FAIRNESS IN THE CONTRACT OF EMPLOYMENT

ABSTRACT

Many labour law scholars in the UK are disillusioned with recent judicial decisions by the House of Lords and Supreme Court on the contract of employment. The argument made in this article is that, although there are good reasons for disillusionment with the *Johnson v Unisys* progeny, there have nevertheless been potentially some very positive developments for employees in recent decisions. On procedural fairness, the High Court has read in principles of 'natural justice' to the employment contract, whereas both High Court and Court of Appeal decisions seem to see courts intervening, at least in some areas, in the employment relation also on the grounds of substantive fairness. It is suggested here that these recent cases are evidence of a nascent duty of 'fairness' in the contract of employment, and the case is made for explicit recognition of, and development of, this duty. A practical application is provided, to finish, with the topical phenomenon of so-called 'zero hours contracts'.

1. INTRODUCTION

This article is written at a time of increasing dissatisfaction with judicial developments in labour or employment law. The benefits employment law scholars hoped to have gained from the Supreme Court's decision in 2011 in *Autoclenz Ltd v Belcher* have not materialised at the same time as the Supreme Court has also chosen,[1] controversially, in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* to extend the already heavily criticised so-called '*Johnson* exclusion zone'.[2] These developments have led even employment law scholars who were previously positive about developments at common law to change their previous assessments.[3] Unless, however, one takes the view that regulation of the employment relation in order to 'protect' employees is not necessary, if judicial developments and the common law are ruled out, that leaves two main options. Option one would be to turn

[1] [2011] UKSC 41, [2011] IRLR 820 (where the benefit hoped to be gain was a 'purposive' approach [35] more generally. Cf, eg, *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467).
[2] [2011] UKSC 58, [2012] IRLR 129.
[3] Compare, for example, M.R. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003) and N. Countouris, *The Changing Law of the Employment Relationship* (Aldershot: Ashgate, 2003) with M.R. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP, 2011) and same authors, 'Common Law and Voice' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014). Compare also J. Riley, *Employee Protection at Common Law* (Sydney: Federation Press, 2005) with same author in footnote immediately below.

from the courts to the legislature.[4] The difficulty with option one is its lack of likelihood.[5] Admittedly, the current Government and previous Government have been activist in passing new legislation pertaining to labour and employment law.[6] Of this new legislation, probably the two most important changes have been the introduction of employment tribunal fees in 2013 and the Trade Union Act 2016.[7] The former has led to a number of judicial review challenges and that which Underhill LJ in the Court of Appeal has described as a 'startling' drop in the number of applications to employment tribunals, whereas the latter makes it considerably harder for trade unions lawfully to organise industrial action.[8] However, even with a different Government, the viability of option one might be questioned. It is noticeable, for example, how little the New Labour Government changed the law on industrial action, despite many years of various expert international committees advising Governments in the UK that domestic strike law falls short of international standards and is too strict.[9] Option two would be instead to advocate a return to widespread collective bargaining, but that too seems unrealistic as membership of trade unions continues to stagnate, if not decline.[10]

The argument made in this article is that even though there is understandable frustration with decisions made at House of Lords and Supreme Court level, simultaneously there are some potentially very positive and interesting developments of the common law contract of employment going on at lower court level, both before and after *Johnson v Unisys Ltd*.[11] Because of the decisions made at House of Lords

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[4] J. Riley, 'The Future of the Common Law in Employment Regulation' (2016) 32 IJCLLIR 33, at 44: '… those of us who earnestly desire the development of more egalitarian labour laws will need to direct our attention to the lobbying of parliaments. Perhaps that is the better solution'. (Also, M. Freedland in M. Freedland (general ed), *The Contract of Employment* (Oxford: OUP, 2016, at 20.)
[5] This article was written before the General Election of 2017.
[6] Described as, collectively, 'the biggest change to employment law since the introduction of the right to claim unfair dismissal more than 40 years ago' (D. Renton and A. Macey, *Justice Deferred: A Critical Guide to the Coalition's Employment Tribunal Reforms* (Liverpool: IER, 2013).
[7] The Employment Tribunals and the Employment Appeal Tribunal Fees Order SI 2013/1893.
[8] *R (on the application of Unison) v Lord Chancellor (No.3) (Equality and Human Rights Commission intervening)* [2015] EWCA Civ 935, [2015] IRLR 911 [75]. Previous, failed, applications: [2014] EWHC 218 (Admin), [2014] IRLR 266; [2014] EWHC 4198 (Admin), [2015] IRLR 99.
[9] On which, see for example, T. Novitz and P. Skidmore, *Fairness at Work: A Critical Analysis Of The Employment Relations Act 1999 And Its Treatment Of "Collective Rights"* (Oxford: Hart, 2001).
[10] DBIS, 'Trade Union Membership 2015: Statistical Bulletin' (May 2016).
[11] [2001] UKHL 13, [2001] IRLR 279 [28]. In terms of 'positive and interesting developments', reference should also be made to more progressive recent statutory developments, such as the introduction of shared parental leave (Children and Families Act 2014 Part 7), the new national living wage (National Minimum Wage (Amendment) Regulations 2016), generally the Modern Slavery Act 2015, and new gender pay gap reporting for larger companies (Equality Act 2010 (Gender Pay Gap

and Supreme Court level, they have been to a large extent overlooked. Lest it be stated that these decisions would simply be reversed if they were to reach the Supreme Court, it is worth remembering the comparable history of the implied term of mutual trust and confidence. By the time *Malik v BCCI SA* reached the House of Lords in 1997, it had been repeated and used so often before industrial tribunals and the Employment Appeal Tribunal that the House of Lords accepted it, verbatim, and moreover did so enthusiastically.[12] The view of this author is that, should it be needed, rather than rely on option one (legislation) alone, it might be both easier and more realistic to persuade a High Court judge or judges to recognise the implications of existing judgments. Case law, to date, tells us that there is no implied term in the contract of employment that the employer will treat employees 'reasonably'.[13] Waddams, back in 1976, writing on contract law generally, made the argument that a doctrine of unconscionability should be acknowledged, because '[o]nly with open recognition of the true principle can the courts begin to develop rational criteria and guidelines that will satisfactorily explain their decisions and offer a useful guide for the future.'[14] In the same way as for Waddams there were pockets of decisions where courts were effectively already applying unconscionability, the argument made here is there are already the clear seeds in case law of what this author will characterise as an implied term, in law, of 'fairness' in the contract of employment. One of the aims of this article is to draw out the implications of these existing judgments and to suggest what explicit recognition of an implied duty of fairness would mean. At the minute, the cases where there is a latent implied duty of fairness tend to protect highly remunerated employees who have a larger than normal degree of bargaining power with their employer. Arguably they have less need for this implied term.[15] A benefit of explicit recognition of an implied term of fairness in the contract of employment would mean that it could also reach lower paid, more vulnerable employees for whom

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Information) Regulations 2017). (On the coherency of Coalition Government reforms, see B. Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 ILJ 203.)

[12] [1997] IRLR 462. (On 'enthusiastic' endorsement, see D. Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 ILJ 79, 80. Also *Johnson*, ibid, [18].)

[13] Eg *Post Office v Roberts* [1980] IRLR 347 (EAT). (More recently, against expansion of implied terms in law: *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] IRLR 377.)

[14] 'Unconscionability in Contracts' (1976) 39 MLR 369, 391.

[15] '[F]or employees such as this defendant [an equity derivatives broker], who are highly valued and most generously rewarded, the inequality of bargaining power, which is recognised to apply in many employment relationships, simply does not exist, or, at any rate, does not exist to such a degree…' (*TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB), [2005] IRLR 246 [83]).

it is surely more the job of labour law to protect: if the rationale of labour law does indeed remain the classical aim of counteracting 'inequality of bargaining power'.[16]

There follows six substantive parts to this article. The first part explains the context of increasing dissatisfaction among labour law scholars with recent judicial developments. The following five parts set out this author's different interpretation of recent judicial developments. The second part focuses on developments with regards to procedural fairness in the common law contract of employment, where there have been some very obvious positive developments. The third part is a discussion of whether there have been comparable developments in terms of substantive fairness. The fourth part considers how to rationalise these existing pockets of cases, with the fifth part developing an implied term of fairness. The sixth part provides a possible practical application. The example of so-called 'zero hours contract workers' is used. This part of the article considers if and how judges at common law could potentially alleviate instances of exploitation of these workers. Zero hours work is also a useful example of sometimes the unwillingness of the legislature, meaningfully, to intervene.

2. DISSATISFACTION WITH RECENT JUDICIAL DEVELOPMENTS

Some labour law scholars are hesitant generally about the prospects of judges at common law protecting the interests of employees. They cite the traditional affinity of the judiciary with employers, in terms of their class and/or background and also in terms of, arguably, their suspicion of trade unions.[17] Reference is also made to the lingering hangover of the old master and servant law in the 'contract of service.'[18] Other scholars have been more positive about the common law, but have become dissatisfied due primarily to two cases at the House of Lords and Supreme Court.

