Chapter Six

Introduction

This chapter addresses the relationship between the general principles of contract law and the more specific rules pertaining to the employment contract. The topic is not simply a matter of academic interest. It is important that we understand whether further evolution of the employment contract will be informed by those general principles or a self-contained body of rules. The dynamics of the rule creation process need to be fully understood. The subject is sometimes addressed on the basis that the paramount question is whether the law of the employment contract should be viewed as an instance of general contractual principles or would be better seen as a discrete body of law: `A central dilemma…is the extent to which [the]…law should, on the one hand, borrow from the general law of contract applicable to commercial and consumer contracts, and on the other, differentiate itself from those general rules in order to tailor a special law for the contract of employment.'[1] This `central dilemma' is somewhat unhelpful as neither depiction is wholly explicatory. Many of the rules of the employment contract are certainly applications of general principles but, as is the case with all nominate contracts, instances exist of modifications or exceptions. No less significant is the manner in which such modifications and exceptions are likely to evolve and impact on other types of contract or indeed contract law as a whole.

By addressing this set of questions, this chapter takes further the set of inquiries which were opened up in the first three chapters of this work. For it was central to those inquiries to consider how far and in what sense we should regard the law of the contract of employment as being distinctive from the law of contracts in general. In particular we need to ask whether and how far the set of core structural principles of the law of the contract of employment, which were articulated in chapter 2 and further developed in chapter 3, mark out the law of the contract of employment as being autonomous of the 'general law of contract' and moreover as being differently constructed even from other kinds of personal work contract.

The Pluralism of Contract Law

It is important to stress at the outset that the general principles/particular rules dichotomy is

[1] H. Collins, `Contractual Autonomy' in A. Bogg et al (ed), *The Autonomy of Labour Law* (Hart: 2015) at 46.

something of a false one in that contract law sets out to provide a framework within which rules appropriate to the varying circumstances and specific needs of nominate contracts can develop. It may be claimed that notions of pluralism underpin the general principles of contract law. Over the last thirty or so years the changes to the content of the employment contract that have occurred have been very significant and some of the more recently created implied terms in law can be viewed, perfectly correctly, as evidence of a profound change in the judicial view of the employment relationship.[2] What is not always appreciated is the extent to which changes in the general contractual framework have facilitated this. Up until the decision of the House of Lords in *Liverpool CC v Irwin* it could have been said with a strong measure of justification that the test for implication was `necessity' even where default rules were concerned.[3] Of late it has been accepted by the judiciary that the "necessity" involved in implying terms such as mutual trust and confidence is "somewhat protean".[4] Fortunately, there is now acceptance that `to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."[5] *Irwin* concerned the landlord and tenant relationship and cogently demonstrates the impact that such an approach can have when judicial deliberations take account of social policy.[6] There the House of Lords implied a term that the landlord was required to take reasonable care of the common parts of the property, such as lifts, stairwells and rubbish chutes. As Atiyah has pointed out such an outcome could hardly be said to be based on a test of necessity.[7] By way of contrast it is striking to note that in Australia a successful attempt was made in *Commonwealth Bank v Barker* to deny the existence of the implied obligation of mutual trust and confidence on the basis that it is not necessary to the functioning of the employment relationship.[8] The High Court applying the test set out in *Byrne v Australian Airlines* that absent the implication, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined" or the contract would be "deprived of its substance, seriously undermined or drastically devalued".[9] Such a rigorous test for implication is favoured as a means of excluding consideration of the policy concerns that have

[2]In *Johnson v Unisys* [2003] 1 AC 518 Lord Hoffmann observed that `over the last 30 years or so, the nature of the contract of employment has been transformed…The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far reaching is the implied term of trust and confidence. But there have been others.'

[3] *Liverpool CC v Irwin* [1977] AC 239.

[4] *Crossley v Faithful and Gould Holdings Ltd* [2004] IRLR 377.

[5] *Crossley v Faithful and Gould Holdings Ltd* (n 4). In *Societe Generale v Geys* [2013] 1 AC 523 Lady Hale endorsed this dictum: `There is much to be said for that approach, given the way in which those terms have developed over the years.'

[6] *Liverpool CC v Irwin* (n 3).

[7] P.S.Atiyah, An Introduction to the Law on Contract, .

[8] *Commonwealth Bank v Barker* [2014] HCA 32.

[9] (1995) 185 CLR 410.

informed the development of the implied term in other jurisdictions.[10] It then becomes easier to cleave to the position that, at some level at least, the contract functions perfectly adequately in the absence of the term. Such an approach is also said to accord with the proper scope of judicial law-making which should `only be exercised as an incident of the adjudication of particular disputes.'[11] It is difficult to see that the claimant in *Irwin* would have been successful on the foregoing approach but in England, in contrast to Australia, the law on the creation of default rules has moved closer to the approach in the law of negligence where, in the application of the test articulated in *Caparo Industries v Dickman*, policy factors help determine whether it is fair just and reasonable to impose a duty of care.[12] Had it not been for *Irwin* a far more cautious approach might have continued to be taken in the employment context and the `employment revolution' would not have come about at common law.

