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RECENT CASES

CASE NOTE

The Demise of the `Voluntarist Exclusion Zone?'

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ABSTRACT

In *Secretary of State for the Environment v PCSU* [2024] UKSC 41the Supreme Court had to consider whether a trade union was entitled to sue on a provision derived from a collective agreement by virtue of the Contracts (Rights of Third Parties) Act 1999.[1] The relevance of the presumption in s. 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 to collectively agreed obligations which are incorporated in an employment contract was at the heart of the litigation. The Supreme Court found in favour of the trade union and this well prove beneficial to unions in future cases centring on third party rights. I would suggest that the decision also has significant implications for cases on incorporation of collectively agreed terms. It is also conceivable that the debate as to the merits of direct enforcement of collective agreements will be reopened.

1. INTRODUCTION

The history of the legal enforcement of collective agreements in the UK is an intriguing one.[1] Currently, section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that such an agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract; the parties may provide otherwise. Section 179 reenacted section 18 of the Trade Union and Labour Relations Act 1974 which reversed the presumption in favour of legal enforceability contained

[1]See, for example, P. Davies and M. Freedland, *Labour Law: Text and Materials*, 1st edn (London: Weidenfeld and Nicolson 1979) 127–141.

in the Industrial Relations Act 1971. The current statutory presumption may obscure a common law past which was notable for a paucity of case law and lack of certainty. In the circumstances arising in *Ford Motor Co v AUEFW* (*Ford Motor)* the view was taken that enforcement did not arise because of a lack of intention to create legal relations,[2] a decision which aligned with (and contributed to) the voluntarist tradition in British industrial relations.[3] *Ford Motor* was very much an exercise in legal fiction as the concept of intention to enter legal relations generally operates to deny domestic or social arrangements legal effect. Commercial contracts have always been regarded as legally enforceable in the absence of evidence to the contrary.

By way of interjection, it should be noted that trade union attitudes may have been much more pragmatic than conventional accounts have allowed for. In *National Coal Board v National Union of Mineworkers* (*NUM*), in the course of proceedings brought against the union, the NUM argued that a collective agreement entered into in 1946 was enforceable by them.[4] This assertion prompted Rees to remark that `One cannot avoid noting the irony of a trade union strongly arguing that a collective agreement should be regarded as legally binding when the union movement historically has been and remains steadfastly opposed to legally enforceable collective agreements. Yet it is equally inescapable that when a union is in a weak position in terms of power relationships with an employer, had the collective agreement been legally binding, then the employer would not enjoy the same freedom of action as the N.C.B. did here to negate a long standing agreement'.[5]

Legal enforcement of the terms of collective agreements does, of course, take place at the level of the individual employment contract though substantive terms are much more likely to be incorporated than procedural ones. This differentiation reflects the conventional analysis that ` Agreements had a dual function: to codify terms and conditions of employment, the 'normative' aspect, and to lay down the mutual obligations of the collective parties, the 'contractual' or peace treaty aspect'.[6] Hepple pointed out in 1970 that the `policy implicit in the Ford decision was that the parties had arranged their affairs on the basis that the "peace " obligation in those collective agreements would be enforced by social rather than legal sanctions…'.[7] Incorporation though allows the normative dimension to be enforceable at the hands of the employee.

[2] [1969] 2 All ER 481.
[3] R. Lewis, 'Kahn-Freund and Labour Law: An outline critique' (1979) 8 *ILJ* 202.
[4] [1986] ICR 736.
[5] W. M. Rees, 'A Minefield for Industrial Relations?' (1987) 50 *MLR* 100, 104
[6] Lewis, above n.3, 207–8.
[7] B. A. Hepple (1970) 28 *CLJ* 122, 136.