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[16] 'The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship' (P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London: Stevens, 3rd ed, 1983) 18. (But see also main text to n 168).

[17] Eg K.W. Wedderburn, *The Worker and the Law* (London: Sweet and Maxwell, 3rd ed, 1986); B. Hepple, 'Restructuring Employment Rights' (1986) 83 ILJ 69; S. Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 ILJ 223.

[18] Eg K. Ewing (ed), *Working Life: A New Perspective on Labour Law* (London: IER, 1996) 46-47 ('Such terms are a legacy of an earlier era of "master and servant" relations. The rigid hierarchical model of employment which they presuppose has no place in a modern system of labour law').

Both of these cases have been written about extensively elsewhere.[19] In *Johnson v Unisys Ltd*, the House of Lords held that the 'implied term of mutual trust and confidence', which is a default term read into all contracts of employment and will be discussed more below, is not applicable to the manner of dismissal.[20] This was on the grounds primarily that to allow this development at common law would be to trespass on the equivalent statutory cause of action (unfair dismissal, as contained at Part X Employment Rights Act 1996) and possibly to overshoot it. For example, there is a cap on the maximum amount of compensation a successful claimant can obtain for unfair dismissal under statute, but - in theory at least - no limit to the amount of damages that an employee could sue for at common law in contract and tort.[21] Lord Steyn provided a powerful dissent on his reasoning, although ultimately agreed the claim failed. When initially given, the decision in *Johnson* would seem to have been one of the most criticised judgments in modern employment law history.[22] For those commentators who were immediately sceptical of the majority's reasoning (with reasoned judgments provided by Lord Hoffmann, Lord Nicholls and Lord Millett), the overriding concern was that the Lords seemed to introduce a new, limiting, principle of statute as a 'ceiling' with regards to comparable developments at common law rather than, as thought before, a 'floor' or a springboard.[23]

Johnson was followed shortly by another decision of the House of Lords in *Eastwood v Magnox Electric Plc; McCabe v Cornwall County Council*, which gave

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[19] For discussion of *Johnson*, see materials at n 22 below. On *Edwards*, see dedicated commentary, for example, at L. Barmes, 'Judicial Influence and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust and Botham v Ministry of Defence* (2013) 42 ILJ 192; C. Barnard and L. Merrett, 'Winners and Losers: *Edwards* and the Unfair Law of Dismissal' (2013) 72 CLJ 313; K. Costello, *Edwards v Chesterfield Royal Hospital* - Parliamentary Intention and Damages caused by Maladministration of a Contractual Dismissal Procedure' (2013) 76 MLR 134.

[20] *Johnson*, n 11 above.

[21] The maximum amount of the 'compensatory award' (Employment Rights Act 1996, s 124(1)) for the year beginning 6 April 2016 is the lower of £78,962 or 52 weeks' pay for the employee concerned.

[22] *Eastwood v Magnox Electric Plc; McCabe v Cornwall County Council* [2004] UKHL 35, [2004] IRLR 733 [43]: 'Since *Johnson* was decided more than two years ago, there has been a great deal of comment on this decision by academic and practising labour lawyers: see Professors Deakin and Morris, Labour Law, 3rd edn, 2001, 410–411, 418–419; Professor Freedland, The Personal Employment Contract, 2003, 162–167, 303–305, 342–345,362– 364; Professor Freedland, 2001, 30 ILJ 309; Professor Collins, Claim for Unfair Dismissal, 2001, 30 ILJ 305; Professor Bob Hepple QC and Gillian Morris, The Employment Act 2002 and the Crisis of Individual Employment Rights, 2002, 31 ILJ 245, 253; Douglas Brodie, Legal Coherence and the Employment Revolution, 2001, 117 LQR 604, 624–625; Lizzie Barmes, The Continuing Conceptual Crisis in the Common Law of the Contract of Employment, (2004) 67(3) MLR 435. *Making due allowance for differences in emphasis between the writers on the subject, there is apparently no support for the analysis adopted in Johnson'* (emphasis added).

[23] Eg S. Deakin and G.S. Morris, *Labour Law* (Oxford: Hart, 6th ed, 2012) 447-448.

the formal imprimatur to the so-called '*Johnson* exclusion zone'.[24] Here, the House of Lords (with almost the same panel) held that *Johnson* did not apply to all elements of the disciplinary process when there was an eventual dismissal, but rather to the moment of dismissal. This meant that if there was a pre-existing, independent cause of action prior to the dismissal, a claim for breach of the implied term of mutual trust and confidence could still be brought. Thus was the case in this particular instance: these conjoined appeals involved harassment and otherwise poor behaviour during the course of a disciplinary procedure prior to the actual dismissals. Lord Nicholls, who gave the lead judgment, acknowledged that deciding whether action fell inside or outside of the '*Johnson* exclusion zone' would be difficult and could lead to duplication of proceedings, but concluded rather than resolve this judicially, Parliament should 'urgently' visit the matter.[25] Parliament did not.

The more recent case, and more troubling case still, is the decision of the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence*.[26] It had generally been assumed until this point, including by the Court of Appeal in *Edwards*, that *Johnson* was applicable to implied terms.[27] A 'majority' in *Edwards*, however, held that the reasoning in *Johnson* was also applicable to express terms, in the form of contractually incorporated workplace disciplinary procedures. The basic argument was that workplace disciplinary procedures are, and have always been, linked with statutory unfair dismissal law and therefore, first, they are not 'ordinary' express terms and, second, because of this link, Parliament must have 'occupied the field' here too.[28] As a result, damages would not be available unless the contract was explicitly to state that the parties intended damages would be available, which is of course going to be unlikely.[29] There are a number of criticisms that can be directed, cumulatively, towards the judgment in *Edwards*.

First, the facts of *Edwards* do not demonstrate the self-evident link between workplace disciplinary procedures and unfair dismissal law which the majority assumes there is. The disciplinary procedure in question there was a collectively agreed procedure that went far beyond the relatively low demands of statutory unfair

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[24] *Eastwood*, n 22 above.
[25] Ibid [33] (and [30]).
[26] *Edwards*, n 2 above.
[27] [2010] EWCA Civ 571, [2010] IRLR 702 (and by Lady Hale in the Supreme Court).
[28] *Edwards*, n 2, [27]-[37] (Lord Dyson) (and [90]-[94] (Lord Mance)).
[29] Ibid [39] (and Lord Mance at [94]).

dismissal law and the relevant ACAS Code of Practice. It could not be described as only having been introduced to avoid findings of unfair dismissal.[30] Second, with respect, the decision has strange remedial consequences. As noted by the dissenting Lady Hale (and supported in this respect by the partly dissenting Lord Kerr and Lord Wilson), it is '[puzzling] as to how it can be possible for an employee with a contractual right to a particular disciplinary process to enforce that right in advance by injunction but not possible for him to claim damages for its breach after the event'.[31]

Third, and to explain the highlighting of the word 'majority' above, it may not be clear what is the ratio.[32] On the face of it, there seems to be a majority: Lord Dyson, Lord Walker, Lord Mance and Lord Phillips, with all four agreeing that both claims should fail. On closer inspection, however, although Lord Dyson regarded Lord Phillips as supporting his judgment, arguably the reasoning of the latter is sufficiently different not to count as support.[33] Leaving aside then Lord Phillips as an isolated seventh Justice, the main majority trio would be supported by the partial dissenters on the extension of the *Johnson* exclusion zone, but would not be supported by them on the non-availability of damages without express words, leaving on the latter point potentially three in the majority and three in the minority. Fourth, by analogy with *Eastwood*, one might feel sympathy with the view of Lord Kerr and Lord Wilson that, even if *Johnson* is applicable, the situation in *Edwards*, albeit not *Botham*, would in any case fall outside the exclusion zone and should therefore have been actionable. A fifth and final criticism might be the express (Lord Phillips) and implicit (majority and partial dissenters) revival of the much earlier wrongful dismissal case of *Addis v Gramophone Co Ltd*,[34] when the House of Lords in *Malik* had seemed to start the process of distinguishing if not overruling *Addis*.[35]

This section has concentrated on the three key decisions of *Johnson*, *Eastwood* and *Edwards* by the House of Lords and Supreme Court. It is interesting in this respect to reflect on academic reception of these three decisions. Although Lord Steyn

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[30] [6]: 'His case was that his contract of employment entitled him to have a panel including a clinician of the same medical discipline as himself and a legally qualified chairman.'
[31] *Edwards*, n 2 above, [122] (and Lord Kerr at [154]: 'curious').
[32] See Barmes, n 19 above; also H. Collins, 'Compensation for Dismissal: In Search of Principle' (2012) 41 ILJ 208, 212-215 and 218.
[33] Eg *Edwards*, n 2 above, [79].
[34] [1909] AC 488 (HL). (On the revival of *Addis* in *Edwards*, see eg A. Bogg and M. Freedland in Freedland (2016), n 4 above, 'The Wrongful Termination of the Contract of Employment'.)
[35] *Johnson*, n 11 above, [70]: '… is not easy to defend and may no longer be the law after *Malik*', but *Edwards*, n 2 above, [85] (and *Johnson* [1999] IRLR 90 (CA)).

