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Constructive Dismissal: The Contractual Maze

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INTRODUCTION

The scheme of statutory protection in the United Kingdom established by the law of unfair dismissal in the Industrial Relations Act 1971 (UK) is sensitive to the need to accommodate the realities of the different ways in which a working relationship might come to an end. Since 1974, the view has rightfully been taken that it was not enough to regulate situations involving dismissals as generally understood where the decision to terminate is one taken and communicated by the employer. Parliament recognised that the employer's behaviour might trigger severance of the relationship at the hands of the employee. Employees may, in response to an intolerable state of affairs, simply resign and have no intention of returning. The common law would not regard this as constituting a dismissal but it was, nevertheless, important that the employer's behaviour still be subject to scrutiny and that the employee be furnished with a remedy should their complaint be upheld.

The foregoing considerations led to the borrowing of the concept of constructive dismissal from the law of redundancy payments. Paragraph 5 (2) of Schedule 1 of the Trade Union and Labour Relations Act 1974 (UK) extended the meaning of dismissal to include situations where ` the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.[1] Section 23 of the 1971 Act (which defined dismissal for the purposes of unfair dismissal) had failed to make provision in that regard. Thus, the employee who resigns in response to the employer's wrongful conduct is regarded as having being dismissed for the purposes of an unfair dismissal action.

In my view, the introduction of constructive dismissal was an admirable step. It provides the beleaguered employee with a measure of empowerment and allows them to bring an unsatisfactory situation to an end whilst, at the same, affording a means of access to an employment tribunal. The way in which constructive dismissal is expressed

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1 The formulation was derived from s3(1) Redundancy Payments Act 1965 (UK).

is, though, of very considerable consequence. In his judgment in *Buckley v Bournemouth University* Sedley LJ explains that `Modern employment law is a hybrid of contract and status. The way Parliament has done this is to graft statutory protections on to the stem of the common law contract.'[2] Constructive dismissal was grafted onto the common law with the consequence that the circumstances which `can bring about a constructive dismissal is determined not by the Act, which is silent on the subject, but by the common law. The common law holds that they must be circumstances amounting to a fundamental or repudiatory breach of contract by the employer.'[3] This article looks at how effective the exercise in grafting has been and whether reform might be required.

ASSESSING THE EMPLOYER'S BEHAVIOUR

Following constructive dismissal's introduction in 1974, an early but absolutely key question was determining the standard by which the employer's behaviour was to be assessed. The case law initially was torn between a contractual test and one based on reasonableness.[4] The famous decision of the Court of Appeal in *Western Excavating v Sharp* ('*Sharp*') resolved the matter by opting for a contractual test: ` But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'[5] It was said that 'The statute itself draws a distinction between "dismissal" in paragraph 5 (2) (c) and "unfairness" in paragraph 6 (8). If Parliament intended that same test to apply, it would have said so'.[6] The outcome was not inevitable; the Court of Appeal had seen matters differently in the earlier case of *Turner v LTE*.[7]

Some 45 years later, it seems less than fruitful to return to the question of whether the Court of Appeal construed the statute correctly. I would merely comment that the reassuring familiarity of the world of contract may simply have been far too beguiling to the judicial mind for any other outcome to have been a realistic possibility: `It is better to have

2 *Buckland v Bournemouth University* [2011] 1 QB 323, para 19.

3 Ibid at 20.

4 In *Scott v. Aveling Barford Ltd.* [1978] ICR 214 the Employment Appeal Tribunal had tried to provide a reconciliation of the competing lines of case law.

5 [1978] QB 761, 769.

6 Ibid at 770.

7 In *Turner v LTE* 1977 ICR 952, 964 it was said that 'on its true construction sub-paragraphs (a), (b) and (c) of paragraph 5 (2) of Schedule 1 are not cognate with concepts of common law and, indeed, in some respects they quite plainly are at variance with those concepts. So far as (*c*) is concerned, in my judgment, the wording of this sub-paragraph is not a wording which involves, or implies, the same concept as the common law concept of fundamental breach of a contract resulting in its unilateral repudiation and acceptance of that unilateral repudiation by the innocent party. The employer's "conduct" here is employer's conduct to be adjudged by the industrial tribunal by the criteria which they regard as right and fair in respect of a case in which the issue is whether or not there has been "unfair" dismissal.'

the contract test of the common law. It is more certain: as it can well be understood by intelligent laymen under the direction of a legal chairman.[8] The complexities of contract law were not thought to stand in the way of the law of unfair dismissal offering adequate guidance as to reprehensible behaviour: `Sensible persons have no difficulty in recognising such conduct when they hear about it. Persistent and unwanted amorous advances by an employer to a female member of his staff would, for example, clearly be such conduct; and for a chairman of an industrial tribunal in such a case to discuss with his lay members whether there had been a repudiation or a breach of a fundamental term by the employer would be for most lay members a waste of legal learning.'[9] This strikes me as simplistic and complacent. The position will often be much more complicated and it is noteworthy that the hypothetical example given involves very serious misconduct. The realities of working day life will often see the employee worn down by a series of `micro-aggressions' and difficult questions of evaluation will arise. In truth, to say that ` what is required for the application of this provision is a large measure of common sense' tells potential claimants nothing at all.[10] It should be said that a reasonableness test, without more, would also be problematic.