In *Secretary of State for the Environment v PCSU* (*PCSU*) the Supreme Court had to consider whether a trade union was entitled to sue on a provision derived from a collective agreement by virtue of the Contracts (Rights of Third Parties) Act 1999.[8] The relevance of the section 179 presumption to collectively agreed obligations which are subsequently incorporated in an employment contract was at the heart of the litigation. The Supreme Court and the Court of Appeal viewed matters very differently and, in the process, raised some intriguing questions as to the legal significance of collective agreements and the ongoing relevance of traditional labour law perspectives.

2. THE DISPUTE IN *PCSU*

The dispute in *PCSU* arose following the decision of several employers to unilaterally vary employment terms to remove a provision in respect of check-off (whereby deductions in respect of trade union subscriptions were made directly from salary by the employer and paid to the union). This led to litigation in which individual employees were successful in the High Court. The Court of Appeal upheld those decisions but, by a majority (Stuart-Smith LJ dissenting), went on to find that the Union was not entitled to sue by virtue of the 1999 Act.[9] It was said that the parties to the individual employment contracts did not intend the check-off clause to be enforceable by the Union. The proceedings in the Court of Appeal have already been thoroughly scrutinised in this journal and I confine myself to focussing on the issues that were still in dispute before the Supreme Court.[10] As we shall see, the Court differed from the Court of Appeal on the meaning of the 1999 Act but, more fundamentally from a labour law perspective, disagreed over the relevance of section 179 in ascertaining the intention of the parties to the employment contract.

For the majority in the Court of Appeal, the section 179 presumption was pivotal to their decision to deny the Union the right to sue. Lewis LJ said that the courts below had erred in `considering that the fact that the contractual provisions originated in a collective agreement, that was not intended to be enforceable by the union, was irrelevant. The context is relevant and is a pointer that the parties to the contract of employment were not intending that the provisions be enforceable by the trade union.'[11] The Court went

[8] [2024] UKSC 41.
[9] [2023] EWCA Civ 551.
[10] P. Lorbar, 'Check Off, Variation of Contract and Collective Voice: Secretary of State for the Home Department v Cox (2023) 52 *ILJ* 944.
[11] Above, n.9, [82].

on to conclude that, against that backdrop, the parties to the employment contract did not intend that the check-off term be enforceable by a third party. In his concurring opinion, Underhill LJ was more emphatic on the matter: `the decisive element in the factual matrix in this case is the fact that there can have been at the collective level no common intention as between the Appellants and the Union that any rights as regards check-off facilities should be conferred on the Union because of (what is now) section 179…'.[12]

The view of the majority of the Court of Appeal was in line with that previously expressed by academic commentators: 'If [the source of the check-off] was a collective agreement, it is not clear why the union's claim [in *Cavanagh*] could succeed in the light of TULRCA 1992…having regard to the *Contracts (Rights of Third Parties) Act 1999*…'.[13] An element of surprise was also expressed by those authors over the fact that `the third party can enforce the contract of which it was the principal author'.[14] In a similar vein Underhill LJ stated that `for the Union, as the party who actually made the (albeit unenforceable) agreement relied on, to be treated for the purposes of the Act as a 'third party' is at odds with reality'.[15]

In his dissent, Stuart–Smith LJ focussed on the intent of the parties to the employment contract given that incorporation of the check-off term had taken place. This led him to find the Union. The difference of view in the Court of Appeal can be treated as concerning nothing more than a routine assessment of contractual intention. I would suggest though it is likely that underpinning the stance of the majority was their understanding of labour law policy. After all, the statutory presumption could be seen as reinstating the `policy implicit in the *Ford* decision'. Consistent with this analysis, in the *NUM* case, Scott J had said that the `parties cannot have it both ways. They cannot, on the one hand, keep their collective agreement outside the area of legal recognition and, it might be said, legal interference by the courts, and, on the other hand, ask the courts to decide questions that arise under it'.[16] I suspect the majority of the Court of Appeal wished to prevent the Union `having it both ways' though, admittedly, they do not discuss the policy