was able to comment in *Eastwood* that there had been no positive commentary about *Johnson*, rehabilitation of *Johnson* is notable in more recent literature.[36] Davies, Bogg, Barnard and Merrett have all now agreed with *Johnson* on the point of 'constitutional principle'.[37] By contrast, criticism of *Edwards* has not abated and it does not seem that it will abate. Bogg, for example, has memorably described *Edwards* as a 'mess', as a 'blot on the legal landscape', and as requiring overruling at the earliest opportunity.[38]

3. PROCEDURAL FAIRNESS

This jurisprudence at the House of Lords and Supreme Court has understandably occupied the attention of labour lawyers. However, one of the main suggestions and observations of this article is that there have been some potentially very promising and interesting developments in terms of procedural fairness in recent cases at common law on the contract of employment. This section will concentrate on two particular developments, although there are others that could also be discussed under this heading, such as the endorsement if not encouragement given to applications by employees for 'injunctive relief' by the Supreme Court in *Société Générale v Geys*.[39]

In earlier cases, it was clearly stated that, at common law, principles of natural justice are not imported into the contract of employment.[40] The first such development that will be discussed in this section is the litigation in *Yapp v Foreign and Commonwealth Office*. *Yapp* is significant because Cranston J at first instance held that, even though (unusually) Mr Yapp had an express right to 'fair treatment' as contained in his letter of appointment, there was also an implied term of fair

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[36] *Eastwood*, n 22 above. See A.C.L. Davies, 'The Relationship between the Contract of Employment and Statute' in Freedland (2016), n 4 above; Bogg and Freedland, n 34 above; A. Bogg, 'Common Law and Statute in the Law of Employment' (2016) CLP forthcoming; Barnard and Merrett, n 19 above.

[37] Specific wording of 'constitutional principle' used in Bogg (2016) ibid. Also discussion of 'constitutional basis' in Bogg and Freedland, ibid, 550-553. (On the relationship generally between common law and statute, see eg J. Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 LQR 247; A. Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 LQR 232.)

[38] 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court' (2015) 131 LQR 15, 21.

[39] [2012] UKSC 63, [2013] IRLR 122 [73] (however, *Hendy v MOJ* [2014] EWHC 2535 (Ch), [2014] IRLR 856 [85]-[87]). As another possible example, on an implied term to a grievance procedure: *Goold (W A) (Pearmak) Ltd v McConnell* [1995] IRLR 516 (EAT).

[40] *Ridge v Baldwin* [1964] AC 40 (HL) 65; *McClory v Post Office* [1993] IRLR 159 (HC).

treatment.[41] The implied term of fair treatment was said to derive from the implied term of mutual trust and confidence.[42] As the implied term of mutual trust and confidence is itself of course, to invoke well known contract law distinctions, an implied term in law as opposed to an implied term in fact, this 'derivation' would suggest that the implied term of fair treatment was for the High Court also an implied term in law.[43] The significance of this is that it would presumably be applicable to all employees as a 'standardised' or 'default' term contained in all contracts of employment.[44] *Yapp* subsequently proceeded to the Court of Appeal.[45] Whereas the High Court had found that there were two breaches of contract and that damages were available for one of those breaches of contract, the Court of Appeal only upheld one breach of contract and, moreover, found that damages would not be recoverable as they were too remote. Indeed, much of the subsequent academic focus on *Yapp* has been to criticise the reasoning of the Court of Appeal in relation to its treatment of tortious principles on psychiatric injury.[46] The contractual obligation of fair treatment has largely been overlooked.[47] But, even though the Court of Appeal disagreed with the High Court in important respects, it did not disagree with Cranston J's implied term of fair treatment. If anything the Court of Appeal did not even seem to find this point contentious. On this point, all that Underhill LJ stated was in parenthesis: 'though such a duty would no doubt have been implied in any event: see *Chhabra*…' without any further discussion.[48]

In contrast to this brevity by the Court of Appeal, Cranston J in the High Court elaborated on the duty of fair treatment, both express and implied in Mr Yapp's contract. Cranston J set out what he memorably termed as 'the golden thread through the case law on fair treatment'.[49] Although the High Court found there were two breaches of contract (first, the unlawful withdrawal of Mr Yapp from his post as UK

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[41] [2013] EWHC 1098 (QB), [2013] IRLR 616 [117]: two possible sources of the duty of fair treatment cited (and, for this author, comments about duty of fairness are just as relevant to the duty of fairness as an implied term, given the lack of detail relating to the express term. Cranston J discussed the duty of fair treatment in the abstract: [82]).
[42] Ibid [117].
[43] Eg *Malik*, n 12 above, [53].
[44] Ibid. On implied terms in the contract of employment generally, see recently H. Collins, with chapter of same name, in Freedland (2016), n 4 above.
[45] [2014] EWCA Civ 1512, [2015] IRLR 112.
[46] Eg D. Brodie, 'Risk Allocation and Psychiatric Harm: *Yapp v Foreign and Commonwealth Office*' (2015) 44 ILJ 270.
[47] Cf D. Cabrelli, 'Liability and Remedies for Breach of the Contract of Employment at Common Law: Some Recent Developments' (2016) 45 ILJ 207.
[48] *Yapp*, n 45 above, [41].
[49] *Yapp*, n 41 above, [82].

High Commissioner to Belize, as upheld by the Court of Appeal and; second, which was reversed by the Court of Appeal, unlawful application of the disciplinary procedure), Cranston J identified three problems under the duty of fair treatment on the facts at hand. These were: the lack of a preliminary investigation before taking the decision to withdraw, not giving Mr Yapp sufficient information to allow him properly to respond to the allegations against him before a decision was to be taken, and the potential bias, at least in these circumstances, of the same person undertaking the fact finding investigation and the disciplinary hearing. In comparison to earlier cases, on three separate occasions, Cranston J invoked specifically the language of natural justice.[50] For example, it was concluded that 'what happened was in breach of a basic principle of natural justice.'[51]

Whilst the reference to and importation of natural justice is important in itself, it is also significant as a comparison to the statutory law of unfair dismissal. A number, albeit not all, of early cases under the statutory unfair dismissal jurisdiction state that a modified version of natural justice only is applicable to the workplace.[52] That modified version of natural justice is less extensive that Cranston J's 'golden thread'.[53] In case it might be said that these unfair dismissal cases are older and therefore may be less reliable over time, the most recent unfair dismissal cases at Court of Appeal level stress that workplace disciplinary proceedings are not 'mini trials', which would seem implicitly to endorse the reasoning in this respect of those older unfair dismissal cases.[54] It might hence be suggested that if comparing common law and statute, the former in *Yapp* appears to provide the more strong protection of procedural fairness.

This conclusion is, however, subject to two caveats. The first is to what extent the *Johnson* exclusion zone prevents the common law from playing a useful role. A

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[50] Ibid [62], [82], [131] (albeit [62] was an argument by Mr Yapp).

[51] Ibid [131].

[52] *Khanum v Mid-Glamorgan Area Health Authority* [1978] IRLR 215 (EAT) (quoting and agreeing with, [20]-[21]: '"What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know of the nature of the accusation made; secondly, that he should be given an opportunity to state his case: and thirdly, of course, that the Tribunal should act in good faith. I do not myself think that there is really anything more"'); *Taylor v Alidair Ltd* [1978] IRLR 82 (CA); *Rowe v Radio Rentals* [1982] IRLR 177 (EAT) [14]; *Ulsterbus Ltd v Henderson* [1989] IRLR 251 (CA). Also *Haddow v Inner London Education Authority* [1979] ICR 202 (EAT), but 209. Cf, however, *Bentley Engineering v Mistry* [1978] IRLR 436 (EAT) and *Louies v Coventry Hood and Seating Co Ltd* [1990] IRLR 324 (EAT).

[53] Compare, for example, the second breach of contract as found in *Yapp* with unfair dismissal law in *Slater v Leicestershire Health Authority* [1989] IRLR 16 (CA) and, more recently, in *Adeshina v St George's University Hospitals NHS Foundation Trust* [2015] IRLR 704 (EAT).

