has been said about the impact of statute. Statutory interventions are pervasive in this area and statute is now the main source of regulation of employment relationships.¹⁰⁰ One argument might be that the distinction between the contract of employment and the relationship of employment is no longer tenable because much employment legislation is premised on the contract of employment.¹⁰¹ But as this section shows, even when legislative concepts appear to be premised on the “contract of employment”, their interaction with common law concepts means that they inevitably fall back in their operation on the “relationship of employment”. This distinction is also at the heart of the divergent approaches recently taken by the Supreme Court in *Uber BV v Aslam*¹⁰² and the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd*¹⁰³ and *ZG Operations Australia Pty Ltd v Jamsek*¹⁰⁴ to the classification of an individual’s worker or employment status under employment protection legislation. That divergence raises a debate about whether when interpreting such statutes they should be understood as focusing on the “contract of employment” (the High Court’s approach) or the “relationship of employment” (the Supreme Court’s approach).

Unfair dismissal

Part X of the Employment Rights Act 1996 (the ‘ERA 1996’) provides various protections against unfair dismissal.¹⁰⁵ Section 95 of the ERA 1996, which defines the concept of dismissal, relevantly provides that an employee is “dismissed” by their employer for this purpose if “the contract under which he is employed is terminated by the employer (whether with or without notice)”.¹⁰⁶ Dismissal is a pre-requisite to invoking

⁹⁸ *Geys* [2013] 1 A.C. 523 at 573 [131].

⁹⁹ See English, “The Nature of Promissory Conditions” (2021) 137 L.Q.R. 630.

¹⁰⁰ A.C.L. Davies, “The Relationship between the Contract of Employment and Statute” in M. Freedland (ed), *The Contract of Employment* (Oxford: Oxford University Press, 2016) 73 at p.81.

¹⁰¹ See, e.g., Employment Rights Act 1996, s.95(1) (the meaning of “dismissal”), s.230 (the meaning of “employee”). See further, Gardner, “The Contractualisation of Labour Law” in *Philosophical Foundations of Labour Law* (2018) at p.42.

¹⁰² *Uber* [2021] 4 All E.R. 209.

¹⁰³ (2022) 96 A.L.J.R. 89.

¹⁰⁴ (2022) 96 A.L.J.R. 144.

¹⁰⁵ Employment Rights Act 1996, s.94.

¹⁰⁶ Employment Rights Act 1996, s.95(1)(a).

the unfair dismissal jurisdiction.¹⁰⁷ Section 97 of the ERA 1996 also provides for the date of dismissal, which is referred to in the Act as the “effective date of termination”. It provides that where a “contract of employment is terminated without notice” the effective date of termination “means the date on which the termination takes effect”.¹⁰⁸ The effective date of termination is important because it determines whether the employee has been continuously employed for the qualifying period of employment of two years,¹⁰⁹ and whether the complaint has been made to an employment tribunal within the required period of three months from the effective date of termination (subject to an extension in cases where it was not reasonably practicable to do so).¹¹⁰

Both the concept of “dismissal” and “the effective date of termination” appear to focus on the contract, drawing no distinction between the contract of employment and the relationship of employment. In the case of a summary dismissal in breach of contract, one would therefore expect the date of dismissal (i.e. the effective date of termination) to be the date on which the employee accepts the repudiation of the employer and brings about a termination of the contract.¹¹¹ After all, “[a]n unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind.”¹¹² That is, it has no effect until it is accepted.

But this is not the position. Instead, a series of cases have held that the “termination takes effect” at the date of the summary dismissal.¹¹³ In *Robert Cort & Son Ltd v Charman*,¹¹⁴ Browne-Wilkinson J. held under the Employment Protection (Consolidation) Act 1978, a predecessor of the ERA 1996, that an employee dismissed without notice at 50 weeks after the commencement of his employment—two weeks shy of the then-qualifying period of 52 weeks—could not bring an unfair dismissal claim. He held that the effective date of termination under the Act was “the date of the dismissal and not a later date”¹¹⁵ (such as the date of the acceptance of the repudiation). In reaching this conclusion, Browne-Wilkinson J. expressly relied on the distinction between the contract of employment and the relationship of employment. He said:

“[T]he draftsman of the section does not refer simply to the date of the termination of the contract, but to the date on which the termination ‘takes effect.’ As we have pointed out, even on the acceptance view [i.e. the elective theory of termination] the status of employer and employee comes to an end at the moment of dismissal, even if the contract may for some purposes thereafter continue. ... We therefore consider it to be a legitimate use of words to say... that the termination of the contract of employment ‘takes effect’ at the date of the dismissal...”¹¹⁶

The decision in *Robert Cort* was followed by the Court of Appeal in *Stapp v Shaftesbury Society*.¹¹⁷ It has also been followed by the Court of Appeal in the context of the ERA 1996 and after the entrenchment of the

¹⁰⁷ Adams, Barnard, Deakin, and Butlin, *Deakin and Morris’ Labour Law* (2021) at p.442.