[12] Ibid., [120].
[13] H. Collins et al, *Labour Law*, 2nd edn (Cambridge: CUP 2019) 622.
[14] Ibid., 622 (n.218).
[15] Above, n.9, [120].
[16] *NUM*, n.4 above, [762]. In *NURMTW v Tyne and Wear PTE (t/a Nexus)* [2024] UKSC 37, [53] the Supreme Court approved this passage but I wonder if they would have in *PCSU* as the Union was seeking to `have it both ways'. They were allowed to do so because the traditional dual analysis has now been heavily qualified. In future, the 1999 Act will allow s. 179 to be circumvented as long a term of the employment contract purports to benefit the union.

concerns underpinning section 179. Had those concerns been articulated, it might well have been said that the enactment of the statutory presumption in 1974 was not simply about codifying industry practice but was as much, if not more, about an expression of public policy that opposed legal interference in the conduct of collective labour relations. This seems a particularly likely explanation in the aftermath of the 1971 Act.

3. THE SUPREME COURT

A. The Legislative Framework

By the time the dispute was heard by the Supreme Court the sole issue for decision was whether the trade union was entitled to sue by virtue of the 1999 Act. This required the Court to construe section 1 of the Act; subsection (1) of which provides that a person who is not a party to a contract… may in his own right enforce a term of the contract if—(a) the contract expressly provides that he may, or (b) subject to subsection (2), the term purports to confer a benefit on him. Section 1(2), in turn, stipulates that the third party is unable to sue `if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party'. The majority of the Court of Appeal had held that section 1(2) merely shifted the burden of proof as to the parties' intentions but the Supreme Court held that it gave rise to a strong presumption in favour of enforcement.[17]No express term in *PCSU* made provision for third party enforcement but the employment contract did purport to confer a benefit on the Union; check-off provided a very efficient mechanism for the collection of trade union subscriptions. This left the Court to decide the very specific question of whether the presumption could be rebutted so that it could be shown that the parties did not intend the term to be enforceable at the instance of the Union. The view was taken that were such an intention to be established it would take the form of an implied term. In holding that the case for implication was not made out the Court rejected `the contention

[17] The view of the Supreme Court was in line with that taken by P. S. Davies, 'Enforcement of check-off facilities by third parties' (2024) 140 *LQR* 171, 175.
[18] *PCSU*, above n.8, [105].

that because 'everyone knows' that collective agreements are not legally enforceable' it was appropriate to imply a term'.[18]

The strength of the presumption in section 1(2) was absolutely pivotal to the approach of the Supreme Court. As a result, denial of a claim would require the defendant to show that the parties had a positive common intention that the obligation should not be enforceable by the third party. This would be far from easy: `the usual difficulty involved in implying a contractual term means that it is correspondingly difficult to find that the presumption of third party enforceability is rebutted'.[19] Under this approach a term purporting to benefit a third party is almost as valuable as an express term in their favour. I would suggest that the treatment of the 1999 Act will, in the main, be of interest to obligations scholars. There is nothing to suggest that the construction of section 1(2) was influenced by the employment context. At the same time the view that a strong presumption in favour of third party rights has been created may well prove beneficial to trade unions in future cases.

B. The Labour Law Dimension

The Supreme Court took the view that the principal reason for the Court of Appeal's decision was their understanding of the consequences of collective agreements not being directly enforceable between the parties; ie, that it pointed to the conclusion that parties to a related employment contract cannot have intended to circumvent section 179. In his concurring opinion, Lord Burrows emphasised that what made the case `particularly difficult' was the labour law dimension.[20] The Supreme Court rejected the notion that contracting against the backdrop of section 179 overrode what would have otherwise constituted an intention to confer third-party rights. It is noteworthy though that the labour law dimension was dealt with by the Court in a less than comprehensive fashion. They provided a brief overview of the legislative history but did not seek to discern the policy underpinning section 179. Had they done so the compatibility of the two legislative regimes would have fallen for consideration. It might then have been more difficult to find for the Union given the sizable gap that an unadulterated application of the 1999 Act creates in the scope of section 179.