[54] *Adeshina*, ibid, [17] (and references therein); *Yapp*, n 45 above, [69].

preliminary question is whether the *Yapp* implied term, moving forwards, would be limited to disciplinary proceedings (although in *Yapp* itself the term was, of course, also express). Certainly it would seem naturally suited to disciplinary proceedings or potential disciplinary proceedings (where an employee is accused of some misdemeanour, giving them the opportunity to defend their name). However, the *Yapp* implied term could potentially extend more broadly. Notably, when describing the 'golden thread' of fair treatment, Cranston J spoke of 'those liable to be affected by a decision' per se.[55] Employees can of course be liable to be affected by other types of decision, such as if the employer is considering making redundancies, or considering transferring the business, or considering a change to terms and conditions. One can imagine, however, that it would be more likely to be invoked, in practice, in the disciplinary proceedings situation. The question then becomes if disciplinary proceedings as a whole fall within the *Johnson* exclusion zone. Some statements in *Edwards* do seem to start to suggest the latter (in spite of *Eastwood*).[56] This would mean that *Yapp* itself would be a rare instance where the implied term of fair treatment could have application to disciplinary proceedings because in this particular instance there had been no dismissal at the time. Rather, after his suspension was lifted, Mr Yapp commenced periods of sick leave; he was registered with his employer's 'corporate pool' but never deployed, and ultimately retired. On the other hand, there are signs that others judges view the 'zone' more narrowly. The claimant in *Monk v Cann Hall Primary School* was 'marched off the premises'.[57] If asked to give a hypothetical example of conduct falling within the *Johnson* exclusion zone, this is probably the type of scenario that would be given. While, as might be predicted, the lead judgment stated 'the manner in which it was carried out was probably too closely related to the dismissal itself to escape the *Johnson* exclusion area', Underhill LJ added a short judgment devoted to the exclusion zone point, stating it was actually 'very arguable' that such conduct fell outside of the zone.[58]

The second is the effect of the judgment by the Court of Appeal in *Yapp*, which is mildly ironic in light of the reference to Underhill LJ immediately above. It has already been noted that the Court of Appeal only upheld one of the two breaches

[55] Above n 49.

[56] Casual references in *Edwards*, n 2 above, to the disciplinary process as inside the zone: 'It arises from what was said by the trust as part of the dismissal process' ([57]) and 'As it is, their claims are for damages arising from what was said in the course of the dismissal process' ([60]) (and [99]).

[57] [2013] EWCA Civ 826, [2013] IRLR 732.

[58] Ibid [23] and [32].

of contract as found by the High Court. Specifically, the Court of Appeal did not find it problematic that there was a duplication of roles, with the same person undertaking the fact-finding investigation and disciplinary hearing. Perhaps more worrying generally, Underhill LJ remarked 'I would regard the process now recommended by ACAS as representing good practice but not as a requirement of fairness in every case.'[59] This is even though the ACAS Code 'provides *basic* practical guidance to employers, employees and their representatives' (emphasis added).[60] Another concern is that the Court of Appeal found that the notorious 'band of reasonable responses' approach from statutory unfair dismissal law was applicable when deciding if there had been a breach of contract.[61] The band of reasonable responses is infamous for providing a great amount of leeway to employers.[62] If Mr Yapp's withdrawal from post would only be unlawful if it was a 'decision that no reasonable employer could have taken', this would severely limit the protective capabilities of the common law. However, although Underhill LJ did endorse the band of reasonable responses approach, this author would argue that Underhill LJ was incorrect to do so. The Court of Appeal referred in support to *Coventry University v Mian*, but that itself was a case where there was scant reasoning; in comparison to the fully reasoned decision of the Court of Appeal in *Buckland v Bournemouth University Higher Education Corporation* in 2010 where it was specifically decided that the 'band' approach from statute is not applicable when deciding, at common law, whether there has been a breach of contract.[63] Moreover, there is ample authority more generally stating that courts should take an 'objective' approach when deciding if there has been a breach of the employment contract, meaning in sum that judges should decide for themselves if there has been a breach, rather than simply 'reviewing' the employer's decision.[64]

Therefore, even though the claim in *Yapp* lost before the Court of Appeal whereas it succeeded before the High Court, this author would argue that *Yapp* is still significant. The Court of Appeal did not disapprove of the High Court's 'duty of fair

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[59] *Yapp*, n 54 above.
[60] Wording of 'basic' used in Code, to describe Code, at pages 1 and 3. (*Blackburn v Aldi Stores Ltd* [2013] IRLR 846 [22]: 'These codes are a reliable indication of the employment context.')
[61] *Yapp*, n 45 above, [61], as criticised by Brodie, n 46 above, 272-3. (On 'band of reasonable responses', see *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 (EAT)).
[62] Eg *Haddon v Van den Bergh Foods Ltd* [1999] IRLR 672 (EAT).
[63] *Mian* [2014] EWCA Civ 1275 [23] ('no dispute'); *Buckland* [2010] EWCA Civ 121, [2010] IRLR 445.
[64] Eg *Buckland*, ibid; *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641, [2012] IRLR 661 [68]-[69]; *British Heart Foundation v Roy (Debarred)* UKEAT/0049/15/RN (16 July 2015) [6].

treatment' and, if anything, strengthened its status by linking it to the *Chhabra* decision by the Supreme Court (even though *Chhabra* had not been mentioned by Cranston J).[65] In terms of whether the 'band of reasonable responses' approach applies when deciding if there has been a breach of this duty, it is hoped that a future court would recognise that *Mian* was not fully reasoned whereas *Buckland* was. Finally, Underhill LJ's narrow interpretation of the *Johnson* exclusion zone in *Monk* gives hope that the exclusionary zone may not always prove too much of a problem to employees relying on this implied term in a disciplinary or even in a dismissal scenario. But the duty of fair treatment, as conceived by Cranston J, potentially it seems could apply more broadly than that scenario anyway.

The second development to be discussed under the heading of procedural fairness is another recent decision by the High Court. *Stevens v University of Birmingham* is a remarkable case for two reasons.[66] First, it shows the willingness of at least some of the judiciary to intervene even when, on the face of it, it would seem very difficult for a court to intervene, where they perceive an employer to have acted 'patently unfairly'.

The disciplinary procedure applicable to Professor Stevens, which was itself a matter of contention, stated that 's/he shall have the right to be accompanied by a member of Staff or a trade union representative of his or her choice'. As found by Andrews J, this clear express wording meant there was no room for a term implied in fact that he could be accompanied by somebody else.[67] The issue was that Professor Stevens was not a union member and due to the nature of his specific role, he had no colleagues either willing or suitable to accompany him to a misconduct investigatory meeting.[68] Even though it was not possible to imply a term in fact, the High Court nevertheless ruled in the claimant's favour, holding it would be a breach of the implied term of mutual trust and confidence if the University were not to allow him to be accompanied by a different, equivalent representative. The threshold for

[65] [2013] UKSC 80, [2014] IRLR 227 (where injunctive relief was granted, requiring the employer to restart the disciplinary procedure before proceeding).
[66] [2015] EWHC 2300 (QB), [2015] IRLR 899.
[67] Ibid [87].
[68] '[C]ogent (and unchallenged)': [97].

intervention, which will be discussed in more detail below, was patent unfairness: 'it would have been patently unfair to force him to attend the interview alone.'[69]

Second, *Stevens* is significant because it goes against the idea that judges will necessarily henceforth refuse to innovate at common law when that would be to proceed beyond statute. As noted in the judgment, the choice of companion at this stage of the University's disciplinary procedure mirrored the statutory right to accompaniment at section 10 Employment Relations Act 1999.[70] Applying *Johnson*, one would have expected the High Court to rule there would be no unlawfulness in the University not relaxing its rules: the choice of companions under the statutory right to accompaniment is exhaustive (trade union representative or colleague) and in any event only applies to formal disciplinary and grievance hearings, as opposed to the situation here which was an investigatory meeting which the University had expressly stated was not disciplinary.[71] Indeed, obiter elsewhere by Lord Hope would support that assumption.[72] *Stevens* is thus an example showing that, at least outside of a dismissal scenario, if there is a situation of 'patent' procedural unfairness, a court may be willing to intervene at common law, first, even when that goes beyond the express wording of the contract and, second, even if that enlarges upon equivalent statutory rights. The next question is whether courts would be willing to intervene also to protect interests of substantive fairness.

4. SUBSTANTIVE FAIRNESS

It has often been observed that judges are much more comfortable intervening in employment disputes where there has been some procedural irregularity than if there is any alleged substantive unfairness. This is because it means they can pay more deference to the employer's legitimate prerogative to run its business as it chooses, which is a positive not least because of the limited expertise and capacity of courts. Judges are also more accustomed to questions of procedural fairness from the

[69] Ibid [92] and [97]. ([93]: 'Yet in this case, the perception has been created that the university has an advantage over Professor Stevens because it has enlisted the support of an external HR consultant, who will attend, and… whereas it is forcing him to go into the meeting without any support of that nature.')
[70] Ibid [78].
[71] Section 10(3); on formal disciplinary and grievance procedures: *Skiggs v South West Trains Ltd* [2005] IRLR 459 (EAT).
[72] *R (on the application of G) v Governors of X School* [2011] UKSC 30, [2011] IRLR 756 [95].

structure of judicial review proceedings. This section takes as its basic definition that procedural unfairness occurs when there is some flaw in the process leading to a decision.[73] The merits of the decision itself are not reviewed. In comparison, substantive fairness is where a court is concerned with the outcome. The argument made in this section is that even though it is sometimes said that judges will not intervene to protect interests of substantive fairness,[74] there are clear pockets of cases, at least in this author's view, where judges in employment disputes have and do intervene on substantive grounds. The issue then becomes to see if there is a good reason why judges are willing to intervene on grounds of substantive unfairness in some cases whereas not in others.