Implied terms in law provide an excellent illustration of contract law's capacity to provide responses which are nuanced to the circumstances of particular contracts. Such terms aim to reflect the `inherent nature of a contract and of the relationship thereby established.'[13] The general law sets out uniform criteria which must be satisfied before an implied term in law can be established but the impact on the content of different types of contract may be very different even though the issue to be addressed is broadly similar. The flexibility in the legal framework extends to the needs of a sub-division of a nominate contract. In *University of Western Australia v Gray* the Australian Federal Court recognised that while one type of term may quite appropriately be implied in a class of contract cast in very general terms: `e.g. in a contract of employment the employee's duty to obey lawful and reasonable directions given by the employer that fall within the scope of the employment, … another term may be of such a character as to be implied only into a recognisable sub-category of that larger class.' [14] *Sim v Rotherham MBC*, where it was held that a school teacher owed an implied contractual duty to discharge their professional obligations, may be seen in this light.[15] *Scally v Southern Health Board* provides a further example; there it was held that where a contract of employment negotiated between employers and a representative body contained a particular term conferring on the employee a valuable right contingent upon his acting as required to obtain the benefit, of which he could not be expected to be aware unless the term was brought to his attention, there was an implied obligation on the employer to take

[10] The implication in *Malik* was seen by the High Court in *Barker* (n 8) as contingent upon a view being taken `of social conditions and desirable social policy'. F. Reynold, `Bad behaviour and the implied term of mutual trust and confidence: is there a problem?' (2015) 44 ILJ 262, 269 argues that `the objections raised in *Barker* to the implication of the term do appear to have considerable substance.' I do not agree.
[11] *Barker* (n 8) 19.
[12] *Caparo Industries v Dickman* [1990] 2 AC 605.
[13] *Liverpool CC v Irwin* (n 3).
[14] [2009] FCAFC 116.
[15] *Sim v Rotherham* [1987] Ch 216.

reasonable steps to publicise that term.[16] In addition, the application of identically worded obligations may vary; an open-textured obligation of fair dealing may impose different requirements in the pensions' context rather than the employment.[17] The contemporary contextual approach to construction is also premised on the desirability of diversity of outcomes: `the factual matrix in which the [employment] contract is cast is not ordinarily the same as that of an arms'-length commercial contract.'[18] The significance of this point will be imperfectly understood unless it is remembered that the factual matrix has a normative element. Fundamental implied terms expound the judicial vision of appropriate behaviour in the context of employment relations. Such implied terms function as aids to interpretation.[19]

In the result, under a general framework, obligations dealing with the same issue (e.g. allocation of risk) may be framed and/or applied differently depending upon the context. This measure of autonomy is consistent with the integrity of a scheme of overarching principles but also of contracts being aligned with and underpinned by differing sets of values. For instance, under the employment contract the employee has an implied right to be given actual work to do in certain (highly specific) circumstances.[20] It is unlikely that such implication would occur in other types of contract for the provision of work where the relationship is viewed as less personal in nature; there the worker's interest would be viewed as purely pecuniary.

Modifying the General Framework

The courts will also, on occasion, modify or create exceptions to general principles to meet the demands of a particular nominate contract.[21] For instance, during the 1980s and 1990s a significant number of cases emerged where the employer's right to exercise clear, express powers under an employment contract was held to be subject to either the implied obligation of trust and confidence[22] or to notions of reasonableness.[23] At the time this line of case law could be seen as constituting a significant modification to the general principles of contract law which, as confirmed by the Privy Council in *Reda v*

[16] *Scally v Southern Health Board* [1992] 1 AC 194.
[17] *IBM v Dalgleish* [2014] EWHC 980.
[18] *Autoclenz v Belcher* [2010] IRLR 70.
[19] See, for example, *Johnstone v Bloomsbury HA* [1991] ICR 269.
[20] See ch 22 this volume.
[21] Cf *Bournemouth University v Buckland* [2011] QB 323, *336.*
[22] *United Bank v Akhtar* [1989] IRLR 507.

[23] *McClory v The Post Office* [1993] IRLR 159.

Flag Ltd in 2002, held that ` an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification.'[24] The position has evolved significantly since then and it now appears that the exception may have become the rule in contract as a whole (see below). There are though limits to the extent to which the courts will adapt the law to take account of the nature of the employment relationship. It is trite law that a contract will not be set aside on the basis of unconscionability merely because one side has exploited their superior bargaining power to conclude a very one-sided bargain. This position might be thought to rest rather uneasily with contemporary judicial recognition that employment relations are normally characterised by such a disparity of bargaining power.[25] Nevertheless, the House of Lords made clear in *National Westminster v Morgan* that the courts will not grant relief purely on the basis of unconscionability and subsequent cases have failed to suggest that a judicial modification will emerge in the employment context.[26] It may of course be said, with good reason, that other relationships would also benefit from the emergence of a common law concept of unconscionability but where the contract of employment is concerned the impact of current juridical limitations might be thought to be particularly acute. Some other conceptual limitations might be thought to be more related to the ongoing nature of employment relations. *Fish v Dresdner Bank* confirms that even if the duties imposed on one party become commercially impracticable to discharge, there is no obligation on the other to agree to a variation.[27]

The common law tends to develop in an incremental way and a mooted innovation may not flourish if it seeks to move the law forward too swiftly or radically.[28] A famous attempt to advance the law on incorporation of collectively agreed terms was the academically conceived concept of crystallised custom: `the parties are, in the absence of an express term to the contrary, deemed implicitly to have incorporated the substance of the prevailing usages or customs, [and this] remains the principal link between collective agreements and contracts of employment.'[29] The doctrinal basis of the concept was never elaborated and it was, in effect, a policy device to bridge the gap between collective decision-making and individual rights and duties. This expansive use of custom brought it into the realms of legal fiction and it failed to acquire judicial endorsement.