[19] Ibid., [98].
[20] *PCSU*, above n.8, [139].

Much more surprisingly and fundamentally, it appears to have been assumed that there were no policy considerations relevant to the decision. The Court rejected the argument that `for the Union to be able to rely on the 1999 Act somehow allows it to circumvent some legislative policy or achieve by the backdoor rights that they ought not to have is mistaken. There is no policy embodied in section 179 that the Union should not have rights; even in relation to a collective agreement it all turns on the parties' intentions'.[21] Viewed through a historical lens the latter statement is a remarkable one. At the time of enactment, the statutory presumption would have been seen as a significant element of a legislative policy which sought to restore `to trade unions and workers the full legal freedom to engage in peaceful industrial action in pursuit of industrial grievances'.[22] Wedderburn, writing contemporaneously, declared that the 1974 Act revived `a voluntary, `non-interventionist' framework of law for British collective industrial relations'.[23] The question may then be posed as to why the Court thought that the provision had been enacted at all if enforceability is simply a matter of the parties' intentions. After all, section 179 does not mandate an outcome but merely codifies what was said by the High Court in *Ford Motor* to be the position at common law. In 1974 the legislature could have contented themselves with repealing section 34 of the 1971 Act, as it was out of line with the practice of the parties, and simply restored the prior position. They chose not to do so and it appears that the enactment of section 18 was less about practical necessity but more a statement of policy.

The Supreme Court's denial of an underpinning abstentionist policy was mirrored in the way that the legal significance of collective agreements was viewed and magnified through the prism of general contractual principles. This revisionist view is also to be seen in *NURMTW v Tyne and Wear PTE (t/a Nexus)* (*Nexus*)and has the potential to be of considerable influence in future litigation.[24] *Tesco Stores v USDAW* (*Tesco)* is also of relevance to this analysis.[25] In the next section, I will elaborate on what might be involved in this new approach.

[21] *PCSU*, above n.8, [110].
[22] P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford: Clarendon Press, 1993) 352 and see also the discussion at 377.
[23] K. W. Wedderburn, 'The Trade Union and Labour Relations Act 1974' (1974) 37 *MLR* 525, 525.
[24] [2024] UKSC 37.
[25] [2024] UKSC 28.

4. REVISIONISM AND THE CONTEMPORARY JUDICIAL VIEW OF COLLECTIVE AGREEMENTS

The decision of the Supreme Court in *PCSU* could be viewed as dealing with the very specific issue of the relevance of the 1999 Act to labour law and therefore as having significance only to third-party beneficiary cases. Any such assessment looks highly questionable when the decisions of the Court in *Nexus* and (to a lesser extent) *Tesco* are also taken on board. I would maintain that, in the round, the trilogy of Supreme Court decisions from 2024 advances a revisionist account of the common law implications of collective bargaining. *PCSU,* in particular, is premised on the basis that collective agreements were and are business arrangements and, as such, can be expected to result in legal obligations. This general expectation is tempered (but only mildly) by the very specific limitation contained in section 179. *Tesco* is supportive of this analysis by holding that the `objective intentions initially of employer and union and, subsequently, of employer and employee may all be relevant in deciding on the correct interpretation of a term that was agreed in a collective agreement and incorporated into a contract of employment'.[26] I would suggest that is a further pointer to collective agreements being seen as business documents or ` industrial bargains'.[27]It would have been easy to take a narrow view and hold that the only intentions relevant were those of the contracting parties to the employment contract. Indeed, at an earlier stage in proceedings in *PCSU,* the High Court had seemed to favour that view.[28]

In *Nexus* the Supreme Court had to consider whether rectification of a collective agreement was permissible. They took the view that it was; the Court of Appeal had held to the contrary due to the legal status of the agreement. Rectification was important to allow the ensuing obligations in the employment contract to be true to the underlying agreement. It was striking that the Court did not approach the issue in terms of whether a decision in favour of rectification would undermine the presumption in section 179. One might say that the question was approached, as in *PCSU*, in a manner unencumbered by the voluntarist tradition. Instead, the