THE PERILS OF A CONTRACTUAL APPROACH

At one level the concept of constructive dismissal appears remarkably straightforward. The disgruntled employee leaves the employment and gains the opportunity for the merits of the workplace situation to be reviewed by an external body. The actual position is, of course, much more complicated and hazardous for the employee. Unacceptable behaviour is only relevant as the basis of a claim should it offend the express or implied terms of the contract. In addition, as the aforementioned dictum of Sedley LJ reveals, the breach must be viewed by the law of contract as a material or fundamental one. The latter question will often be difficult to answer. Even on the assumption that the employer has behaved inappropriately it is not inevitable that an implied term will have been infringed or, at least, to a justiciable extent. Determining whether there has been a material breach of an express term may involve difficult questions of interpretation of the language used. Again, whether a breach of a term is material or not may involve questions of degree. For example, an employee may regard any delay in the payment of wages as fundamental but the law says otherwise. The importance of prompt payment has been judicially acknowledged but not every delay will be viewed as sufficiently lengthy to constitute a material breach.[11] The problem is aggravated by the fact that the degree of leeway afforded to the employer is decided upon on a case by case basis and the position is only established

8 *Sharp*, n 5 above, 770.
9 Ibid at 772.
10 Ibid at 773
11 *Adams v Charles Zub Associates* [1978] IRLR 551.

retrospectively. Even where an employee seeks and obtains advice they would often be unable to resign with absolute confidence. The stakes are high as an employee who resigns in the absence of a material breach will be denied the protection of the statutory right not to be unfairly dismissed.[12]

Determining the existence and seriousness of a breach is not the only concern. Other aspects of contractual doctrine may serve as potential pitfalls for the employee. The law of anticipatory breach, for instance, may come into play. The employer who threatens to break the contract will commit anticipatory breach and, in consequence, the employee will be entitled to resign and claim to have been constructively dismissed. Problems may arise should the employer withdraw the threat. The employee may still feel aggrieved and unable to place in any trust in the employer. However, a failure to `unequivocally' accept the breach prior to withdrawal will prevent a constructive dismissal claim arising should the employee resign in any event.[13] *Norwest Holst* illustrates this point and also flags up a further problem. In that case, the employee had written to the employer, having taken legal advice, to object to the employer's intention to unilaterally vary the contract. The letter was headed 'without prejudice.' In the eyes of the Court of Appeal the use of the term was of considerable consequence: 'To my mind the effect of heading the letter "without prejudice" was to communicate to the recipient that the letter was to be regarded as a commencement of a process of negotiation or compromise, which at first sight is a communication of a very different kind from what is commonly called an open letter, stating in black and white the final stance taken upon an issue which has arisen between the parties.'[14] As a result, the employee was regarded as having failed to have accepted the breach and a constructive dismissal claim was denied. Such a conclusion may have been appropriate in *Norwest Holst* itself as the employee had taken legal advice. Often, however, that will not be the case and, in any event, I would suggest that a more general problem is also revealed. One will often find, in a variety of contexts, that a layperson will resort to the use of legalistic terms and expressions should they be in dispute. Such language will be viewed as an appropriate means of conveying the seriousness of the situation. The consequences of the use of terminology of this nature may not be fully understood and not what is intended.

The difficulties associated with anticipatory breach do not arise should the employer actually break the contract. English contract law does not confer on the party in breach a right to `cure' and, irrespective of the employer's actions after the breach, the employee will be entitled to resign and claim to have been constructively

12 It should also be remembered that a constructive dismissal may be found to be fair. In *Savoia v Chiltern Herb Farms* [1982] IRLR 166, 167 it was said that if 'the statute had intended to exclude from consideration in Section 57 cases of constructive dismissal arising under Section 55(2)(c) it would have said so. Although it will be more difficult for an employer to say that a constructive dismissal was fair, nevertheless in my view there may well be circumstances where it is perfectly possible to do so'.

13 *Norwest Holt v Harrison* [1985] ICR 668.

14 Ibid at 679.

dismissed.[15] Once a breach becomes fundamental, subsequent actions taken by the employer (no matter how well intentioned) are irrelevant.[16] Such legal subtleties are likely to be lost on the potential claimant. The employee resigned in *Norwest* when he should not have if he wished to be able to claim to have been constructively dismissed. Equally an employee may assume that they are no longer entitled to resign where the employer has taken remedial action (such as making the workplace safe again) and has `cured' the breach. The lay person and judicial perception of the employer's behaviour may not align.