The relationship between general principles and special rules is very much a dynamic one. A modification in one branch of the law may provide the catalyst for a more wide ranging reformulation

[24] *Reda v Flag Ltd* [2002] IRLR 747.
[25] *Malik v BCCI* [1998] AC 20.
[26] [1985] AC 686. See Ch 5.
[27] [2009] IRLR 1035.
[28] *Lloyds Bank v Bundy* [1975] QB 326.
[29] P.Davies and M.Freedland (eds), *Kahn-Freund's Labour and the Law* (3rd edn 1983) 172. See also M. Freedland, `Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law' in A. Bogg et al (n 1) at 37.

of the underlying general principles. Earlier in this section I discussed case law developments in the law of the employment contract which modified the relationship between express and implied terms. Those developments can now be seen as contributing to the law as a whole moving beyond the position stated by the Privy Council in *Reda*[30]. One should not undervalue `the conceptual contribution of labour law itself to the remainder of the law.'[31] Writing extra judicially Arden LJ has noted with particular reference to several commercial cases[32] that the kind of rules which developed in the employment context to regulate employer discretion have evolved to become part of mainstream contractual doctrine: `These cases to my mind represent a turning point in our understanding of the impact of good faith in contract. They demonstrate that there is nothing inherently unenforceable or inherently impossible in law about an obligation to act in good faith.'[33] It is also important to appreciate that through the process of `mainstreaming' the developments in the law of the employment contract are rendered more secure. It is more difficult for a litigant to persuade a court that a modification is, in truth, an unsound aberration. Where mainstreaming does not occur the courts are more likely to elect to abandon a modification and return to regulation by general principles should circumstances change or the wisdom of the modification fail to stand up to scrutiny. The decision of the Supreme Court in *Societe Generale v Geys* provides an excellent example at this juncture. [34] The court had to choose between the elective and automatic theories of termination. The former prevailed and the outcome was therefore in line with a return to general principles. *Geys* also reminds us that the judicial vision of the employment relationship may vary over time. The automatic theory was consistent with a judicial view that employment relations should be based upon a very strong core of employer prerogative; a position to which the common law has become less wedded. It is important to note that the automatic theory (which could be seen as specific to a relationship such as employment) could lead to opportunistic behaviour `The timing of the repudiation may be crucial, and if the automatic theory were to prevail an employer may well be tempted to play this to his advantage – by getting in first before a rise in pay or pension entitlement takes place or, as in this case, a rise in the entitlement to

[30] *Reda v Flag Ltd* (n 24).

[31] H. Collins, `Contractual Autonomy' in A. Bogg et al (n 1) at 51.

[32] The cases referred to include *The Product Star* and *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2002] EWCA Civ 248 and *Lymington Marina Ltd v MacNamara* [2006] EWHC Ch 704.

[33] Lady Justice Arden, `Coming to Terms with Good Faith' (2013) 30 JCL 199. The developments in contract law as a whole prompted Lord Neuberger in *Braganza v BP* [2015] ICR 449 to question whether `**trust** and **confidence** would require more than what in a normal commercial context would be expected, either of [the employer] when carrying out the investigation, or of the court when scrutinising the investigation and its results'.

[34] *Societe Generale v Geys* (n 5). See ch ??.

bonuses…'.[35]

Modification and Cross-fertilisation

The dynamics of the rule making process are informed not just by the general principles of contract law but by developments in the law of other nominate contracts which can in turn lead to cross-fertilisation across a wider range of contracts or even contract law as a whole.[36] A good example is furnished by the decision in the case of *Yam Seng v ITC* whereby changes in a number of areas – including the law of the employment contract – prompted the court to imply a term of good faith into a commercial contract.[37] The term was viewed as an implied term in fact as the law of commercial contracts was not seen to be at a stage of development whereby it could apply as a matter of generality and therefore be an implied term in law. [38]

Developments in the law of other nominate contracts can, of course, be borrowed to the benefit of the employment contract. The development of the law on sham contracts is worthy of mention. The conception of sham in the pivotal decision in *Snook v London and West Riding Investment Ltd* was unhelpful in the employment context as it regarded the mischief to be addressed as a common intention to deceive a third party.[39] In the case of a relationship such as employment, which is hallmarked by disparity in bargaining power, it is more appropriate to focus on the capacity of the dominant party to adversely affect the weaker party. An influential decision on sham contracts in that regard was that of the House of Lords in *AG Securities v Vaughan* where it had to be determined whether the contract concerned was a lease or a license.[40] The clause in issue provided that the licensor was entitled at any time to use the rooms together with the licensee and permit other persons to use all of the rooms together with the licensee. It was held that the parties never intended that the clause should operate and that it was "mere dressing up" in an endeavour to clothe the agreement with a legal character which it would not otherwise have possessed. The effect in law was that the clause was to be disregarded as it was a sham. In general, behaviour subsequent to the formation of the contract is not relevant to its interpretation but *Vaughan* holds that such behaviour is relevant when determining whether a contractual provision is a sham.[41] The advance in conceptualisation made by *Vaughan* came to the fore in *Autoclenz v Belcher* and allowed a decision to be arrived at which recognised the realities of the working arrangements.[42] Public Law may also provide the catalyst for change. In *Hayes v Willoughby*

[35] *Societe Generale v Geys* (n 5).
[36] D. Brodie, `Fair Dealing and the World of Work' (2014) 43 ILJ 29.
[37] [2013] EWHC 111.
[38] This would appear to be correct: *Mid Essex v Compass Group* [2013] EWCA Civ 200.
[39] See A.C.L.Davies, `Sensible thinking about sham transactions' (2009) ILJ 318.
[40] [1990] 1 A.C. 417.
[41] And see A.Bogg, `Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328.
[42] *Autoclenz v Belcher* [2011] ICR 1157.