One case that could obviously be mentioned here would be *Transco (formerly BG plc) v O'Brien*.[75] The Court of Appeal in *O'Brien* upheld the ruling that it was a breach, again of the implied term of mutual trust and confidence, to offer all employees bar the claimant a revised contract of employment. The flaw was substantive: due to a mistake on the employer's part, Mr O'Brien had not been paid an enhanced redundancy package when really he should have been. The employer had mistakenly thought he was a temporary employee when he was in fact a permanent employee. In other words, his claim was not the typical procedural argument from redundancy unfair dismissal cases that his redundancy was flawed, for example, due to a lack of consultation or concerns about the selection procedure utilised. In fact, no such typical 'procedural' flaws are mentioned in any of the judgments in *O'Brien*.[76]

O'Brien is normally referred to as an example of the 'positive' possible dimension of the implied term of trust and confidence.[77] Pill LJ rejected the argument put forward by the employers: '[i]t may be applied to enforce existing terms and to regulate existing terms, but not to create' new rights.[78] This author would add that this was significant as in *Malik v BCCI SA,* which was the case where the House of Lords first discussed (and endorsed) the implied term of trust and confidence, Lord Nicholls

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[73] In the employment context, in his seminal work on unfair dismissal, Collins also draws a distinction between procedural and substantive fairness (*Justice in Dismissal: The Law of Termination of Employment* (Oxford: Clarendon Press, 1992)).
[74] Notably D. Brodie, 'Voice and the Employment Contract', 342-3, in Bogg and Novitz, n 3 above.
[75] [2002] EWCA Civ 379, [2002] IRLR 444.
[76] '*The only reason* provided to exclude Mr O'Brien from the scheme was that BGP did not know that he was an employee' (emphasis added) ([2001] IRLR 496 (EAT) [22]).
[77] Wording of 'positive' used by Court of Appeal and EAT, ibid; also by D. Brodie, *The Employment Contract: Legal Principles, Drafting and Interpretation* (Oxford: OUP, 2005) [5.07].
[78] *O'Brien*, n 75 above, [16].

had stated 'failure to improve is one thing, positively to damage is another.'[79] Riley goes the stage further of suggesting that the Court of Appeal also implicitly endorsed the formulation by the employment tribunal that the implied term of mutual trust and confidence includes a 'duty to treat employees in a fair and even handed manner'.[80] Her reasoning is that 'he [Pill LJ] refused to declare that the employment tribunal was in error'.[81] This author would agree that *O'Brien* is a significant decision, but not necessarily with that interpretation.[82] The employment tribunal's decision was more likely held to be correct in spite of that error ('It is submitted that the wrong test has been applied. In my judgment, even if that is right it does not affect the outcome of this appeal') and the Court of Appeal, moreover, in that particular case, emphasised the need to apply *Malik* 'unvarnished'.[83] *O'Brien* is also significant for the purposes of this article because it postdates *Johnson*. If *Johnson* represents the start of a new more restrictive era, if indeed it is possible to conceive of judicial eras, this is another example of where expansion and development of the common law has still occurred.[84]

Despite the academic attention given to it, *O'Brien* is arguably, however, somewhat of an isolated decision. It is only referred to relatively infrequently in subsequent case law. In comparison, there are two other true pockets of cases where courts in employment disputes do intervene to protect matters of substantive fairness. As well, the recent decision of the Supreme Court in *Braganza v BP Shipping Ltd* might be added.[85] All members of the Supreme Court in this split decision held that both limbs of *Wednesbury* unreasonableness were applicable to disputes about the exercise of a contractual discretion and for Lady Hale,[86] the second limb explicitly assesses substantive fairness: '[t]he second focusses upon its *outcome* – whether even though the right things have been taken into account, the result is so outrageous that

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[79] *Malik*, n 12 above, [28].
[80] Riley, n 3 above, 78-80.
[81] Ibid 80.
[82] Eg *University of Nottingham v Eyett* [1999] IRLR 87 (HC) [23]-[24].
[83] *O'Brien*, n 75 above, [19] and [24].
[84] I am grateful to an anonymous reviewer for pointing out that judicial progressivism tends to come in fits and starts. (One might cite, for these purposes, the short gap between *Malik*, n 12 above, and *Johnson*, n 11 above.)
[85] [2015] UKSC 17, [2015] IRLR 487.
[86] Ibid [30], [53], [103].

no reasonable decision-maker could have reached it' (in contrast to the first limb, which 'focusses on the decision-making *process'*) (emphasis added).[87]

The first such pocket of cases are the so-called cases on bankers' bonuses. Lest it be thought that the focus of this article thus far has mainly been on decisions at first instance, most of the cases in this category are decisions by the Court of Appeal.[88] This category of cases involves the employer promising a bonus and then either not paying the bonus at all or paying a lower level of bonus. There are two surprising features here: first, the ratio of success by 'bankers' in these cases and,[89] secondly, in some of the cases, that the employer's promise to pay a bonus when stated to be discretionary and made in an informal and skeletal fashion has even been held to be legally binding.[90]

It should be emphasised that the argument is not that the courts already in every case reassess the precise levels of bonuses awarded to employees.[91] Looking at the overall pattern of cases, rather the argument is threefold: first, courts generally intervene in an activist way to hold that promises to pay a bonus are legally binding in the first place.[92] Second, they do sometimes review the adequacy of a bonus. More particularly, they are much more likely to intervene and to set the level of a bonus themselves if no bonus has been paid, as opposed to, third, if the claimant is challenging the amount of a bonus already paid.[93] It is the logic between one and

[87] [24]. (Cf potentially *Patural v DG Services (UK) Ltd* [2015] EWHC 3659 (QB), [2016] IRLR 286 [61], but subsequently, *Hills v Niksun Inc* [2016] EWCA Civ 115, [2016] IRLR 715.)
[88] *Mallone v BPB Industries plc* [2002] EWCA Civ 126, [2002] IRLR 452; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942; *Keen v Commerzbank AG* [2006] EWCA Civ 1536, [2007] IRLR 132; *Attrill v Dresdner Kleinwort Ltd* [2011] EWCA Civ 229, [2011] IRLR 613; *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] IRLR 548.
[89] Eg, most recently, *Hills*, n 87 above (but cf in 2014 and 2015: *Brogden v Investec Bank Plc* [2014] EWHC 2785 (Comm), [2014] IRLR 924 and *Patural*, n 87 above; but n 93 below). (The generic term 'banker' is used to capture the complicated different specialisms within the financial services industry.)
[90] Eg *Clark v Nomura International plc* [2000] IRLR 766 (HC) ('is not guaranteed in any way') (and, similarly, *Clark v BET plc* [1997] IRLR 348 (HC): 'shall be reviewed annually and be increased by such amount if any as the board shall in its absolute discretion decide'); n 88 above: *Horkulak* ('may in its discretion'... 'however the final decision shall be in the sole discretion of the president of CFI…'; *Attrill* (as discussed in main text to n 95).
[91] *Keen*, n 88 above, [39]; *Attrill* (2013), n 88 above, [94].
[92] Above n 90.
[93] A decision to award no bonus is more likely to be deemed irrational than a decision to award some bonus. Compare eg success in *Nomura* (n 90), *BET* (n 90), *Mallone* (n 88), *Horkulak* (n 88), *Attrill* (n 88) (for those with 'individual guaranteed bonuses'), with lack of success in eg *Keen* (n 88) and *Patural* (n 89). Also, D. Brodie, *The Contract of Employment* (Edinburgh: Thomson 2008) [9.04].

three that is arguably problematic: if three undermines the reasons for intervening at one.[94]

As an example of judicial reasoning for intervening at one (and as an example of activist intervention at one): *Attrill v Dresdner Kleinwort Ltd* highlights possible unfairness to the affected employees if the employers were to be able to renege on their promise to pay bonuses.[95] Even though the bank was soon to be sold and there was 'widespread uncertainty about their future', staff would appear to have stayed on the basis of this undertaking.[96] There, the announcement of a minimum bonus pool of €400 million was made at a 'town hall meeting'. Notably, no further details as to individual entitlement or method of calculation were given at that time.[97] Although the primary finding by the Court of Appeal was that this communication satisfied a unilateral variation clause in the employees' contracts, doctrinally as a matter of general contract law perhaps surprisingly, it also found as an alternative ground for the claimants that 'there was in any event a binding contractual promise resulting from the terms of the promise and the circumstances in which it was made.'[98]

As approved in the subsequent authorities, *Clark v Nomura International plc* sets out there are two stages, which must be kept distinct, in the bonus cases.[99] These two stages apply once that seemingly lower threshold, of deciding whether there is a contractually binding promise to pay a bonus, has been met. The first stage in *Clark* is that the court should apply a test of irrationality or perversity to the exercise of the discretion. At this stage, the courts do not 'substitute their own views' but rather only review the employer's decision.[100] Only if that first stage is surpassed, then the second stage is for the court to conclude what the level of the bonus should have been if the discretion had been correctly exercised. At this point, unlike at the first stage, the court will '[put] itself in the position of the employer', hence the need to distinguish between the two stages.[101] A further distinction would appear to have been drawn at this second stage by the Court of Appeal in *Commerzbank AG v Keen*, with