THE DEPENDENCY ON IMPLIED TERMS

Employees who are dissatisfied and believe that they have been badly treated will often not be able to point to an express term that may have been infringed. The contract, for example, may say little about behavioural standards in the workplace. This may be changing to some extent as employees in some sectors are employed under much more extensive contracts and related policies. Nevertheless, employees will often have to look to the law of implied terms. The judges deserve a great deal of credit for expanding and modernising the law in this area. The creation of the implied obligation of mutual trust and confidence has been the primary element in this reforming agenda.[17] The expectations that are placed on employers by their employees evolve constantly. The key obligation of mutual trust and confidence, through its open-textured nature, is constructed in such a way as to allow it to respond to situations of a type that have not been previously litigated. This has led to the emergence of a body of case law which is now voluminous and covers numerous situations that may arise in the workplace. Writing in 2010, Bogg drew attention to `a whole range of misdeeds that have breached the implied term.'[18] The range becomes ever wider. It remains the case though that an employee who litigates in the context of a scenario that has not previously arisen will be uncertain as to how mutual trust might apply.

An employee's assessment and evaluation of the appropriateness of the employer's behaviour may not correspond with that of the courts. This is in no way surprising as the employee's basis of evaluation will not be a contractual one. Behaviour that an employee regards as unreasonable may not be seen in that way by the judges. Equally, employees may, on occasion, be unlikely to appreciate that a particular instance of conduct would give rise to a material breach or even a breach at all. In *Rawlinson v Brightside* the employer misled the employee about the reason for termination

15 The issue is discussed more extensively in the section below titled 'The Onward March of Contractual Doctrine'.

16 *Flatman v Essex* [2021] 1 WLUK 557.

17 And see MR Freedland, *The Personal Employment Contract*, 166 (OUP:2003).

18 A Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve' (2011) 32 *Comparative Labor Law & Policy Journal* 729, [756].

of his employment which was, in truth, about performance. [19] To 'soften the blow' for the employee, who the employer wanted to work through his notice period to ensure a smooth handover of work, the employer did not tell him the real reason for its decision but told him there was to be a re-organisation of his work, which would be carried out by an external service provider. Such behaviour was regarded as disrespectful and held to breach the implied obligation of mutual trust: `In all but the most unusual of cases, the implied term must import an obligation not to deliberately mislead - after all, how can there be trust and confidence between employer and employee if one party has positively determined to mislead the other? That does not mean an employer is necessarily placed under some broader obligation to volunteer information, but where a choice has been made to do so, the implied term must require that it is done in good faith. And, even if I allow that there may be particular cases in which the operation of the implied term would permit some element of deceit (the white lie that serves some more benign purpose), I cannot see how that was so in this instance.'[20] This conclusion mandates respect for the employee but also requires greater transparency in decision making which is very much an expectation of the modern workplace. At the same time, one might query whether an employee would suspect that a `white lie' would constitute a breach of contract.

The difficulties of navigating the world of contract may be accentuated by the manner of the common law's evolution. It may be assumed that, with the passage of time, the case law will address unsatisfactory features of the law and render the legal framework better suited to the resolution of employment disputes. On occasion the law does move forward in this way as the following section on the treatment of a course of conduct demonstrates. However, it is equally likely that judicial developments may render the law more complex and less comprehensible. This point may be illustrated by the case law on judicial control of discretionary powers. Mutual trust and confidence has for many years played an important regulatory role here and an inappropriate exercise of a discretionary provision may amount to a material breach.[21] However, the courts apply a different test depending upon the nature of the discretion being exercised: `In *IBM UK Holdings Ltd v Dalgleish* … [2018] ICR 1681 the Court of Appeal drew a distinction between cases where the employer is exercising an express or implied discretionary power, and cases where the concern is simply with the conduct of the employer. In the former category of case, the discretion is required to be exercised in accordance with the duty of mutual trust and confidence but the test is as to the rationality of the employer's exercise of its contractual discretion … .'. [22] In cases in the latter category (where the employer's prerogative is concerned) one simply asks whether a breach of mutual trust and confidence has occurred.

19 *Rawlinson v Brightside* [2018] IRLR 180.
20 Ibid at para 38.
21 *United Bank v Akhtar* [1989] IRLR 507.
22 *Smo v Hywel DDA University Health Board* [2020] EWHC 727 (QB), at para 205.

The lack of a singular test is a source of confusion as can be seen from *Avsar v Wilson James* which concerned a decision to suspend the employee.[23] At first instance the view was taken that, for a challenge by the employee to be successful, it had to be shown that the employer's decision was irrational. On appeal this was found to be incorrect as the question which should have been asked was whether the decision gave rise to a breach of mutual trust and confidence. It must be said that a position which gives rise to judicial discord is unlikely to be found readily comprehensible by a wider audience. If the judges become lost in the contractual maze it seems reasonable to hazard that they will not be alone.

IMPLIED TERMS AND COURSE OF CONDUCT

As has already been alluded to, the judicial treatment of a course of conduct has much to commend it. The implied term of trust and confidence has evolved in a way that is sensitive to the realities of the conduct of employment relations. Unacceptable behaviour which is intolerable from the employee's perspective will often be the result of a course of conduct rather than a single incident. As already mentioned, a series of `micro-aggressions' may make the employee's life a misery.