Lord Sumption observed that:"… Rationality is a familiar concept in public law. It has also in recent years played an increasingly significant role in the law relating to contractual discretions, where the law's object is also to limit the decision-maker to some relevant contractual purpose.' [43]

The Opportunities for and Perils of Further Cross-fertilisation

It should be said that greater recourse to cross-fertilisation would have the potential to further evolution of the employment contract in a manner consonant with contemporary judicial recognition of its nature. Where recovery for injury to feelings is concerned one of the pivotal decisions of the by-gone age of master and servant, while the subject of cogent and persistent criticism, remains good law: *Addis v The Gramophone Company*.[44] *Addis* serves to deny recovery for injury to feelings should the employment contract be breached. Elsewhere in the law of contract, the list of exceptions to *Addis* continues to lengthen; the most notable recent instance being the decision of the Lords in *Farley v Skinner* which allowed recovery where a major or important part of the contract, rather than the sole object, was to provide pleasure, relaxation or peace of mind.[45] A departure from *Addis* would make a great deal of sense as it can be seen as representing an aberration from the general principles of contractual damages and constituting a barrier to contract fulfilling its normal compensatory function. In a similar vein in *Farley,* Lord Scott had stated that the issue can and should be resolved by applying the well-known principles laid down in *Hadley v Baxendale* .[46]

The policy concerns underpinning the rules in other branches of contract law may however be at odds with the needs of the employment contract. This may mean that it is inappropriate to borrow doctrinal developments. This can be illustrated very clearly by examining how the law on implied contracts in commercial relationships has evolved and impacted on employment law. It will be suggested that the uncritical reception of those developments in the employment context has been unhelpful. Where commercial contracts are concerned the judgment of Bingham LJ in *The Aramis* has been particularly influential: "As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those

[43][2013] 1 WLR 935.
[44] [1909] AC 488.
[45] *Farley v Skinner* [2002] 2 AC 732.
[46] (1854) 9 Exch 341.

enforceable obligations to exist."[47] This dictum has been highly influential in the employment context; in part because there has been a common assumption that it is a straightforward reiteration of general contractual principles though it is far from clear whether this is actually the case. The approach in *The Aramis* would, in fact, appear to be a departure from orthodoxy. Earlier English cases had accepted that, subject to the normal burden of proof being satisfied, a contract could be inferred from the conduct of the parties if they demonstrated an intention to enter contractual relations. The 1920s Court of Appeal case of *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co* held that a contract could be implied from the acts of presenting a bill of lading, payment of the freight, and delivery and acceptance of goods specified in the bill of lading.[48] The Privy Council adhered to this approach in *New Zealand Shipping v AM Satterthwaite*.[49] The latter approach acknowledges that contracts are formed in a myriad of ways; the actings of the parties may constitute both offer and acceptance or, on occasion, merely acceptance. A famous example of the latter scenario is the celebrated case of *Carlill v. Carbolic Smoke Ball Co*: "why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?"[50] The approach in *The Aramais* seems to be inconsistent with a well established body of case law which recognises performance as a conventional mode of acceptance. [51] Adjudicating on the basis of *The Aramais* may defeat the reasonable expectations of the parties even in commercial cases. Having said that, across a range of cases, it may well be that such a development is appropriate in the field of commercial law. A long standing relationship between two commercial parties (where disparities in bargaining power will be ignored) is unlikely to give rise to an implied contract as the parties have chosen not to enter into an express one when they could readily have done so. [52] The parties' behaviour, unlike that of their employment counterparts, can be assumed to be consensual and can be explained by the desire to retain flexibility in their choice of commercial partners. This may accord with the values of commercial law. The position is however different where the employment contract is concerned since : `In the field of employment it is not uncommon to find that a contract of employment has come into being through the conduct of the parties without a word being put in writing or even, on occasion, spoken. In particular, conduct which might not have manifested such a mutual intention had it lasted only a brief time may become

[47] [1989] 1 Lloyd's Rep 213. And see the discussion in J. Prassl, *The Concept of the Employer* (OUP 2015) 172-4.
[48] [1924] 1 KB 54.
[49] [1975] AC 154.
[50] [1893] 1 TB. 256, 268.

[51] The recent decision of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] 1 WLR 753 would seem to capture the general position:` unequivocal agreement can in principle be inferred from communications between the parties and conduct of one party known to the other.'

[52] *Baird Textile Holdings Ltd v Marks and Spencer* [2002] 1 All ER (Comm) 737.

unequivocal if it is maintained over weeks or months.'[53] Recourse to conduct can allow the reality of the parties' relationship to be revealed. The ability to imply an employment contract may mean that workers who are in substance employees are brought within the framework of employment law. However in employment cases the predominance of recent authority has been resistant to wider resort to implied contracts. This has been partly a question of social policy; protection of agency workers for example has been thought to be a matter for the legislature.[54] However, it has also been a result of borrowing from the aforementioned developments in the law of commercial contracts and, in particular, the adoption of the `necessity' test.[55] The use of the test has made the implication of contracts much more unlikely in the employment context. The adoption of the approach in *The Aramis* is however out of line with the increasing significance being placed by the courts on conduct in the employment relationship. The courts have been willing to modify substantive and evidential rules to make it easier to take account of conduct to determine fundamental questions about the nature of the relationship and the obligations undertaken.[56]

Changes in the External Environment

Further conceptual limitations may emerge should the way in which employment relations are actually conducted change. A challenge for the legal framework, in any branch of contract law, is to be able to respond timeously and effectively to such changes in practice. The common law's response to the rise of single employer custom in the employment arena demonstrates the malleability of the common law and its resilience when confronted by litigation arising in a new context. The acute decline in the number of workers employed in traditional industries has meant that questions concerning incorporation of industry or trade practices are far less likely to arise nowadays. Cases of this sort would have been dealt with on the basis of the approach set out in *Sager v Ridehalgh*; i.e. the custom should be reasonable, certain and notorious before incorporation takes place.[57] Nowadays the courts are far more likely to be asked to adjudicate on the status of practices which are said to arise in a particular firm. The test in *Sager* is no longer relevant and, in fact, it is now recognised that there is a danger that the terminology of "custom and practice" should not be allowed to obscure an enquiry into `what the parties must have, or must be taken to have, understood from each other's conduct and

[53] *Ajar- Tec v Stack* [2014] UKEAT 0293, 32.
[54] *Tilson v Alstom Transport* [2011] IRLR 169.
[55] The necessity test is of course perfectly apt where implied terms in fact are in issue.
[56] *Carmichael v National Power* [1999] ICR 1226; *Autoclenz v Belcher* (n 42).
[57] [1931] 1 Ch 310.