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[94] *Keen*, n 88 above, [38]: '… along with some reservations about the direction in which the law was developing in this area'. Cf main text to n 152.
[95] *Attrill*, n 88 above. Also *Mallone*, n 88 above, [44] and *Horkulak*, n 88 above, [46].
[96] Ibid (2013) [14], [19] and [135].
[97] Eg *Attrill* (2011), ibid, [28]-[31].
[98] *Attrill* (2013), n 88 above, [142]. Arguments by the respondents in relation to a lack of intention to create legal relations, lack of consideration, lack of certainty and lack of acceptance were all rejected.
[99] *Nomura*, n 90 above, [40].
[100] Ibid.
[101] Above n 99.

the criteria seemingly added that the employee will need to make an 'overwhelming' case for intervention when, rather than no bonus being paid, some bonus has been paid and the challenge is to the amount.[102] To conclude on this part, the reason for including the bankers' bonuses cases in this section is because these cases demonstrate intervention on substantive grounds: firstly, in holding sometimes vague promises to pay bonuses to be legally binding; and, secondly, if no bonus is paid or, more rarely, if the higher threshold of 'overwhelming' is surpassed when a bonus has been paid, the cases show that courts are able to look at the facts of a given case and themselves determine the appropriate rate of a bonus.[103] Moreover, intriguingly for the later parts of this article, this substantive intervention on bonuses comes in relation to pay.

The second 'pocket' of cases would be litigation assessing the validity of restrictive covenants in contracts of employment, where the language of 'reasonableness between the parties' is explicitly used, and there is discussion of the adequacy of consideration.[104] On the other hand, these cases have also been described as 'anomalous'.[105] However, the standards said to be applied in these cases of 'oppressive' and 'completely inadequate' are interesting as a parallel to the standard of 'patent unfairness' which was discussed previously under the heading of procedural fairness.[106]

5. RATIONALISATION

In the more expansive judgment on the obligation of fair treatment in *Yapp*, the High Court stated that, if implied, it derived from the implied term of mutual trust and confidence.[107] Similarly, the breach in *Stevens* was a breach of the implied term of

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[102] *Keen*, n 88 above, [59] (see Brodie, n 93 above, on whether the test of 'overwhelming' is different from irrationality.)
[103] On the standard to be applied: *Nomura*, n 99 above: 'balance of probabilities'; 'without unrealistic assumptions'.
[104] *Reuse Collections Ltd v Sendall* [2014] EWHC 3852 (QB), [2015] IRLR 226 [71]. Summary of applicable principles eg in *Merlin Financial Consultants Ltd v Cooper* [2014] EWHC 1196 (QB), [2014] IRLR 610 [62]-[63].
[105] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL) 295.
[106] Eg Deakin and Morris, n 23 above, 379-80 (with reference to *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] IRLR 241). 'Oppressive' used in *Esso*, ibid.
[107] Above n 42.

mutual trust and confidence.[108] In comparison, some of the bankers' bonuses cases reject the application of the implied term of mutual trust and confidence and suggest a different implied term: an implied term not to act capriciously, arbitrarily or irrationally with regards to matters of remuneration.[109] Finally, the Court of Appeal in *Yapp*, in its very brief discussion of the duty of fair treatment, referred to paragraph 37 of *Chhabra v West London Mental Health NHS Trust*, which in turn mentioned 'the obligation of good faith in the contract of employment'.[110] Thus far, this article has documented developments at common law in procedural and substantive fairness. Which implied term or terms are applicable is important both for explaining the current case law and for predicting future developments in the relevant jurisprudence.

The two main contenders for explaining these decisions would be, as foreshadowed above, first, the implied term of mutual trust and confidence and, second, good faith.[111] This section first considers the implied term of mutual trust and confidence. As seen above, the cases on procedural fairness specifically refer to this implied term. Even leaving aside the bankers' bonus cases; with reference to the decisions discussed under the heading of substantive fairness, it was also found that there was a breach of the implied term of mutual trust and confidence in *O'Brien*.[112] It is appropriate to begin with the trust and confidence implied term because of its wider significance to modern employment law. In practical terms, it is key, for example, to the operation of the statutory law of constructive dismissal, but it is also said to be important, normatively, outside of that context and more generally, for sending a message to employers as to what behaviour is and is not appropriate in today's employment relation.[113] As memorably described by Freedland in *The Personal Employment Contract* (and similarly argued by Brodie in a series of influential articles), it is 'undoubtedly the most powerful engine of movement in the modern law of the employment contract'.[114] The standard formulation of this implied term, as

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[108] *Stevens*, n 66 above, [103].
[109] Trust and confidence meant something quite different in *Keen*, n 88 above ([47]: 'The probable reason for this is that Mr Keen wants more than adequate reasons to be supplied in respect of the bonuses that he has received').
[110] Above n 48; above n 65.
[111] If there is even a difference between the two.
[112] Above n 75.
[113] *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 (CA). Freedland (2003), n 3 above, 159. A 'duty of fairness' could equally send a powerful message.
[114] Freedland (2003), n 3 above, 166 (and generally 154-168). (Eg D. Brodie, 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 ILJ 121; n 12; 'Legal Coherence and the Employment

endorsed by the House of Lords in *Malik*, is that it imposes an obligation, on both employers and employees, not to 'without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'[115] However, a slight concern is expressed here as to whether trust and confidence is the best way of analysing recent developments.

First, and more fundamentally, the implied term of mutual trust and confidence is sometimes described as mainly or even wholly procedural.[116] The previous section of this article, in comparison, demonstrated developments at common law where courts have intervened in the employment relationship more substantively. Second, if one is arguing for an expansion of the common law or that there has already been an expansion at common law, possibly it may not be the wisest term to invoke.[117] The main issue in *Johnson* was whether the trust and confidence term could apply to the manner of a dismissal and it was held it could not. Hence a limit has already been placed on the, if Lord Steyn was correct, natural development of the implied term. Admittedly other subsequent cases, after *Johnson*, do seem still to expand this implied term, such as *Stevens* and *O'Brien* as discussed earlier. However, the point is that a 'brake' has still been applied in relation to this implied term, and at the highest level.[118] Third, at a time when employment tribunal fees act as a disincentive to litigation before employment tribunals and, as a result, more employees may be turning to the common law, the language of the implied term of trust and confidence could be queried. Without the possible assistance of an Employment Judge, the formulation as endorsed in *Malik* may not be the most comprehensible on its face for claimants.[119] This perhaps results from its origins: this

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Revolution' (2001) 117 LQR 604; 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37 ILJ 329.)

[115] *Malik*, n 12 above, [54], [57] and [70] (note: some parts of the judgment use the wording 'and' instead of 'or').

[116] Eg Brodie (2008), n 114 above, 341-345 (341: 'Had the employer followed due process he would not have lost').

[117] Including after events in Australia with the rejection of the implied term of trust and confidence by the High Court in *Commonwealth Bank of Australia v Barker* [2014] HCA 32. (Also *Ahmed v Amnesty International* [2009] IRLR 884 (EAT) and *Leach v Office of Communications* [2012] EWCA Civ 959, [2012] IRLR 839.)

[118] Freedland (2003), n 3 above, 166.

[119] *Drysdale v Department of Transport* [2014] EWCA Civ 1083, [2014] IRLR 892 [49].

wording was first suggested by counsel and then simply repeated by an Employment Appeal Tribunal.[120] Multiple cases afterwards then replicated said formula.