Mutual trust and confidence has responded to this in a way that is highly practical and responsive to the employee's position. A series of incidents, which in themselves do not constitute a material breach, may do so when taken together.[24] The following passage from Harvey on Industrial Relations and Employment Law met with approval in *London Borough of Waltham Forest v Omilaju*: 'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.'[25]

An important element in the law in this area is the notion of conditional affirmation. The courts allow for the possibility that an employee's affirmation of a breach of contract, in the face of a breach of mutual trust and confidence, be regarded as conditional upon the employer's future conduct. The Court of Appeal has recently reaffirmed that this approach does not involve `any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the *Malik* term … fall within the well-recognised qualification to that

23 [2020] EWHC 3412.
24 *Lewis v Motorworld* [1986] ICR 157.
25 [2005] ICR 481, 487.

principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter.'[26]

THE CONCEPT OF AFFIRMATION

Against the backdrop of a contractual maze, the decision to resign is clearly a difficult one. Successful identification of a material breach of contract does not put an end to the hurdles that an employee faces. The fact that the claimant has been transported to the world of contract law cannot be lost sight of. The challenge for the employee is compounded by the fact that the law may not look kindly on delay despite the magnitude of the decision. The courts are though aware of the difficulties presented: `When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason, the law looks carefully at the facts before deciding whether there has really been an affirmation.'[27]

Judicial understanding of the difficulties faced by employees only takes you so far. The significance of delay is viewed through the lens of the legal concept of affirmation. The following dictum of Denning MR (commonly cited in the employment context) which is to be found in the *Sharp* case is less than helpful: 'he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'[28] The passage of time suggests that Lord Denning may have taken an unduly narrow view of the rights of the employee and that there has been some amelioration of the employee's position. The tribunals and courts accept that an employee may be reluctant to object to a material breach and, as a result, will not rush to a conclusion that a reasonable time has elapsed.[29] Moreover, caution is also displayed where the only evidence of affirmation is delay.[30] Other factors may point against affirmation having taken place. An employee who is seriously ill during the period of delay will be unlikely to be viewed as affirming the contract. Neither will the employee who `rather than reacting immediately to the breach by accepting the employer's repudiation, gives the employer the opportunity

26 *Kaur v Leeds Teaching Hospitals* [2018] EWCA Civ 978, para 51.
27 *Buckland*, n 2 above, para 54.
28 *Sharp,* n 5 above, 226.
29 *Cantor Fitzgerald International v Bird* [2002] IRLR 867.
30 *WE Cox Toner (International) v Crook* [1981] IRLR 443; *El-Hoshi v Pizza Express Restaurants* [2004] UKEAT 0857

to withdraw from the offending course of action, or to remedy the breach.' [31] All that said, the concept of affirmation drags the employee deeper into the world of contract.

FURTHER MYSTERIES OF AFFIRMATION

The law of affirmation undoubtedly creates further perils for the employee. The complexities of contractual doctrine will often be utterly baffling to the employee who lacks the benefit of legal advice. Common sense may well point in another direction should the employee attempt to assess the impact of his actions. This may be illustrated by the Court of Appeal decision in *Patel v Folkestone Nursing Home* which addressed the relationship between constructive dismissal and contractual appeal rights.[32] The Court holding that, by exercising such a right, the claimant was affirming the contract and forfeiting the right to claim constructive dismissal: `clearly implicit in a term in an employment contract conferring a contractual right to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout.'[33] I am not convinced that an employee would perceive that this danger to their rights existed or believe that such a crucial election was at stake. An employee might be motivated to exercise appeal rights by the desire to allow every opportunity to resolve the differences that had arisen but, in the last resort, decide that the relationship was so damaged by the employer's behaviour that they could not continue. They might take the view that the manifest reasonableness of that course of action would allow them to be seen in the best possible light by a tribunal should litigation ensue. A different view to *Patel* was taken by another division of the Court of Appeal in *Kaur v Leeds Teaching Hospitals.*[34] The Employment Appeal Tribunal ('EAT'), in *Gordon v J & D Pierce (Contracts) Ltd,* preferred the reasoning in *Kaur* and expressed the view that `it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure.'[35] I would agree that the reasoning in *Kaur* is much more convincing.

THE NEED FOR A CAUSAL CONNECTION

Causality plays a key role in the common law of obligations. Irrespective of the blameworthiness of the defendant, liability will not arise in the absence of a causal link to the

31 *Wedgewood v Hortimax* [2003] UKEAT 997.

32 [2019] ICR 273.

33 Ibid at para 26.

34 *Kaur*, n 26 above, para 63 where Underhill LJ said that "exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract."