words, applying ordinary contractual principles.' [58] The courts have responded constructively to the challenge posed by adjudication on custom which is specific to an individual employer. A not insignificant body of case law has emerged and those decisions may be seen as involving a return to first principles in that the courts have sought to resolve disputes by examining the interaction that has taken place between the parties and, in the light of that, seek to infer what obligations have been undertaken. At root a conventional offer and acceptance analysis has been deployed: ` The analysis by reference to offer and acceptance may seem rather artificial, as it sometimes does in this field; but it was not argued before us that if the employer had indeed sufficiently conveyed an intention to afford the benefits claimed as a matter of contract he would not thereby be bound.'[59] However, the application of that analysis is rendered more difficult because the employer has chosen not to formalise a specific dimension of the employment relationship; informality is sometimes looked to as a means of preserving managerial prerogative. Where, for example, incentivisation of employees through payment of bonuses is concerned the employer may choose to operate by making ad hoc payments. No formal proposal will be made to vary the work-wage bargain and the act of making the payment may be represented as standing apart from not only the normal remuneration package but also the contractual framework. By behaving in this way the employer aims to avoid regulation through the medium of contract law. The courts have however responded by, in the application of the offer and acceptance analysis, taking full account of the conduct of the parties and will determine whether that conduct involved supports the inference that the employer intended to be contractually bound.[60] As a result, even the making of ad hoc payments may give rise to an ongoing contractual obligation. The employer wishes to retain absolute freedom of action but that may be regarded as impermissible depending upon the nature of the employee's expectations which have been brought about by the employer's behaviour. The employer's conduct can serve to convert reasonable expectations into enforceable obligations. Nevertheless the need to demonstrate that conduct amounts to acceptance gives rise to vulnerability from an employee's perspective. The counter-argument to the assertion that implicit acceptance arises by the employee continuing to work will be that the employee's behaviour is ambiguous. It should also be said that the theoretical underpinning of this development remains somewhat underdeveloped but may lie in unilateral contract.[61] Matters would be less tenuous in a system that contained a doctrine of

[58] *Park Cakes v Shumba* [2013] EWCA Civ 974.
[59] *Park Cakes v Shumba* (n 58).
[60] *Albion Automotive v Walker* [2002] EWCA Civ 946. And see D.Brodie, `Reflecting the Dynamics of Employment Relations' (2004) 33 ILJ 159.
[61] *Great Northern Railway Co. v. Witham* (1873) L.R. 9 C.P. 16 provides a hypothetical example relevant to the world of work: `If I say to another, "If you will go to York, I will give you 100l.," that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive the 100l. His going to York at my request is a sufficient consideration for my promise.' The

unilateral promise and the practical difficulties involved in implicit acceptance would be avoided.

The Role of Policy

Where the law of negligence is concerned it is readily apparent and explicitly accepted that policy considerations inform the application of key concepts such as duty of care; the final element of the approach to duty in *Caparo* brings such arguments into play. Policy considerations tend to more opaque where the law of the employment contract is concerned. However, it is important to appreciate that an application of many of the relevant concepts, in a manner sensitive to the needs of the employment relationship, is highly contingent upon the identification and application of policy factors: `The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'[62] Open textured obligations clearly invite consideration of policy factors but even more technical concepts, such as the doctrine of intention to enter into legal relations, are informed by the context in which they operate.[63] The manner in which policy factors are identified, expounded and evaluated is crucial. In *Ford Motor Co v AUEW* the application of the concept of intention to enter legal relations allowed the court to deny a collective agreement direct legal effect and thereby promote voluntarism. [64] The outcome in *Ford Motor Co* has been seen by many commentators as highly satisfactory.[65] However, arriving at a judicial outcome on the basis of the concept without proper regard to context may not be. The evolution of the law on the employment status of ministers of religion illustrates this very well. It is and has always been difficult to generalise given the diversity in employment patterns across different religious bodies but in a number of cases where a member of a religious body has claimed to be an employee the spiritual dimension has led to the conclusion that the parties did not intend to enter legal relations. A dispute involving the Methodist Church, *Methodist Conference v Parfitt,* was one such decision which was arrived at despite the explicit acknowledgement that the position of employees in general had changed radically since earlier litigation: `I do not for my part see any good reason why modern economic conditions or the development of social security and employment protection should lead to

old House of Lords decision in *Brogden v Metropolitan Railway Co* may also be relevant (1877) 2 App Cas 666 ,682.

[62] O.W. Holmes, The Common Law (1881). 1.

[63] The decision of the Court of Appeal in *Yapp v FCO* [2015] IRLR 112 deals with remoteness but can be viewed as a policy decision to restrict recovery where psychiatric harm arises: D.Brodie (2015) 44 ILJ 270.

[64] [1969] 2 QB 303.

[65] R.Lewis, `The Legal Enforceability of Collective Agreements' (1970) 8 BJIR 313.

a different conclusion now.'[66] This position was endorsed by Lord Rodger in the Inner House in *Percy v Church of Scotland* who started `from the presumption—rebuttable, of course—that, where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law.'[67]

The House of Lords in *Percy* adopted a very different stance and held that the claimant was employed under a contract personally to execute work within the meaning of the Sex Discrimination Act 1975.[68]It should now be assumed that those involved in a working relationship should receive the protection afforded by modern employment law: ` The context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection.'[69] Such relationships are now much more likely to be seen as multi-dimensional and recognition of the spiritual dimension no longer involves a denial of the temporal. *Percy* is a policy decision stemming from the acknowledgment that an exchange of services for payment, where the recipient of services has vastly superior bargaining power, necessitates judicial protection through the medium of contract law.[70]