¹⁰⁸ Employment Rights Act 1996, s 97(1)(b).

¹⁰⁹ Employment Rights Act 1996, s 108(1).

¹¹⁰ Employment Rights Act 1996, s 111(2).

¹¹¹ Adams, Barnard, Deakin, and Butlin, *Deakin and Morris’ Labour Law* (2021) at p.463.

¹¹² *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421.

¹¹³ *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 W.L.R. 171; [1974] 1 All E.R. 520; *Robert Cort* [1981] I.C.R. 816; *Stapp* [1982] I.R.L.R. 326; *BMK Ltd v Logue* [1993] I.R.L.R. 477; [1993] I.C.R. 601; *Rabess* [2017] I.R.L.R. 147. See M. Freedland and J. Adams-Prassl, “Employment” in H. Beale (ed), *Chitty on Contracts*, 34th edn (Sweet & Maxwell, 2021) Vol. 2 at p.1654; Adams, Barnard, Deakin, and Butlin, *Deakin and Morris’ Labour Law* (2021) at p.463.

¹¹⁴ [1981] I.C.R. 816.

¹¹⁵ *Robert Cort* [1981] I.C.R. 816 at 820.

¹¹⁶ *Robert Cort* [1981] I.C.R. 816 at 821.

¹¹⁷ [1982] I.R.L.R. 326.

elective theory of termination in *Geys*.¹¹⁸ Indeed, in *Rabess v London Fire and Emergency Planning Authority*,¹¹⁹ the Court of Appeal said that *Geys* “does not bear at all on the interpretation of statutory rights arising under the 1996 Act”.

The effect of these decisions is that even though the ERA 1996 refers to the “contract of employment”, what has in practice mattered is the “relationship of employment”. The effect of the interaction between the statute and the common law has been that it is not correct to say that the employee is dismissed only when the contract ends—the employee is dismissed when the employer determines the relationship of employment in breach of the contract, even if the employee refuses to accept the repudiation.

This is not to deny that some cases point in the other direction. In *Sarker v South Tees Acute Hospitals NHS Trust*,¹²⁰ the Employment Appeal Tribunal dealt with a contract of employment entered into on one date where work was to commence on a later date. Ms Sarker was offered a job, which she accepted on 22 August 1995, to commence on 1 October. On 11 September, the health authority revoked her offer of employment. The issue was whether the Tribunal had jurisdiction on the basis that it was a claim that “arises or is outstanding on the termination of the employee’s employment”.¹²¹ At first instance, Ms Sarker’s claim failed because while she had entered a contract of employment, her “employment” had not commenced at the date of the anticipatory breach. But the Appeal Tribunal disagreed and held that the termination of the employee’s employment was synonymous with the termination of the contract of employment and the Tribunal therefore had jurisdiction. But the decision, which treats the contract of employment and the relationship of employment as coterminous, is difficult to reconcile with the conclusions reached by appellate courts in the cases above. As Freedland has observed of the case, “the court was conscious that this was a difficult point, and that the law was being stretched in a purposive way to reach that conclusion”.¹²² In any event, it is clear from the cases above that in practice what usually matters for unfair dismissal is the determination of the relationship of employment, irrespective of the contractual position.

The proper approach to determining employment status

The distinction between the contract of employment and the relationship of employment can also help evaluate the recent divergent approaches taken by the Supreme Court and the High Court of Australia to the classification of an individual’s employment status under employment protection legislation.