[26] *Tesco*, above n.25, [4].
[27] Ibid., [32].
[28] [2022] EWHC 680, [79, 80].
[29] *Nexus*, n.24 above, [47].

collective agreement was viewed as a source of legally relevant material that one would expect to find expression in law. Had matters been otherwise rectification would not have been granted: `If correcting the wording of a document would not alter any legal rights, there is no point in granting the remedy of rectification'.[29] It is of course the case that the normative import of collective agreements has always been seen as consistent with voluntarism but it may well be that a more expansive approach is being ushered in.

5. THE `VOLUNTARIST EXCLUSION ZONE': SECTION 18 REVISITED

The foregoing trilogy points to the need to consider whether the enactment of the statutory presumption may have cast a wider shadow than has been appreciated. Historically, labour lawyers would have taken a benign view of the provision. It was seen as being in keeping with the best traditions of collective laissez-faire and reflective of the legal implications of the dual function of collective agreements. However, with the benefit of hindsight, the presumption may have created something of a `voluntarist exclusion zone' by implicitly flagging that the outcomes of the collective bargaining process were beyond the legal domain. Other factors of course, such as a desire to protect managerial prerogative were also at play. I would suggest though that the existence of the exclusion zone is evidenced in at least two ways in the case law. First, by the general reticence to incorporate collectively agreed terms. Second, more specifically, by the historical reluctance to view terms straddling the collective/individual divide as other than collective in nature and thereby inappropriate for incorporation. Such unintended consequences should not surprise us. Wilson pointed out many years ago, with reference to the dual function analysis, that ` When the issue at both "levels " concerns the form, content, enforcement and interpretation of the same collective agreement, it is hardly surprising that the courts occasionally forget to invoke the aid of this artificial conception and arrive at the wrong result'.[30]

PCSU rejects any notion of an exclusion zone as collective agreements, by their very purpose, serve to create legal obligations. The trilogy liberates the common law from a restrictive approach that viewed the enforcement

[30] A. Wilson, 'Contract and Prerogative: A Reconsideration of the Legal Enforcement of Collective Agreements' [1984] 13 *ILJ* 1, 8.

of collectively derived terms by individual employees as a concession to the general position proclaimed by section 179; viz. that collectively agreed outcomes are beyond the provenance of law.

I will go on to argue that this exercise in revisionism may well have practical consequences where incorporation is concerned and that the two elements of restriction mentioned earlier in this section may be addressed thereby. In future legal effect at the level of the individual relationship is what you should expect in the absence of a good reason to the contrary.

6. INCORPORATION

The law of contract places greater emphasis nowadays on giving legal effect to the reasonable expectations of the parties. However, when one turns to expectations that are raised by the outcomes of collective bargaining, it is far from certain that they will find effect in law. The influential decision in *Alexander v Standard Telephones (No 2)* tells that incorporation will only take place should the parties to the employment contract so intend.[31] In itself, the latter dictum is utterly innocuous but the Court goes on to hold that the `mere existence of collective agreements which are relevant to the employee and his employment does not include a contractual intent'.[32] More ominously still, `the contractual intent has to be found in the individual contract of employment and very often the evidence will not be sufficient to establish such an intent in a manner which satisfies accepted contractual criteria…'.[33] The approach is not aimed at facilitating incorporation but is rather one of minimising the influence of collectively agreed norms. This is not an inevitable consequence of the application of contractual principles as is apparent when we have regard to the markedly greater willingness to incorporate terms emanating from publications issued unilaterally by the employer.[34] Decisions such as *Briscoe v Lubrizol (No 2)* (which concerned a staff handbook) tend to adopt a different stance: `incorporation by express reference in the statutory particulars of employment will not usually be

[31] [1991] IRLR 286.
[32] Ibid., 292.
[33] Ibid., 292.
[34] See G. Anderson et al, *The Common Law Employment Relationship*, (Cheltenham: Elgar 2017) [79].
[35] [2002] EWCA Civ 508, [14]. *Dept for Transport v Sparks* [2016] EWCA Civ 360 provides another example.
[36] [2005] I.C.R. 625.
[37] [2010] I.R.L.R. 431.

required by the court."[35] The employer, in effect, is allowed to construct the factual matrix to their own advantage.