35 [2021] IRLR 266, para 24.

harm suffered by the claimant. It is therefore not surprising to find that the disaffected employee must resign in response to the breach otherwise the situation is not viewed as one of constructive dismissal.[36] This has given rise to a difficult related question of whether the employee must inform the employer of the reason for the resignation. The Court of Appeal has decided that there is no such requirement.[37] This seems absolutely correct as the statute simply requires that the employee terminates the contract in circumstances such that they are entitled to do so without notice by reason of the employer's conduct. The employee who does not inform the employer may though face a more arduous task in demonstrating that they resigned in response to the employer's breach: `Leaving the employment without notifying the reason does not preclude a finding of constructive dismissal, though it will usually make it more difficult to obtain such a finding.'[38] This is despite the fact that saying nothing may be readily comprehensible: ` For many employees, the more outrageous or embarrassing are the instructions given to them, or suggestions made to them, the less likely they may be to argue the point there and then. They may reasonably wish to remove themselves at the first opportunity and with a minimum of discussion.'[39] I would suggest that the reluctance of employees to be effusive is likely to be much more commonplace. Faced with an intolerable situation the focus will be very much on departure, and in a way which minimises the possibility of further conflict or unpleasantness. It is also explicable that the employee may give the wrong reason on occasion to ease the route to the exit door: `A young employee is bullied by his or her employer in circumstances which clearly entitle the employee to treat such conduct as amounting to constructive dismissal. The employee does not have the necessary courage to inform the employer of the reason for leaving but gives an untrue explanation such as, "I am leaving to look after my mother who is ill."'[40]

In more extreme cases the courts will readily infer that the employer's conduct led to the resignation: ' … There may be contracts which are so egregiously performed by the employer that it is obvious that the reasons for an employee's leaving have everything to do with those conditions, which collectively amount to a fundamental breach of contract.'[41] While the employee must resign in response to the behaviour that constitutes a material breach it is not essential that the employee appreciates that a breach has occurred. This was particularly important in *Mruke v Kahn* where the EAT had held that a constructive dismissal had not taken place where the claimant was being paid less than the national minimum wage. The Court of Appeal corrected the position: `In so far as the ET's reasoning was based on the point that the Claimant

36 The breach by the employer need not be the sole cause of the employee's resignation: *Meikle v Nottinghamshire CC* [2004] IRLR 703.
37 *Weathersfield v Sargent* [1999] ICR 425.
38 Ibid at 432.
39 Ibid.
40 Ibid at 498.
41 *Mruke v Kahn* [2018] ICR 1146, para 82.

did not appreciate that she was being paid less than she was entitled to be paid, that was based, in my view, on an error of law. It was because she was ignorant of her legal rights under the legislation of this country.'[42]

REMEDIES AND ALTERNATIVE COURSES OF ACTION

An employee who is contemplating resigning and claiming to have been constructively dismissed will wish to know whether there are any other options that are worthy of consideration. After all, securing justice by severing the working relationship is a decision not to be taken lightly. Alternative options may exist in some scenarios. Some forms of wrongful behaviour by the employer will give rise to a remedy at the hands of the employee other than constructive dismissal. Wrongful deduction of wages is one example. However, it will often be the case that the only route offered by law is constructive dismissal. What of Sedley LJ's hypothetical employee in *Dunnachie v Kingston upon Hull CC* 'who had been appallingly treated and finally driven out of his job with his self-confidence in tatters'.[43] *Dunnachie* itself `was a bad case of workplace bullying, compounded by an equally serious refusal by management to deal with it. The blow to a conscientious employee's self-esteem which such treatment delivers may well be the unkindest cut of all, worse in many ways than the monetary loss. There was no professional evidence that the distress and its effects had amounted to a recognised psychiatric condition but Mr Dunnachie had been reduced by his treatment to a state of overt despair.'[44] The options open to such an employee are decidedly limited and the position is particularly constrained where the employer's breach has not caused pecuniary loss. It is conceivable that this could arise in a significant number of cases where the obligation breached is mutual trust and confidence. In the absence of pecuniary loss, the only remedy open to the employee is to resign and claim constructive dismissal; the choice has to be made between vindicating one's right to dignity in the workplace and preserving job security.

It is submitted that the foregoing position is unsatisfactory. Common law reform by allowing recovery for injury to feelings (which is currently denied by the rule in *Addis v Gramophone*) would be an important step forward. [45] Such a claim would be consistent with the recognition of the employment contract as a relational one by providing a

42 Ibid at para 84. It was said, at para 73, with reference to minimum wage legislation that 'Parliament was well aware that there can be individual employees who are susceptible to exploitation precisely because they may be illiterate or have received very little if any education, particularly if they have been recruited from overseas. In my view, to rely upon that person's ignorance of her rights in accordance with the law of this country as meaning that she could not be considered to have resigned in response to what was otherwise found to be a fundamental and repudiatory breach of contract by her employer does amount to an error of law.'

43 [2004] ICR 481, 496.

44 Ibid at 485.

45 [1909] AC 488.

remedy that facilitated preservation of the relationship. Scope to make an award in respect of injury to feelings is essential in a case of non-pecuniary loss otherwise the employee may receive no compensation should they decline to resign. Denial of this possibility conflicts with judicial recognition that the employee's interest in the employment relationship is not purely financial. It also fails to provide a means of deterrence of inappropriate behaviour. In the Canadian Supreme Court in *Wallace v United Grain Growers* it was said that 'The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law.'[46]