In *Uber BV v Aslam*,¹²³ the issue was whether Uber drivers were “workers” under the Employment Rights Act 1996, the National Minimum Wage Act 1998, and the Working Time Regulations 1999 and thus entitled to receive, among other things, the national minimum wage and paid annual leave. Under the relevant provisions,¹²⁴ a “worker” is defined as an individual who has entered into or works under (a) “a contract of employment” (i.e. common law employees), or (b) “any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual” (often called “limb (b) workers”).¹²⁵ The Employment Appeal Tribunal and the Court of

¹¹⁸ *Rabess* [2017] I.R.L.R. 147 at [24]–[25].

¹¹⁹ [2017] I.R.L.R. 147 at [24].

¹²⁰ [1997] I.R.L.R. 328.

¹²¹ *Sarker* [1997] I.R.L.R. 328 at 329.

¹²² Freedland, *The Personal Employment Contract* (2005) at p.99.

¹²³ [2021] 4 All E.R. 209.

¹²⁴ Employment Rights Act 1996, s.230(3); National Minimum Wage Act 1998, s 54; Working Time Regulations, r 2(1).

¹²⁵ A. Bogg and M. Ford K.C., “The Death of Contract in Determining Employment Status” (2021) 137 L.Q.R. 392 at 392.

Appeal had held that drivers working for Uber London were “workers” within limb (b). The Supreme Court agreed.

The importance of the case lies in how the Supreme Court dealt with Uber’s (unsuccessful) argument that in determining whether an individual is a “worker” under the relevant statutes, the focus should be on “interpreting the terms of any applicable written agreements”.¹²⁶ In rejecting that argument and the interpretation Uber sought to place on the Supreme Court’s decision in *Autoclenz v Belcher*,¹²⁷ Lord Leggatt, writing for the Court, said:

“Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. ... [The task] was to determine whether the claimants fell within the definition of a ‘worker’ in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.”¹²⁸

The effect of this was that, following *Autoclenz*, the court could “disregard[] terms of the written documents which were inconsistent with an employment *relationship*”¹²⁹ that in fact could be shown to exist. This approach was seen as giving effect to the purpose of the employment legislation, namely, the protection of workers.¹³⁰ As Professor Alan Bogg and Michael Ford K.C. have argued, “this entailed a purposive approach, in which the question is whether the worker protective legislation, construed purposively, was intended to apply to the relevant relationship, viewed realistically”.¹³¹

The distinction between the contract of employment and the relationship of employment provides a further lens through which to view the *Uber* decision (even though it was concerned with the limb (b) worker category). Viewed through that lens, the question becomes: what was the object to be regulated by the statute—the *contract* or the *relationship*? And as Lord Leggatt explained, at least in the context of this Act, to focus on the contract as the starting point “would be inconsistent with the purpose of [the] legislation” and “reinstate the mischief which the legislation was enacted to prevent”.¹³² It would allow employers, who often occupy a superior bargaining position, to dictate the contractual terms and draft them in a way that may or may not correspond to the relationship established, as a matter of fact, between the parties.¹³³

By contrast, when the High Court of Australia came to consider a similar question in two joint appeals it took a different approach. The relevant issue in *CFMMEU v Personnel Contracting Pty Ltd*¹³⁴ and *ZG Operations Australia Pty Ltd v Jamsek*¹³⁵ was whether particular individuals were “employees” under the Fair Work Act 2009 (Cth).¹³⁶ In both cases the courts below had undertaken that task by looking at “the totality of

¹²⁶ *Uber* [2021] 4 All E.R. 209 at [57].

¹²⁷ [2011] UKSC 41; [2011] 4 All E.R. 745.

¹²⁸ *Uber* [2021] 4 All E.R. 209 at [69].

¹²⁹ *Uber* [2021] 4 All E.R. 209 at [68] (emphasis added).

¹³⁰ *Uber* [2021] 4 All E.R. 209 at [70]–[71].

¹³¹ Bogg and Ford, “The Death of Contract in Determining Employment Status” (2021) 137 L.Q.R. 392 at 393.

¹³² *Uber* [2021] 4 All E.R. 209 at [76].

¹³³ *Uber* [2021] 4 All E.R. 209 at [76]. See also Gardner, “The Contractualisation of Labour Law” in *Philosophical Foundations of Labour Law* (2018) at p.42.

¹³⁴ (2022) 96 A.L.J.R. 89.

¹³⁵ (2022) 96 A.L.J.R. 144.