When one turns to the question of whether a term is apt for incorporation considerable caution is often shown in allowing employees to benefit from collectively agreed norms: the Court of Appeal decisions in *Kaur v MG Rover Group*[36] and *Malone v British Airways*[37] provide significant examples. In *Alexander* itself the litigation concerned the part of a collective agreement which set out a redundancy procedure; cl. 15.5.1 providing that 'In the event of compulsory redundancy selection will be made on the basis of service within the group'. It was held that the clause was 'not sufficiently cogently worded to give rise to an inference of incorporation into individual contracts of employment'. This is more than contestable. The wording of the clause seems clear enough and it would not be difficult to argue that individual rights were conferred on the basis of seniority.

A number of techniques are deployed to limit the scope of incorporation. The terms of a collective agreement may be characterised as concerning policy or an administrative process rather than individual employment rights. In *B.L. (UK) Ltd v McQuilken* a redundancy agreement was held to be inappropriate for incorporation on the grounds that the 'agreement was a long-term plan' and was in the nature of a policy document.[38] It would have been perfectly possible to have held that the employee had a contractual right to elect for either retraining or redundancy under the clause in dispute; the effect of the decision was to re-write the bargain so that the scope of managerial prerogative was increased.

In 1983 Freedland drew attention to `recent decisions of the E.A.T., in which there is quite a tendency to hold that the contract of employment must be so construed as to embody the firm reasonable de facto expectations of the employee, and a further tendency to treat the results of collective bargaining as the best prima facie guide to those firm and reasonable expectations'.[39]Hitherto, this assessment has been thwarted by an unsympathetic

[38][1978] I.R.L.R. 245. The clause at issue provided that the 'employees… would be interviewed by a member of the personnel department with the object of establishing a list of employees who wished to take up the option of (a) retraining, or (b) redundancy'.

[39]M. Freedland, 'Incorporation of Site-Level Collective Agreements' (1983) 12 *ILJ* 256, 257.

judicial stance. I would suggest that the trilogy has the potential to usher in a new world and vindicate Freedland's view. *PCSU* and its sister cases are based on the premise that collective agreements are a natural source of legal obligations where the parties to the employment contract are concerned; a fulsome approach to incorporation would reflect their reasonable expectations.

7. HYBRID TERMS

The voluntarist exclusion zone may have had a particularly detrimental impact on the prospects of terms with both an individual and collective dimension being accorded normative effect. In *City and Hackney HA v NUPE* a provision of the Whitley Council agreement addressed the rights of full-time officers. It was held to be arguable that ` the existence and maintenance of trade union facilities at a hospital is a condition of service which can be treated as incorporated into the terms of an agreement'.[40] However, decidedly less enthusiasm for embracing the collective interest was shown when it came to the position of an employee who was a shop steward. The employer had argued that `the only provisions which could give rise to any contractual rights are those which are clear and affect the position of an employee as an employee and not as a trade union representative'.[41] The Court of Appeal were minded to agree and appeared reluctant to countenance the holding of more extensive rights by an employee in their capacity as shop steward.[42] It may be objected that such a denial of the collective interest serves as a diminution of the individual one.

Much more recently, in *Hamilton v Fife Council,* a collective agreement provided that 'Unless there are teachers who have been designated surplus, any permanent post will normally be advertised'.[43] The EAT found that the term was not apt for incorporation as it was `truly collective in…nature'.[44]

[40] [1985] IRLR 252.
[41] Ibid., 255.
[42] Ibid.
[43] [2021] 3 WLUK 673.
[44] Ibid., [29].
[45] Ibid., [30].
[46] *Burroughs Machines v Timmoney* (1977) SC 393 rejects a literal approach to translation. This would meet the concern in *Hamilton* at [31], that there was a lack of specification as to the circumstances in which the clause could be invoked by an individual employee, to be addressed.