The second contender is good faith. Both the advantage and the disadvantage of regarding recent cases as examples of good faith is good faith's link to general contract law. On the positive side, it does seem that 'good faith' can incorporate concerns about substantive fairness as well as procedural fairness.[121] There is also a rich broader literature about good faith in the general contract law context, which employment lawyers could draw upon.[122] Another advantage could be good faith's broader personal scope. Certain cases still seem reluctant to expand the implied term of trust and confidence to working persons who do not meet the strict definition of 'employee', [123] whereas good faith is applicable to a far broader range of 'relationships'.[124]

In turn, the disadvantage of regarding these cases as examples of good faith would be that they could be susceptible to negative developments in ordinary contract law, in two ways. First, and more radically, there is the fate of *Yam Seng Pte Ltd v International Trade Corp Ltd*, where Leggatt J controversially held that there was an implied term, in fact, of good faith in a distributorship agreement, but discussed good faith more generally too. [125] Some subsequent commercial contract cases have endorsed *Yam Seng*, whereas others have doubted it and others still have distinguished it.[126] If recent employment law cases are characterised as subsets of 'good faith' and if *Yam Seng* were stated to be incorrect at Court of Appeal or Supreme Court level, which is not beyond the realms of possibility, this could, indirectly, potentially jeopardise the current employment law cases too.[127] Second, looking at *Yam Seng*, it

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[120] *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 (EAT) [10].
[121] Eg H. Collins, 'Good Faith in European Contract Law' (1994) 14 OJLS 229.
[122] For an example of an excellent discussion in the context specifically of employment, see A.L. Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve?' (2010-2011) 32 *Comparative Labor Law and Policy Journal* 729.
[123] Cf Freedland (2003), n 3 above, 168-171. But *Tullett Prebon plc v BGC Brokers LP* [2011] EWCA Civ 131, [2011] IRLR 420 [45].
[124] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 CLC 662 [143]; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) [196].
[125] Ibid [132] (and generally [120]-[155]).
[126] Eg approved in *Bristol Groundschool* (n 124 above) and in *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB); ambiguity in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200, [2013] BLR 265; doubt in *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch), [2014] 1 CLC 562 [150] and in *MSC v Cottonex Anstalt* [2016] EWCA 789 [45].
[127] Cf Leggatt J referred to employment as an example of where there is already a duty of good faith 'implied by law', at [132]. (Also *Chhabra*, n 65 above).

might be concluded that the current employment law cases go further in any event. Although Leggatt J noted that the requirements of good faith are context dependent, he also stated that good faith meant a duty of 'honesty' as well as 'fidelity to the parties' bargain'.[128] Cranston J's principles of natural justice in *Yapp* would seem plenty more extensive.

Leggatt J's extended discussion of good faith in *Yam Seng* might also cause employment lawyers to question if good faith, normatively, is even suitable. Employment contracts are often described as 'take it or leave it' contracts. With the emphasis on typically rather than always, they are typically drafted by employers and are simply presented to employees, with little scope for extended negotiation. If good faith is about ensuring 'fidelity to the parties' bargain', in the employment context (depending on how broadly one interprets the word 'bargain'), this could mean ensuring fidelity specifically to the employer's view of the bargain.[129] Kahn-Freund had famously stated that the aim of labour law is to offset the inherent imbalance of bargaining power between employers and employees.[130] On this analysis of good faith, rather than offset, it could potentially contribute to imbalances of bargaining power.

Collins and Mantouvalou have recently argued for an implied term that employers should respect the dignity and autonomy of their employees.[131] It would be linked to 'a legal requirement of respect for the human rights of employees.'[132] They also, however, acknowledge that this is an argument of how the law should prospectively develop, rather than a description of current cases. Accordingly, they give the example of an employee dismissed for having a tattoo of which their employer disapproves, and argue that this likely would not constitute a breach of the implied term of trust and confidence, because 'the employer is acting openly in what it regards as its own best interests', however likely would breach an implied term of dignity and autonomy.[133] While this author would agree that it would be a positive development if the common law were to recognise such a new implied term, the different suggestion made here is that courts are already using the language of fairness

[128] *Yam Seng*, n 124 above, [136]-[142].
[129] Whether one looks at the written documents or also at the 'reality' (*Autoclenz*, n 1 above; also *Carmichael v National Power plc* [2000] IRLR 43 (HL)).
[130] Above n 16.
[131] 'Human Rights and the Contract of Employment' in Freedland (2016), n 4 above, 205-6.
[132] Ibid 205.
[133] Ibid.

in some employment law cases. It is notable that Lord Nicholls, for the conventional majority in *Eastwood*, referred on a number of occasions to an implied term in the employment contract to 'act fairly'.[134] Perhaps surprisingly, that same language is also used to a certain extent in *Johnson*.[135] As recognised by the High Court subsequently, 'post-*Imperial* cases have included references to fairness.'[136] Moreover, the developments under the heading of procedural fairness and substantive fairness discussed thus far in this article would be coterminous with a duty of fairness. 'Fair treatment' was the implied term in *Yapp*, there would have been 'patent unfairness' without intervention in *Stevens* and there was also reference to 'fair play', Mr O'Brien was essentially treated unfairly by not being offered the enhanced package when he was entitled to it, courts would review the rate of a bonus when the amount paid was unfair in the sense of being irrational or perverse, and restrictive covenants may not be valid if they are unfair to the extent of being 'oppressive'.

This section thus concludes with the view that, rather than trust and confidence or good faith, a preferable 'portmanteau' term would simply be fairness.[137] There is of course a vast jurisprudential literature on the meaning of 'fairness' and 'fair play', but at the same time, fairness is similar to 'reasonableness' from negligence law in having also an intuitive, simple and comprehensible, meaning.[138] There is a detailed debate elsewhere about the virtue of the implied term of trust and confidence as the leading implied term in the employment contract, in comparison to it being one of a number of more specific implied terms.[139] This section, however, refers back again to Waddams' work on unconscionability.[140] If there are 'pockets' of intervention here and there, this leads to two dangers: first, arbitrariness and gaps, and, second, what could potentially be as dangerous to respondents, uncertainty as to when any intervention will occur.

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[134] *Eastwood*, above n 22, [11], [15], [28]-[29], [33].
[135] Ibid [49].
[136] *Prudential Staff Pensions Ltd v The Prudential Assurance Company Ltd* [2011] EWHC 960 (Ch) [142] (but cf on substantive fairness, also in [142]).
[137] *Malik*, n 12 above, [13]. Freedland (2003), n 3 above, 186-195, suggests an 'overarching principle of fair performance and management', which is also simply referred to as a 'principle of fairness'. (Where, however, Freedland might disagree with this author is on the ambit of 'fairness': compare Freedland, eg 227, with the argument to be made in the next section on pay.)
[138] Eg, the duty of 'fair play' as developed by Rawls (eg 'Justice as Reciprocity (1971)' in S. Freeman (ed), *John Rawls: Collected Papers* (London: Harvard University Press, 1999)). 'Fair play' was mentioned in *Stevens*, n 66 above, [74]. (Another alternative is 'fair dealing', as discussed by Collins in 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) CLP 1.)
[139] Eg D. Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' (2005) 34 ILJ 284.
[140] Above n 14. (Also Freedland, n 137 above.)

6. A DUTY OF FAIRNESS?

To summarise the argument of this article thus far, recent cases on the contract of employment were reviewed and it was found that courts have made some possibly quite radical developments in the area of procedural fairness but interestingly have also intervened, either implicitly or expressly, on grounds of substantive fairness in other cases. An attempted rationalisation was then made. It was considered whether these recent cases are examples of the implied term of mutual trust and confidence at work or an obligation of good faith in play. It was argued that these cases are better understood as examples of a nascent duty of 'fairness' in the contract of employment, with that language expressly being used in dicta by the House of Lords. The conclusion was that this nascent implied term or duty should henceforth be explicit.[141]

It will also be noted that most of the cases discussed so far have involved higher earning employees. The concerns of these higher earning employees have been with, for example, not being afforded an extensive workplace disciplinary procedure as promised to them or being paid a bonus at a lower than expected level. In comparison a worker in precarious employment is less likely to want principles of natural justice to apply in the unlikely event that disciplinary proceedings are started against them and more likely to want a decent overall pay package or regular hours of work. This section makes an argument that a duty of fairness needs also to work in favour of lower earning and lower skilled working persons. As noted in *Commerzbank AG v Keen*, albeit in a different context, but nevertheless still true: '[i]t is trite but salutary to observe that the courts must not discriminate between the rich and poor employee.'[142]

One obvious way in which such a duty of fairness could help lower earning and lower skilled working persons would be in relation to remuneration. For example, if it could create an implied right to pay in circumstances where currently there is no pay (to be discussed in the next section) or if it could even potentially allow courts to review the main rate of remuneration in the same way as they can already review the

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[141] The wording 'implied term' and 'duty' are used interchangeably in *Yapp* (including under the contractual analysis).
[142] Above n 88, [109].

rate of a bonus. Preliminary support for the latter idea can be found in the 1970s case of *FC Gardner Ltd v Beresford*, where the claimant had resigned in response to the lack of a pay rise compared to her colleagues, and the Employment Appeal Tribunal discussed the same standard that would subsequently apply in the bonus cases of irrationality.[143] If that is preliminary support, the argument of this section is more clearly that courts should also be able to review too, where appropriate, the main rate of pay. If the reason for judicial intervention in the bankers' bonuses cases was to prevent abuse of discretion, intervention in other areas of remuneration should also be possible.[144] Now that over two thirds of the workforce do not have their pay affected by a collective agreement, with contracts of employment frequently characterised as 'take it or leave it' contracts, the main rate of pay too is set unilaterally by employers.[145] Nor is it an answer to respond that a bonus in the bankers' cases was an ancillary aspect of pay:[146] those cases predate new regulation of bonuses in the financial sector and judges expressly comment that a bonus makes up a large proportion of the claimant's wage packet.[147] Moreover, an argument can be made that, if anything, there are more compelling reasons to intervene outside of the bankers' context, if Cox J was correct to note that 'bankers' typically have a higher degree of bargaining power in comparison to other employees.[148]