¹³⁶ Additionally in *Jamsek*, for the purposes of the Superannuation Guarantee (Administration) Act 1992 (Cth) and the Long Service Leave Act 1955 (NSW).

the relationship between the parties¹³⁷ and not just by focusing exclusively on the contract. But a majority of the High Court rejected that approach. Kiefel C.J., Keane J., and Edelman J. were of the opinion that where a contract was entirely in writing it should “exclusively determine the relationship between the parties”.¹³⁸ They said:

“In cases such as the present, where the terms of the parties’ relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship.”¹³⁹

Gordon J., with whom Steward J. agreed on this point,¹⁴⁰ took a similar approach.¹⁴¹

Gageler J. and Gleeson J., while agreeing with the outcome of appeal, disagreed on the proper approach to determining employment status. Drawing on Australian cases that had distinguished between the contract of employment and the relationship of employment,¹⁴² they cautioned against conflating “the relationship of employment” with “the contract under which the relationship is established and maintained”, noting that the two are “distinct”.¹⁴³ They said “[t]he employment relationship is established and maintained ‘within’ the contractual relationship, the employment relationship does not subsist simply ‘in’ the contractual relationship.”¹⁴⁴ Gageler J. and Gleeson J. were of the view that the lower courts had been correct to consider the totality of the relationship between the parties and not to focus exclusively on the contract.¹⁴⁵ In light of this, it is surprising that the majority make no mention of the influential Australian decisions, on which Gageler J. and Gleeson J. relied, which had distinguished between the contract of employment and the relationship of employment. As mentioned earlier, while recognising that an employment relationship may consist partly in contract and partly in statute,¹⁴⁶ Kiefel C.J., Keane J., and Edelman J. appear to assume that where there the contract is entirely in writing and no statute has intervened, there is no distinction between the contract of employment and the relationship of employment.

At the heart of the differing approaches taken by the Supreme Court in *Uber* and the High Court in *Personnel Contracting* and *Jamsek* is the distinction between the “contract of employment” and the “relationship of employment”. The Supreme Court, adopting a purposive approach to the construction of the legislation,¹⁴⁷ has taken the view that it is the relationship, established and maintained pursuant to the contract, that matters for this purpose.¹⁴⁸ The relationship is the object of regulation. The High Court has instead taken the view that the only relationship which exists, for all legal purposes, is the contractual relationship. In other words, the High Court has assimilated the relationship of employment exclusively into the contract of employment.

¹³⁷ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 C.L.R. 16 at 29; (1986) 63 A.L.J.R. 513 at 521; *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 C.L.R. 21 at [24].

¹³⁸ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [44].

¹³⁹ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [43].

¹⁴⁰ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [203].

¹⁴¹ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [162], [188]–[189].

¹⁴² *Automatic Fire Sprinklers* (1946) 72 C.L.R. 435 at 466; *Byrne* (1995) 185 C.L.R. 410 at 427; *Visscher* (2009) 239 C.L.R. 361 at [59].

¹⁴³ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [110].

¹⁴⁴ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [106].

¹⁴⁵ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [121].

¹⁴⁶ *Personnel Contracting* (2022) 96 A.L.J.R. 89 at [43].

¹⁴⁷ Bogg and Ford, “The Death of Contract in Determining Employment Status” (2021) 137 L.Q.R. 392 at 393.

¹⁴⁸ The decision in *Gey's* [2013] 1 A.C. 523 and Lord Wilson’s rejection of the distinction between the contract of employment and the relationship of employment in the common law context is not discussed.

Is either approach to be preferred? One must always be sensitive to the different statutory regimes.¹⁴⁹ The Australian legislation could have as its object the contract of employment as distinct from the relationship of employment. Even a “purposive approach” to interpretation does not mean that one can disregard the words used.¹⁵⁰ But given that the Australian legislation picks up and applies the “ordinary meaning” of “employer” and “employee”,¹⁵¹ this conclusion seems doubtful. Moreover, adopting a purposive approach, the view of the majority of the High Court—that there is no reason why the contract should not be decisive—overlooks the danger that:

“[q]uite apart from the possibility that the documentation of a contract misrepresents the true terms of the contract, there is the possibility that the true terms of a contract themselves misrepresent the true norms of the non-contractual relationship that the contract exists to establish or maintain or otherwise assist with. By locating the employment relationship in the contractual relationship, the law blocks the claim that there is any non-contractual employment relationship that the contract could be misrepresenting.”¹⁵²

The approach of the Supreme Court in cases like *Autoclenz* and *Uber* addresses these concerns while adhering to the distinction between the contract of employment and the relationship of employment as established at common law. From that perspective, the approach of the Supreme Court is preferable to the approach that must now be taken in Australia.