The Role of Third Parties

Historically, and to an appreciable extent today, the content of the employment contract has not been derived solely through negotiation between the contracting parties but has also been the product of collective negotiations. Incorporation of collectively agreed terms has though been a perpetual source of controversy. It is clear that the appropriate terms of an agreement may be incorporated expressly or implicitly. A collective agreement may also constitute a custom or a usage of the trade; in which case, the test for incorporation remains that established many years ago in *Sager v Ridehalgh.* [71] The latter is an extremely difficult test to satisfy.[72] The rigours of the test might be seen as problematic for all areas of contract law in so far as contracting parties have a reasonable expectation that background customs and usages will be incorporated. The general position does however cause particular difficulties in the field of employment relations given the scope for collectively agreed terms and conditions to help

[66] [1984] QB 368.
[67] 2001 SC 757.
[68] [2006] 2 AC 28.
[69]*Percy v Church of Scotland* (n 68).
[70] It may be noted that in *Percy v Church of Scotland* (n 68) the claimant did not argue that a contract of employment existed.
[71] *Sager v Ridehalgh* (n 57).
[72] Davies and Freedland, (n 29) 168. And see ch 21 this volume.

redress the balance of power.

Why does the incorporation of collectively agreed terms present a problem? It should be said that the law of contract has traditionally displayed a considerable degree of caution, in any context, in accepting an argument that extraneous material constitutes a contractual obligation. This may be justified on the basis that the parties can be more certain about the content and extent of their obligations if they do not have to look beyond the body of their written agreement. Common law rules are often at pains to stress the importance of knowledge. For instance, the requirement of `reasonable sufficiency of notice' must be satisfied before an exemption clause is incorporated and this protectionist stance serves to safeguard the interests of the weaker party lest unfairly prejudicial material be involved. [73] However, the continued unwillingness to modify or relax the traditional approach in employment cases where collectively agreed terms are at stake points to a very individualistic conception of the employment relationship. This can also be seen when the question of the appropriateness of individual terms for incorporation is being considered. There is a very real contrast with the treatment of documents such as staff handbooks which are external to the contract, but not to the employer/employee relationship, and tend to be viewed more readily as contractual.[74] In *Tomlinson v Congleton* Lord Hoffmann emphasised the continued endurance of the individualist values of the common law. [75]This is highly problematic where incorporation is concerned as a failure to incorporate will favour the more powerful party.

Construction

The employment contract largely adheres to the general canons of construction; e.g. pre-contract negotiations remain inadmissible[76]. The contemporary contextual or "factual matrix" approach promulgated in *Investors Compensation Scheme v West Bromwich* by Lord Hoffmann and pioneered by Lord Wilberforce in *Reardon Smith Line v Yngvar Hansen-Tangen* has not proved contentious in employment cases.[77] It allows the construction of an employment contract to be informed by a wide range of

[73] See, for example, *Briscoe v Lubrizol (No 2)* [2002] EWCA Civ 508

[74] In *Briscoe v Lubrizol (No 2)* (n 72) at para 14 it was said that `It is of course frequently the case that details of an employee's contract and the benefit to which he is entitled by virtue of his employment are largely to be found in a handbook of the kind supplied to the claimant in this case. For this purpose, and depending upon the circumstances, incorporation by express reference in the statutory particulars of employment will not usually be required by the court.'

[75] [2004] 1 AC 46.

[76] G. McMeel, `Prior Negotiations and subsequent conduct' (2003) LQR 272.

[77] *Investors Compensation Scheme v West Bromwich* [1998] 1 WLR 896*; Reardon Smith Line v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

considerations.[78] In *Byrne Brothers v Baird*, for example, the contract appeared to confer a right of delegation on the employee. In interpreting the clause in question the EAT held that employment practices within the industry informed the factual matrix: "As a matter of common sense and common experience, when an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. In our view that consideration is admissible as part of the factual matrix."[79]This evidence, as to the realities of how jobs of the sort in question are actually conducted, was relevant in categorising the nature of the working relationship. When the wording of the clause was construed against this background it was apparent that no right of delegation existed.

Against a backdrop of conformity, the revisionist approach to construction adopted in *Carmichael v National Power* was a welcome development.[80] There the House of Lords accepted that agreement on the establishment of an employment contract could be `contained partly in the letters, partly in oral exchanges at the interviews or elsewhere and partly left to evolve by conduct as time went on.' Putting it another way the initial exchanges took their meaning from the way in which the agreement had been operated. [81] In contrast, in general, behaviour subsequent to the formation of a contract is not relevant to its interpretation. *Carmichael* looks to the subsequent conduct of the parties to help determine what they are taken to have agreed. The terms upon which employment is entered into are very much driven by the employer who will take responsibility for drafting the contract. *Carmichael* offers a modicum of control over the employer's prerogative as behaviour inconsistent with the original framework may result in an outcome at odds with the employer's aim. There is some doubt whether, where the employment contract is purely in writing, *Carmichael* would still apply. In *Carmichael* Lord Hoffmann referred to the House of Lords case of *Whitworth Street Estate v James Miller* where it was held that a contract cannot be construed by reference to the subsequent conduct of the parties.[82] Lord Reid famously saying that `Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.' Two points might be made by way of response. First, in terms of doctrinal purity, it has been pointed out that ` Evidence of subsequent conduct does not invite a subsequent meaning. It is directed to the original meaning; that is, the meaning of the contract when it was signed. It is a distraction to suggest

[78] (1998) 1 All E.R. 98. In so far as the contract is relational this might be thought to make sense. See Ch 7 this volume.
[79] [2002] I.R.L.R. 96
[80] *Carmichael v National Power* (n 56).
[81] *Carmichael v National Power* (n 56) holds that extraneous evidence is admissible to establish objectively the fact of the intention of the parties where the documents relied upon do not constitute the entirety of the contact.
[82] [1970] AC 583.