It was surely the case that the term was hybrid in nature and of relevance to the individual employment relationship. It was also said that the `policy does not seem to…to have been intended to confer the right on a particular employee to prevent the employer from advertising a vacant post…'[45]Such a clause was clearly capable of individuation; particularly when one bears in mind that the process of translation from a collective agreement need not be entirely literal.[46] Again, it is to be hoped that hybrid clauses may be incorporated more frequently as a consequence of *PCSU*. In any event resort to the 1999 Act may also be feasible where a term benefits both the employee and the trade union.

8. CONCLUSIONS

Fifty years after the enactment of section 18 it is conceivable that *PCSU* will reopen the debate as to the merits of direct enforcement of collective agreements. Detached from the industrial relations context of an earlier age the notion they are akin to social arrangements seems utterly implausible. The radically different framework of collective labour law more widely is also highly relevant. The current restrictive regime on industrial action means that, in effect, trade unions already bear the burden of a `peace obligation' (albeit one that is not undertaken voluntarily). Mutuality of obligation is though denied by virtue of section 179. Direct enforcement would, for example, allow the normative function to be enforced more effectively than by reliance on individual action. This would be particularly helpful in ` those cases (usually redundancy procedures) where the courts typically say the terms are not apt for incorporation into contracts of employment'.[47] *PCSU* is particularly timely given concern that there may be increased resort to unilateral variation in response to more robust legislation over fire and rehire emerging. Direct enforcement would allow trade unions a locus to prevent terms derived from collective agreements being set unlawfully cast aside by the employer.

It is a sign of just how much has changed over the last 50 years that employer opposition to any such reform would be more likely than trade union. That aside, whatever the outcome of any debates on the issue, the trilogy has the potential to be transformative where incorporation is

[47]M. J. Pittard and K. D. Ewing, ``Fire and Rehire: Four Lessons from Australia' (2024) 53 *ILJ* 331, 347.

concerned. Collective bargaining is now seen as creating an overarching framework which may be expected to have legal effect subject to closely delineated exceptions.

The Supreme Court transported the dispute in *PCSU* from the world of labour law to that of general contractual principles and entirely different perspectives emerge as a result. In *PCSU*, for instance, `it was not clear what loss the employees had suffered … The person who had really suffered the loss was the Union, but the Union was not a party to the contract of employment and so did not, under common law, have a right to sue for that breach.'[48] Such a lacuna would, on a traditional labour law view, be seen as the price to pay for the protection of section 179. Obligations lawyers would see matters very differently and take objection to any such black hole. The analogous position of the disappointed beneficiary in *White v Jones* becomes much more apposite than would ever have been imagined.[49]

In *PCSU* the outcome was favourable to the trade union but greater recourse to general contractual principles is not without its dangers. In the absence of judicial amelioration, the application of contractual doctrine can be troublesome in the employment context. It is difficult to predict to what extent (if any) the trilogy gives cause for concern. Much will turn on whether the particular attributes of the employment contract continue to be taken into consideration by the courts. *PCSU* is encouraging in that regard; a measure of reassurance is offered in that the significance of the imbalance of power at the level of the individual employment relationship is acknowledged.[50]

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[48] *PCSU*, above n.8, [3].
[49] [1995] 2 AC 207.
[50] *PCSU*, above n.8, [121]. In *Uber v Aslam* [2021] UKSC 5, [68] Lord Leggatt reflected on the extent to which the imbalance of power in employment relations differentiated the employment contract from other forms of contractual relations. The outcome in *Uber* notwithstanding, it would be a cause of some concern if the fact of that imbalance was viewed as less significant.