5 RETURNING TO *GEYS V SOCIÉTÉ GÉNÉRALE*

This article began by trying to resolve a question left open in *Geys*: why a wrongfully dismissed employee is generally unable to claim a salary or wages through an action for the agreed sum even if the employee refuses to accept the repudiation and “keeps the contract open”. But *Geys* was not concerned with this question. It was concerned with the calculation of a “termination payment” under Mr Geys’ contract of employment. The question considered in this final section is whether, in light of the distinction drawn in this article between the contract of employment and the relationship of employment, *Geys* is correctly decided. This turns on the construction of the contract and the conditions of Mr Geys’ entitlement to a termination payment. At least on the face of it, the clauses that entitled Mr Geys to a termination payment were concerned with his “employment”, not the “contract of employment”.

Mr Geys was summarily dismissed on 29 November 2007. He was handed a letter terminating his employment “with immediate effect” and he “was escorted from the building and did not return to it”.¹⁵³ On 18 December 2007, the bank, in accordance with its staff handbook, made a payment in lieu of notice amounting to his basic salary and flexible benefits allowance for three months. Mr Geys was sent the details of this payment but did not see the letter until 7 or 8 January 2008. Meanwhile, on 2 January, Mr Geys’ solicitors wrote to the bank on his behalf affirming his contract of employment. The bank replied on 4 January, confirming that they had terminated Mr Geys’ employment on 29 November with immediate

¹⁴⁹ In particular, the English provisions distinguish between three classes of individual: limb (a) workers (common law employees); limb (b) workers; and independent contractors. The Australian legislation distinguishes only between employees and independent contractors.

¹⁵⁰ “[T]he problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all cost”: *Carr v Western Australia* [2007] HCA 47; (2007) 232 C.L.R. 138 at [5].

¹⁵¹ Fair Work Act 2009 (Cth), ss.11, 15.

¹⁵² Gardner, “The Contractualisation of Labour Law” in *Philosophical Foundations of Labour Law* (2018) at p.42.

¹⁵³ *Geys* [2013] 1 A.C. 523 at [9].

effect, and that they would pay him in lieu of notice. Mr Geys was deemed to have received this letter on 6 January.¹⁵⁴

The key provisions of Mr Geys' contract of employment with Société Générale were as follows:

1. paragraph 13 of his contract said “[y]our employment can be terminated on the expiry of 3 months’ written notice of termination given by you to [the Bank] or by [the Bank] to you”;¹⁵⁵
2. paragraph 5.14 said that “[t]he Company will, within 28 days after such termination of your employment, make a payment to you (the “Termination Payment”) as specified in clause 5.15”;¹⁵⁶ and
3. paragraph 5.15, which concerned the value of the termination payment, variously referred to the “termination of your employment” and “if your employment terminates”.¹⁵⁷

At issue was when precisely Mr Geys' employment ended. The effect of paragraph 5.15 was that if Mr Geys' “employment terminate[d]” after 31 December 2007, he would have been entitled to a significantly larger “termination payment” than if his employment had terminated on or before 31 December 2007.¹⁵⁸ This was on top of his payment in lieu of notice. Although the amount was not specified, Lord Sumption speculated that it would likely “have brought him a windfall amounting to several million euros”.¹⁵⁹ A majority of the Supreme Court (Lord Hope, Baroness Hale, Lord Wilson, and Lord Carnwath; Lord Sumption dissenting) held that it was not until 6 January 2008 that the contractual right to terminate had been “validly exercised and his employment with the bank came to an end”.¹⁶⁰ As has already been noted, the majority also firmly rejected the automatic theory of termination in favour of the election theory.¹⁶¹ The effect was that the bank's repudiation could not unilaterally terminate the “contract of employment”.

It is no part of this article's aim to criticise the majority's rejection of the automatic theory of termination. But it at least seems arguable that if the clauses of Mr Geys' contract of employment are to be given their natural meaning, then *Geys* is wrongly decided on the ground that while the wrongful dismissal did not terminate the contract, it did end his employment relationship. The references in paragraphs 5.14 and 5.15 were to the termination of Mr Geys' *employment*.