that post-contract evidence is capable of changing the contract date meaning, when its sole purpose is to elucidate that meaning.'[83] Second, Lord Reid's views may well continue to be valid in the commercial law context. However, where the employment contract is concerned the manner of operation may well provide cogent evidence of the realities of the relationship. Sham arrangements apart, we should remember that it will often be highly ambiguous whether a relationship is one of employment or not. Again, the dynamic nature of employment relations is highly relevant: ` Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic…relationship new terms will be added or will supersede older terms.'[84]

Lord Hoffmann's judgment in *AG of Belize v Belize Telecom* may prove to be particularly significant in the employment context.[85] He observed `that the implication of a term is an exercise in the construction of the instrument as a whole.' Key implied terms in law may be relevant to questions of interpretation. For instance, the co-operation norm possesses unfulfilled potential as a means of construction. In *The Personal Employment Contract* Freedland points to a guiding principle of construction which obliges the parties `to co-operate with each other in realising the objectives' of the contract.[86] I would suggest that this principle may be particularly helpful where the work-wage bargain is concerned. For instance, the employment contract may contain income protection clauses where the benefits are contingent upon the beneficiary retaining the status of employee. In some situations the employee will be concerned that the employer will seek to terminate the contract to avoid incurring the cost of, for example, income protection benefits. As a result of *Johnson,* there would be no implied restraint on the notice clause but, when the contract is read as a whole, it may be apparent that the employer has restricted his capacity to terminate. In *Reda* it was said that `even if the case is taken as a rare example of a term being implied into a contract to qualify an express right, the justification for this course lay in the need to reconcile express terms of the contract which were mutually inconsistent'.[87] In addition, it would be possible to establish that it was implicit in a clause dealing with income protection in respect of ill health that, should the employer terminate the claimant's employment for that very reason, the claimant would continue to be entitled to benefit.[88] Such an implicit restraint may be

[83] *Wholescale Distributor v Gibbons* [2008] 1 NZLR 277. And see D.McLauchlan `Contract Interpretation: What is it about?' (2009) 31 Sydney Law Review 5.
[84] *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11.
[85] [2009] 1 WLR 1988.
[86] M.R. Freedland, *The Personal Employment Contract*, (OUP 2003) 141.
[87] See the Privy Council's explanation of *Aspden v Webbs Poultry* [1996] IRLR 521 in *Reda v Flag Ltd (Bermuda)* (n 24).
[88] *Briscoe v Lubrizol* [2002] IRLR 607

necessary to ensure that employees gain the full benefit of the work-wage bargain. The guiding principle allows the contract to be construed so that income protection arises where the individual has the status of employee or that status has been lost because the very contingency arose that the scheme was meant to guard against.

Further Developments

It seems clear that the general principles of the law of contract will continue to have a pivotal role in the development of the law of the employment contract and the resolution of hitherto unresolved controversies.[89] The range of issues thrown up by a relationship such as employment is extensive; moreover as social and economic conditions change further challenges emerge. It would be foolish to restrict the extent of contractual doctrine that is seen as being relevant to the creation of solutions to problems that arise in the industrial relations context. Concepts of seemingly limited importance can play a major role in the development of the employment contract. The duty of co-operation performed that function in both assisting and legitimising the emergence of the implied obligation of mutual trust and confidence. [90] In *Stirling v Maitland* the former duty was stated in the following terms: `If a party enters into an arrangement which can only take effect by the continuance of an existing state of affairs…there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances.'[91] Mutual trust and confidence, with its positive dimension, could be presented as a modification of that overarching norm.[92] Further recourse to the obligation of co-operation may be advantageous. Sedley LJ, in *Cerberus Software Ltd v Rowley,* drew attention to `one of the great unresolved questions of employment law: is it ever open to a wrongfully dismissed employee to affirm the contract and sue for wages?'[93] Despite the endorsement of the theory of elective termination in *Geys v Societe Generale* this question remains unresolved: `even if the question can be said to be unresolved, this court is not invited to resolve it'. [94] It should be said that as matters stand the employee will be restricted to a claim in damages.[95] Of course, the reason wages cannot be earned is because the employer has wrongfully denied the employee the opportunity to do so. The following

[89] Developments in the law of tort should not be lost sight of. Decisions such as *Viasystems v Thermal Transfer* [2006] QB 510 may impact on the law of the employment contract. And see the discussion in Prassl (n 47) 186-7.
[90] The obligation probably has its origin in the general duty of co-operation between contracting parties: *B.A. Hepple , Employment Law*, 4th ed. (1981), paras. 291-292, pp. 134-135.
[91] (1864) 5 B & S 840, 852 and approved by the House of Lords in *Southern Foundries v Shirlaw* [1940] AC 701.
[92] *Bournemouth & Boscombe AFC v Manchester United FC*, The Times, May 22, 1980.
[93] [2001] ICR 376, 386.
[94] *Geys v Societe Generale* (n 5).
[95] *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, 726.