The current absence of a right to claim for injury to feelings is not the only deficiency in the common law armoury. The very limited range of circumstances in which the employer comes under a duty to protect an employee's economic interests can also be highly problematic. The denial of damages for `advance mitigation' of loss is worthy of particular attention at this juncture. The difficulties that can arise may be illustrated by *Greenway v Johnson Matthey Plc*.[47] In *Greenway* it was alleged that the claimants had suffered financially as a result of sensitisation to platinum salts, being unable to take work in any environment where further exposure might occur. It was accepted that the employer had failed to ensure that its factories were properly cleaned and, as a result, platinum salt sensitisation had arisen. The employer's behaviour gave rise to a breach of a duty in negligence at common law. The employer addressed the situation by removing the claimants from that workplace environment. A number of claimants were redeployed and remained in employment. One clamant (Greenway) remained employed in work settings which did not involve exposure to platinum salts. He claimed that he has suffered financial loss through loss of promotion prospects with the company. Other claimants sought significant loss of earnings as a result of losing their relatively highly paid jobs working in the areas of the factories in which it was known that there was an increased risk of exposure to platinum salts and being unable to take up work in any other work environment in which such exposure might arise.

Once the employer became aware that sensitisation had arisen action had been taken to protect the claimants from suffering physical injury by removing them from work involving platinum salts. However, ameliorating the risk of physical injury resulted in the creation of loss of a different nature. The Court of Appeal took the

46 (1997) 152 DLR (4TH) 1, para 107.

47 [2017] ICR 276. And for more detailed discussion see D Brodie, 'Employer's Liability and Allocation of Risk' (2018) 47 *Industrial Law Journal* 431.

view that a claim for purely financial loss could not be made. The orthodox position that the scope of the employer's obligation only extended to protection from personal injury and not from economic loss unaccompanied by personal injury was adhered to. However, unlike many situations concerning loss of this nature, a potentially distinctive and significant feature of *Greenway* was that the employer had breached its duty to take reasonable care to prevent physical injury. This might have advanced the claimant's position, but did not. The risk of harm arising had been avoided but it was said that the law did not allow recovery for the costs of mitigation of loss in advance of injury. Where the employee suffers purely financial loss because the employer has breached its duties in respect of protection against physical harm I would suggest that recovery should be allowed. The employer should not be permitted to escape liability as the employee is then left to bear the cost of avoiding a risk carelessly created by the employer. Unless the law is reformed the aggrieved employee may be forced down the route of constructive dismissal.

The current position though remains the one summarised in *Rihan v E & Y Global*: ` it would be an illegitimate extension of the law to make the leap from the standard employer's duty to safeguard its employees against personal injury, to a broad duty to safeguard them against pure economic loss incurred as a result of the claimant's need to cease working to avoid a threat to his physical safety.' [48]

THE ONWARD MARCH OF CONTRACTUAL DOCTRINE

Employment lawyers are familiar with the ever evolving body of doctrine that forms the law of the contract of employment. Claimants will not be, but it is important to appreciate that the contractual framework may change. This may occur in a way that is more or less favourable to the claimant but, as we have seen, may complicate the position yet further. It is salutary to remember that *Buckland v Bournemouth University* contains an intriguing discussion of whether the law would be enhanced by the creation of a right of cure.[49] Sedley LJ expressed concern that the current absence of such a provision might mean that, in this respect at least, the law of the employment contract failed to reflect 'sensible industrial relations'. In raising the issue in *Buckland,* Sedley LJ makes clear that any new right would only apply to breaches which are curable. [50] It is though the case that, irrespective of the type of contract, some breaches cannot be cured where harm has materialised and the status quo cannot be restored. One can only look to the secondary obligation to pay damages. I would also like to suggest that cure is much less likely to be feasible where employment relations are concerned

48 [2020] EWHC 901, para 476.

49 *Buckland*, n 2 above. I have explored this issue in greater detail elsewhere. See D Brodie, 'Common Law Remedies and Relational Contracting' (2014) 43 *Industrial Law Journal* 170.

50 Similarly, in the Scottish case of *Lindley Catering Investments v Hibernian FC* 1975 SLT (Notes) 56 Lord Thomson spoke of breaches which 'can be remedied'.

as opposed to a purely commercial exchange. Where a breach diminishes the trust that exists between the parties, it may not be possible to repair the damage that has been done to the relationship. In such a case, the appropriateness of any proposed cure very much goes to the heart of the employment contract.

Numerous difficult situations might be envisaged such as where a bona fide mistake has taken place. In *Assamoi v Spirit Pub Company,* the following hypothetical example was given: 'If … in a large industrial undertaking an employee called John Smith were to be given notice of a disciplinary hearing concerning a sexual assault perpetrated by him on a female employee, and it later transpired that due to an administrative mix-up the letter should have been sent to another employee of the same name, would the recipient of the first letter, sent in error, be entitled to say there had been a breach of an implied term, albeit that as soon as he had taken up the matter there was a profuse apology and an acceptance that the recipient of the letter was wholly innocent of any such inappropriate behaviour?'[51] However, in a case where mutual trust and confidence has been breached, there can be no guarantee that the promptest and fullest of retractions will properly restore the relationship between the parties. As in all aspects of life, some things which are said and done, even if in the heat of moment or in error, cause irreparable damage to personal relations.