Lord Sumption, in his dissenting judgment, noted that this would be the consequence on the view that the relationship of employment is distinct from the contract of employment. While not adopting that view, he stated that if it is correct, then “Mr Geys will not be entitled to recover [the larger] profit-related bonus ... because his right to such a bonus depends on paragraphs 5.15(b)(iii) and (iv) of the contract, which depend on when his ‘employment terminates’, and not (if it is different) on when the contract terminates.”¹⁶² The majority did not consider this possibility, appearing instead to assume that the references to Mr Geys'

¹⁵⁴ *Geys* [2013] 1 A.C. 523 at [13].

¹⁵⁵ *Geys* [2013] 1 A.C. 523 at [5].

¹⁵⁶ *Geys* [2013] 1 A.C. 523 at [6].

¹⁵⁷ *Geys* [2013] 1 A.C. 523 at [6].

¹⁵⁸ *Geys* [2013] 1 A.C. 523 at [110].

¹⁵⁹ *Geys* [2013] 1 A.C. 523 at [110].

¹⁶⁰ *Geys* [2013] 1 A.C. 523 at [61] (Baroness Hale). See also at [21] (Lord Hope), [62] (Lord Wilson), [103] (Lord Carnwath).

¹⁶¹ *Geys* [2013] 1 A.C. 523 at [18] (Lord Hope), [93]–[94] (Lord Wilson), [42] (Baroness Hale), [100]–[102] (Lord Carnwath).

¹⁶² *Geys* [2013] 1 A.C. 523 at [137].

employment were to the contract of employment.¹⁶³ As we have already seen, Lord Wilson rejected the distinction, when considering the different theories of termination, as “unhelpful, indeed confusing”.¹⁶⁴

It may be that notwithstanding this oversight, the result in *Geys* is still correct on the construction of this particular contract. But future courts should be wary of reaching the same conclusion in cases involving other employment contracts, for some odd outcomes could result if they do. Suppose a car salesperson is automatically entitled to a “group bonus” each month depending on the performance of the company, so long as they remain “an employee” at the specified date.¹⁶⁵ The contract contains no express or implied power of dismissal without fault. Could it really be said that a salesperson when wrongly dismissed could refuse to accept the repudiation and claim the bonus for months on end simply by holding themselves out as available to work? The non-entitlement to the bonus could not be explained by the condition that the work must be done as this particular entitlement is not conditional on any work being done. If the same conclusion as *Geys* is reached then, perhaps subject only to a *White and Carter v McGregor*-type restriction,¹⁶⁶ the car salesperson would be entitled to the bonus indefinitely. The conclusion reached in *Geys*, as a matter of construction, is either wrong or exceptional.

6 CONCLUSION

The justification for the common law rule that a wrongfully dismissed employee who refuses to accept their employer’s repudiation generally cannot claim their salary or wages lies in the conditions of an employee’s entitlement to remuneration. As this article has explained, there are usually two such conditions: (i) substantial performance of the employee’s obligations over the period in which the right to payment accrues; and (ii) the continuation of the “employment relationship”, a relationship which, although arising from the contract, does not subsist exclusively in the contract. The claim that there is a distinction between the contract of employment and the relationship of employment is controversial, and much of the article has been spent defending it. The employment relationship is a legal relationship, not only a social one, with legal incidents that do not necessarily depend solely on the contract. And, in England at least, it has been highlighted rather than stifled by the interaction between statute and the common law in this area. The Supreme Court in *Geys* failed to understand the distinction, and there is consequently at least significant doubt as to whether the decision was correctly decided.

At the heart of this article is a plea to resist the temptation to analyse all legal relations in contractual terms. Contract is an important part of the picture, but it is not the only part. We would do better to recognise that contract law does not have exclusive dominion over the legal relationships it helps to create or maintain. Some contracts create *both* contractual and non-contractual—but still legal—relationships. The contract of employment is just one example of this phenomenon.

¹⁶³ See, e.g., *Geys* [2013] 1 A.C. 523 at [14] (Lord Hope). See Summers, “Termination and the Agreed Sum” in *Commercial Remedies: Resolving Controversies* (2017) at 78–79.

¹⁶⁴ *Geys* [2013] 1 A.C. 523 at [82].

¹⁶⁵ See, e.g., *Commerzbank AG v Keen* [2006] EWCA Civ 1536; [2007] I.R.L.R. 132 at [73]–[76], although this was not a case involving wrongful dismissal.

¹⁶⁶ *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413; [1961] 3 All E.R. 1178.