dictum of Sir John Donaldson is highly pertinent at this point: `Why should not the servant sue for wages if it is the act of the employer which has prevented his performing the condition precedent of rendering services? And if he can sue in debt for his wages, no duty to mitigate would arise and there would be no practical necessity to accept a wrongful dismissal as terminating the contract of employment, provided that the employer is solvent and the servant is sure that the dismissal was wrongful.'[96] The learned judge supported this stance by reference to the House of Lords decision in *Mackay v Dick* which involved the application of the general obligation of co-operation[97]. There the seller of a digging machine agreed that he would demonstrate that it could achieve a specified standard of performance and that this demonstration should be a condition precedent to his right to be paid the price. The buyer prevented the demonstration taking place and the House of Lords held that in such circumstances he was entitled to be paid the price not just damages. This was because the seller's obligation was complete either when he demonstrated that the performance target could be met or he was prevented from doing so. Contemplating extending this approach to the employment context Sir John Donaldson opined that `the fact that the servant has not rendered the service would be no obstacle in suing for wages if it was the employer's act which produced this state of affairs.'[98] One might cavil that there is certainly no obstacle to the employee suing but what is the nature of the action? The elective principle is subject to the limitation that ` the innocent party must also perform its contractual obligations if it is to earn the right to claim the price that is due to be paid by the party in breach. If the innocent party cannot earn the right to claim the price due to it for its performance without the co-operation of the party in breach, it will not be able to pursue a debt claim and will be limited to a claim in damages.' It may be said that the consequence of refusing to allow the employee to perform is simply that there arises a secondary obligation to pay compensation (damages) for non-performance of a primary obligation.[99] However, the later analysis is avoided if the work wage bargain is constructed so that wages become due both where work is performed but also where the employer wrongfully prevents performance. In either case the employee becomes entitled to payment of wages. This construction is the result of the application of the guiding principle of co-operation. Such a construction is also supported by the categorisation of an employment contract as relational.[100] This points towards the obligations of the contract being framed in a manner that is supportive of the relationship continuing; ` harmonisation of relational conflict' is promoted.[101] Forcing the employee to look to the law of damages brings into play the law on mitigation of loss. As matters stand where the

[96] *Sanders v Neale* [1974] ICR 565, 571.
[97] (1881) 6 App.Cas 251.
[98] *Sanders v Neale* (n 96) 571.
[99] *Photo Production v Securicor* [1980] AC 827
[100] *Johnson v Unisys* (n 2).
[101] See I. Macneil, The New Social Contract and ch 5

employee has been denied the opportunity to work, notwithstanding the triumph of the elective theory, he ` must almost invariably be bound to seek other employment in fulfilment of that obligation; it would be very rarely that he could expect to find other employment, or could mitigate his damages in any other way'.[102] The pressure to avoid the amount of compensation being decreased directs the employee's focus away from preservation of the employment relationship.[103]

Prudent recourse to general principles is crucial to the successful development of the law of the employment contract; conversely there are dangers in developing rules without proper regard to overarching principles. The manner in which the concept of mutuality of obligation has emerged offers a cogent warning here. In a seminal judgment in *Ready Mixed Concrete v Minister of Pensions* McKenna J stated that ` That a contract of service existed if (a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master' and two further conditions were satisfied. [104] The first condition transmuted into a requirement that before a contract of employment came into being there should be an exchange of obligations as to future performance. This was unnecessary as MacKenna J can best be understood as talking about the requirement for consideration. The effect though has been to make it more difficult for particularly vulnerable groups to establish employment status. It is important to recognise that the blame for this cannot be laid at the door of the general law of contract as it is not a requirement of contractual relations that mutuality of obligation exists with respect to future performance.[105] Nevertheless, the courts elaborated on the essential requirements of an employment contract to produce a concept of mutuality of obligation particular to employment relations. Had greater regard been had to general principles it is more than conceivable that this would not have happened. Freedland has suggested that the concept of mutuality of obligation can be best thought of as a way of expressing the requirement for consideration in the language of promissory obligations.[106] This is extremely helpful. So expressed, mutuality of obligation can be seen as a requirement rooted in the mainstream body of contractual doctrine. The practical consequence of relocating mutuality of obligation within the four walls of the concept of consideration is that a broader range of case law become relevant. Thus Freedland rightly draws attention to the fact that the contemporary articulation of mutuality of obligation is inconsistent with traditional acceptance that a right to lay off is not incompatible with ongoing relations. On the

[102] Gunton [1981] Ch 448, 468.
[103] S.Rowan, *Remedies for Breach of Contract*, 100.
[104] [1968] 2 QB 497.
[105] *Cornwall CC v Prater* [2006] ICR 731.
[106] Freedland, (n 86). And see N.Countouris, `Uses and Misuses of `Mutuality of Obligations' and the Autonomy of Labour Law' in A. Bogg et al (n 1).

Freedland analysis such a line of case law becomes relevant in cases where work is performed on an intermittent basis. The reconciliation of the requirement for mutuality and the employee's need for continuity is then fully addressed.

Conclusions

This chapter has been premised on the basis that the relationship between general principles and the rules of the employment contract is not a straightforward one and a proper understanding can only be gained through consideration of the way in which the law of the employment contract also interacts with the law of other nominate contracts. The common law responds to the need for change by drawing not only on general principles but also on developments in all areas of contract law. Considerable scope exists for judicial creativity; in terms of modification of existing concepts or, in effect, the creation of new ones. Modification may well be to the benefit of the employee as we know from observing the transmutation of the implied obligation of co-operation into mutual trust and confidence.

Underlying notions of pluralism allow overarching principles to be fashioned to the needs of particular relationships. The common law is capable of considerable flexibility. Satisfactory evolution is very much contingent on regard being had to policy factors and matters become tendentious on occasion. There are other features of contracting in the employment sphere that require careful attention. A key issue is where, as is typically the case, the employer's assumes responsibility for the drafting of the contract. The employer's control over the process of formalisation requires the courts to guard against abuse; decisions to formalise and not to formalise are equally relevant in this respect.[107] Resort to formalisation allows the employer to present the bargain in a particular way; failure to do so may take an aspect of the employment relationship out with the contractual framework. Successful regulation requires an employment orientated approach to evidential and substantive rules. The courts have made a great deal of progress here through decisions such as *Carmichael v National Power* and *Albion Automotive v Walker*.[108]

[107] The decision of the Canadian Supreme Court in *Shafron v KRG Insurance Brokers* [2009] 1 SCR 157 provides an example in the context of restrictive covenants.

[108] *Carmichael v National Power* (n 56), *Albion Automotive v Walker* (n 42).