It is of course the case that some breaches of the employment contract are undoubtedly curable. Notwithstanding the impossibility or impracticability of cure in some specific situations, the question remains whether the creation of a general right to cure would enhance the law. In my opinion, in the employment context, the answer should be in the negative. Given the limitations in the law of remedies that have already been discussed, it is vital that access to constructive dismissal should not become more restrictive than it currently is. As matters stand, the employee will forfeit the right to an unfair dismissal claim if the breach turns out to be less than material and, as a result, will be very hesitant about taking that risk. The employee's dilemma would be further exacerbated if rectification could also constitute a basis for defeat. Were a right of cure to emerge, some challenging questions would have to be addressed, such as how long would the employer have to cure a breach and would that time vary depending upon its nature. Again, where the breach served to damage trust between the parties, could any breach, no matter how serious, be cured? It is difficult to predict how the law would evolve but, given the infinite variety of circumstances in which a right to cure would have to operate, it seems likely that the legal framework would take the form of open textured rules. For instance, where the length of time available to the contract breaker was in issue, it is difficult to imagine that the courts would say anything more than that the time available was what reasonable in the circumstances. It would certainly be the case that the element of uncertainty would increase considerably and it would be much more difficult for an employee to know whether they were entitled to resign. As Sedley LJ himself acknowledged, the

51 [2011] UKEAT 50, para 37.

recognition of an 'exception where amends have been made or offered for a fundamental breach is to open up case after case to an evaluation of whether the amends constituted an adequate cure of the breach … Legal niceties would also lie in wait: for example, whether a subjective or an objective valuation is called for and, if the latter, whether factors personal to the wronged party count as objective or subjective factors'.[52] I would submit that such recognition would mean that the balance of power in employment relations would swing yet further towards the employer.

Other potential developments may also be unwelcome. The modern employment contract, particularly through the medium of mutual trust and confidence, places much greater weight on procedural fairness than was the case traditionally. Strong affinities with natural justice are now apparent and this to my mind is very welcome. There have been attempts to restrict this development by importing the band of reasonableness responses test from the statutory law of unfair dismissal. The decision in *Buckland* repelled this attack and denied statute a role. [53] *Buckland* endorsed 'the unvarnished *Mahmud* test' and indicated that to do otherwise would be to contrary to the stance taken in *Sharp* which had made clear that the test was contractual should constructive dismissal be in issue. [54] Matters are never entirely straightforward and the subsequent decision of the Court of Appeal in *Yapp v FCO* would though seem to be inconsistent with *Buckland.*[55]*Yapp* reminds us that further obstacles are always likely to emerge.

CONTEMPORARY STANDARDS AND EXPECTATIONS

Employee expectations of appropriate behaviour on the part of their employers evolve constantly; `workplace morality' is a dynamic creature. As a corollary, searching questions are asked of the law of implied terms and new terms require to be mooted and endorsed if the common law is to meet changing expectations. The formulation of a new implied term in law can be problematic. *Rihan v E & Y* provides a good example where the challenging question was asked as to what an ethical employer should do.[56] As we shall see the answer given is a progressive one but, at the same time, may not lend itself to ready application in future cases. The facts of the case were complicated and the judgment lengthy but the dispute centred on the treatment of the claimant by the defendants and the regulator. The claimant was a partner of the defendant and formed the view, while undertaking an audit, that a client based in Dubai was engaged in money laundering. He maintained that the local regulator required him to conduct the audit unethically and that the defendants colluded in

52 *Buckland*, n 2 above, 335.
53 *Buckland*, n 2 above.
54 On the issue of coherence with statute see A Bogg, '*Bournemouth University HEC v Buckland*: Re-Establishing Orthodoxy at the Expense of Coherence?' (2010) 39 *Industrial Law Journal* 408.
55 *Yapp v FCO* [2015] IRLR 112.
56 *Rihan,* n 48 above.

that. The claimant resigned and publicly disclosed the wrongdoing. He also left Dubai and was not prepared to return as he feared for his personal safety. He claimed that he was thereafter unable to secure alternative employment and his earning capacity was largely destroyed. He argued that two duties were owed to him in negligence. The claimant was a partner but the case was decided very much by analogy with the position of the employee and the outcome is therefore of interest. Again the fact that the claim was founded in negligence does not diminish its relevance. Deciding whether to imply a term in law or to establish a duty of care are very similar exercises.

The claimant argued that the defendants owed him a duty to take reasonable steps to prevent him from suffering financial loss by reason of their failure to conduct the audit in an ethical and professional manner. This part of the claim was successful: `I see no reason why, in certain circumstances, the moral and professional integrity of the employee (or quasi-employee) should not be protected by a duty to take reasonable steps to provide an ethically acceptable work environment, free of criminal conduct … and free of professionally unethical conduct.'[57] It was also held on the facts that the duty had been breached.

The seminal decision in *Malik v BCCI* played its part here given the recognition that the way in which the employer ran the enterprise could impact on the employee's interests.[58] In *Malik* a breach of the obligation of trust and confidence arose as the business had been run corruptly. *Rihan* is of note in that it extends the range of behaviours on the part of the employer that may be impugned. It also addresses situations where the employer cannot be regarded as corrupt as such, but nevertheless acts improperly in a specific situation and the behaviour impacts on a limited number of individuals.

The duty was formulated by reference to several forms of improper conduct. The language used is, in part, somewhat open-textured and that may prove troublesome. One might agree that an `ethically acceptable' work environment is highly desirable but this element of the duty also imports a strong degree of subjectivity. By way of contrast, the reference to `professionally unethical conduct' points to a standard of behaviour that can be measured by the published standards of the relevant professional body and would pose less of a challenge for an adjudicator. The reference to criminal behaviour is appropriate and, of course, the employee is not obliged to obey an unlawful order. Should refusal lead to termination a claim for wrongful dismissal would arise. If the employee carries on working, *Rihan* suggests that a breach of mutual trust may occur. There is a difficulty though in that the possibility of the employee acquiescing is also flagged. The realities of working life may make adjudication difficult. In *Rihan* itself it was said that `the duty would be owed to members of the team conducting the … audit. Within that team, only those unwilling to lend their professional name to the conduct of the audit, i.e. the claimant, would be in any position to bring a claim in negligence for breach of the audit duty. Those … who willingly took part in

57 Ibid at para 621.
58 [1998] AC 20.

the conduct of the audit would be treated as having acquiesced in the conduct.'[59] It was also made clear that should an employee (such as a whistle blower) have an alternative statutory remedy a duty might not arise.

The judgment in *Rihan* is a bold one which seeks to compel employers to observe greater propriety in their business practices. It would be difficult to argue that the creation of the obligation in *Rihan* is anything other than a step in the right direction but it would not be surprising if an appellate court viewed the position more narrowly.

CONCLUSIONS

Shortly before the enactment of the 1971 Act, Winn LJ said that `As a general approach to this whole topic it is really very desirable that in relations between employers and workmen and employers and the workmen's union, there should be, so far as it can possibly be achieved, simplicity: academic discussions as to the operation in certain circumstances in the law of contract of repudiations and acceptances, and acceptances of offers, novations and counter-offers, and so on, should not be allowed to produce waste of time or energy.'[60] The concept of constructive dismissal is a crucial element of the statutory framework but, judged against the criterion of simplicity, it falls well short. It is equally open to the related criticism that it fails to offer adequate and readily comprehensible guidance. How is the employee meant to determine whether the employer has 'clearly shown an intention to abandon and altogether refuse to perform the contract'?[61] It is not difficult to conclude that the employee who attempts to navigate the world of constructive dismissal without the benefit of legal advice is very likely to make errors from which recovery will be impossible. The would-be claimant is more than likely to be as bewildered as Winston Churchill was by the study of mathematics: 'I had a feeling once about mathematics - that I saw it all. Depth beyond depth was revealed to me - the byss and abyss. I saw - as one might see the transit of Venus or the Lord Mayor's Show - a quantity passing through an infinity and changing its sign from plus to minus. I saw exactly how it happened and why the tergiversation was inevitable - but it was after dinner and I let it go'.[62]

It is suggested that reform is called for. The contractual maze acts as a barrier to access to justice. At the same time the concept of constructive dismissal is an important and valuable one. One way forward would be to allow the claimant to resign, with or without notice, in the circumstances outlined in a code of practice. Such a document would be comprehensive and prospective. It should be said that it would reduce

59 *Rihan*, n 48 above, para 626.

60 *Marriott v. Oxford and District Co-operative Society Ltd. (No. 2)* [1970] 1 Q.B. 186, 193.

61 In *Square Globe v Leonard* [2020] IRLR 607 it was pointed out at para 138 that this test (derived from the commercial case of *Eminence Property Developments v Heaney* [2010] EWCA Civ 1168) has been 'applied many times in the employment law sphere.'

62 *Lamb v Camden LB* [1981] QB 625.

rather than eliminate the risk faced by the employee who elects to resign. Whichever route is adopted there will always be questions of interpretation and judgment calls. It must also be emphasised that no dimension of employment law should be looked at in isolation. The employee's position should be assessed holistically. When this is done it becomes apparent that the paucity of remedies available to employees encourages recourse to constructive dismissal when, all too often, another remedy would be much more appropriate. For the moment employees in search of a remedy will often be forced into the vagaries of the world of constructive dismissal.

The effectiveness of the law of constructive dismissal is of great importance to individual claimants. I would suggest that it also has a wider significance. It is important to bear in mind that, given limitations in the framework of employment protection legislation in the UK, constructive dismissal can fulfil something of a roving enforcement role. It not only provides a remedy for the individual but claims can also highlight the need for more effective measures to ensure that statutory rights are adhered to. *Mruke* provides a useful illustration: `the reality was that the Appellant was being paid the equivalent of 33 pence an hour for the work that she was doing. That was not just slightly below the national minimum wage, it was shockingly so.'[63] The Court of Appeal noted that the approach ` … was in the context of social legislation such as the National Minimum Wage Act', adding that ' It is important that the purpose of such legislation should be given full effect in order to protect workers in this country. That was the will of Parliament.'[64]

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

63 *Mruke v Kahn*, n 41 above, para 84.
64 Ibid at para 73.