However, the suggestion that courts could potentially review the main rate of a wage or salary would clearly be contrary to the views of most academic lawyers and statements in various cases. Typically, there are three reasons given why this would not be possible. First, the cases simply do not allow such intervention;[149] second, it would be too difficult and courts do not have sufficient expertise and; third,[150] it would invite litigation and may lead to an abundance of vexatious claims.[151]

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[143] [1978] IRLR 63. (But *Murco Petroleum Ltd v Forge* [1987] IRLR 50 (EAT).)
[144] *Brogden*, n 89 above, [100].
[145] DBIS, n 10 above, 35: 27.9 per cent of employees had their pay affected by a collective agreement.
[146] *Powell v Braun* [1954] 1 All ER 484 (CA), 486: (then) 'quantum meruit' applicable to additional remuneration, *as well as* to basic remuneration. (See also n 159 below.)
[147] Eg *Keen*, n 88 above, [47]. (Subsequently Capital Requirements Directive IV 2013/36/EU, arts 92-94.)
[148] Above n 15.
[149] Eg *Murco*, n 143 above, [15]: 'a wild leap forward' (on suggested implied term to give a pay rise). Also relatively frequent references in equal pay cases denying the idea of 'fair wages' (eg *Strathclyde Regional Council v Wallace* [1998] IRLR 146 (HL), *Glasgow City Council v Marshall* [2000] IRLR 272 (HL) and *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 (EAT)), but those comments were made specifically in the context of describing equal pay legislation. (For instance in *Strathclyde*: 'As I have said, the long title of the Act renders such an argument impossible', at [21].)
[150] Admittedly, as a fourth possible point, bonuses were discretionary in the cases discussed above, but arguably there may also be a way to read a set amount subject to implied terms: see discussion at text

While these all valid concerns, this section will argue that there are qualifications that can be added to each. As to the first point, there is indeed a longstanding line of cases where courts do determine the rate of remuneration.[152] These are those admittedly rather rare cases where the contract is silent as to the rate of pay and it is to be implied that there will be payment. Recently, the Court of Appeal in *Stack v Ajar-Tec Ltd* upheld the principle that courts, in these circumstances, will establish 'a reasonable sum for work done'.[153] This line of decisions is also interesting for the second point about impracticality. The trial judge in *Stack* identified a 'reasonable sum' with reference to the rate of pay of a comparable employee already working for the same company.[154] By contrast, Lord Atkin in the older case of *Way v Latilla* asked if there was 'trade usage' as to the calculation of remuneration.[155] Another alternative is presented in *Driver v Air India Ltd*, where the Court of Appeal fixed the rate of payment for overtime by looking at previous practice by the same employer.[156] Whilst none of these ways are perfect, as there may be no comparable employee, there may be no industry practice or, foreseeably, all employees at the grade at that company or in that sector are paid badly, they do offer some guidance to a court.[157] These situations from the cases - inequitable pay between colleagues, a sudden drop in pay, an informal promise of more pay, or possibly also 'trade usage' – possibly also give an indication as to when it might be more likely that remuneration could be found to be 'patently unfair'.[158]

When suggesting an explicit duty of fairness, the analogy that is drawn in this article is with existing cases, meaning the threshold for breach would be similarly high.[159] The standards examined earlier were: 'patent unfairness' (*Stevens*),

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to n 179. See also *Gardner*, n 143 above. A more radical example would be *Stevens*, n 66 above, where the express term, at least there, was seemingly not a limit.

[151] Eg 'deference factors' as discussed in A.C.L Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278, 289-291; Davies (2015), n 36 above; Brodie, n 93 above; Brodie, n 74 above, 349-50 ('Herculean task', at 350); *Allied Dunbar (Weisinger) Ltd v Weisinger* [1988] IRLR 60 (HC) [32].

[152] Eg *Way v Latilla* [1937] 3 All ER 759 (HL); *Powell*, n 146 above. (Described as 'well-known cases' in *Stack v Ajar-Tec Ltd* (2011) UKEAT/0527/10/CEA [12].)

[153] [2012] EWCA Civ 543, [14] (subsequent CA decision at [2015] EWCA Civ 46, [2015] IRLR 474).

[154] *Stack* (2015), ibid, [18].

[155] *Way*, n 152 above, 764.

[156] [2011] EWCA Civ 830, [2011] IRLR 992.

[157] By analogy with Waddams, n 14 above: 'Given the open recognition of a general principle of unconscionability one would expect the courts to develop guidelines. There is every reason to think that they would be fully equal to this task.'

[158] See eg discussion of 'reasonable expectations' in *Brogden*, n 89 above, [115]-[117].

[159] The language used in the Consumer Rights Act ('CRA') 2015 is, similarly, 'significant imbalance' (s 62(4)). This article does not, however, draw a parallel with the CRA, because, first, the CRA is not

oppressive or completely inadequate (restrictive covenants), irrationality and perversity (bonus cases). These seem to be relatively similar: they each set a tall threshold. Indeed, if there is to be a criticism, it is that they set too tall a threshold. Setting a high standard for breach would, however, seem to be necessary, if not to allay the floodgates concern, but to align the standard here with the implied term of mutual trust and confidence, which in turn would be needed as many of the existing cases, as discussed above, are currently analysed as trust and confidence cases. The authorities are clear that, in order to find a breach of the implied term of trust and confidence, the conduct must be likely to 'destroy or seriously damage', not just damage, the relationship of trust and confidence: described by the Court of Appeal as a 'severe' test.[160]

On the other hand, if thinking about the lower paid, the next section consider how precisely the suggested duty of fairness could potentially help one particular and topical set of precarious workers: so-called 'zero hours contract workers'.[161]

7. A PRACTICAL APPLICATION

It would not be an exaggeration to say that 'zero hours contracts' were one of the defining features of the General Election in 2015.[162] Yet, first, it seems there is still not agreement even on the basics: on the name to be given to this type of work ('zero hours work' or 'zero hours contract work', with potentially significant differences between the two), its definition (even within Government, notably after a statutory

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applicable to contracts of employment (s 61(2)) and, second, this article does not follow its division of 'main subject matter' and ancillary subject matter (s 64(1)).

[160] *Gogay v Hertfordshire County Council* [2000] IRLR 703 [55].

[161] I am grateful to an anonymous reviewer for suggesting equal pay as another possible example for exploring the suggested duty of fairness. There was alleged inequality of pay between colleagues in *Gardner* (and in *Murco*), n 149 above, but no indication of a gender element. There would be an obvious *Johnson* type issue (as discussed in Part 2) if it were attempted to use the suggested duty of fairness to bypass the (many) limitations of equal pay legislation. If it is any indicator, the SC in *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38 did allow the claims in question to proceed before the High Court even though the claimants were out of time before the employment tribunal. On the other hand, this was based on an interpretation of now section 128(1) Equality Act 2010. There are other obvious differences between equal pay and unfair dismissal legislation: equal pay claims are contractual (now Equality Act 2010, s 66) and statute expressly envisages equal pay claims can be brought before either employment tribunals or civil courts (now Equality Act 2010, s 127). At the same time, courts in *Abdulla* and also more recently in *Asda Stores Ltd v Brierley* [2016] EWCA Civ 566, [2016] IRLR 709 have emphasised the many benefits to claimants of bringing equal pay claims before employment tribunals as opposed to before the civil courts (eg *Abdulla*, ibid, [6]).

[162] Again, this article was written before the General Election of 2017.

definition has been provided),[163] and on the number of these contracts (with estimates currently ranging from 900,000 to 1.7 million).[164] Second, despite various proposals suggested for regulation of this type of work, the resulting legislation is clearly limited.[165] Section 153 Small Business, Enterprise and Employment Act 2015 defines a zero hours contract as '(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker and (b) there is no certainty that any such work or services will be made available to the worker'. It inserts a new section 27A into the Employment Rights Act 1996, making 'exclusivity clauses' in zero hours contracts henceforth unenforceable, and subsequent Regulations protect detriment or dismissal if a zero hours worker is punished for working in breach of such an exclusivity clause.[166] The reason for describing section 153 as minimal is because few employers prevent zero hours workers from working elsewhere anyway.[167]

The conventional understanding of a zero hours contract is that there is no obligation on the employer to offer any work and the employer only needs to pay for hours actually worked as opposed also to when the worker is waiting to work. Freedland and Kountouris have written powerfully about the need to reformulate the goals of labour law, to fit the changing world of work, as ensuring a 'fair' mutualisation of risk in employment relationships.[168] Zero hours contracts would seem to run directly against this suggested goal, as they transfer a large amount, or even all, the risk from employers to workers.[169] As the Government has indicated there will be no further legislation on zero hours work, this heightens the need to

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[163] Compare statutory definition ('request or require') to subsequent Government Guidance: http://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers (last accessed 1 November 2016).
[164] For latest ONS figures and discussion: https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/september2016 (last accessed 1 Nov 2016).
[165] Ranging from a ban, to providing a statutory right to request permanent work after a qualifying period, to providing anti-discrimination protection. (See also Zero Hours Contract Bill 2014-15.)
[166] Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015. (Compare stronger draft reg 3.)
[167] CIPD (previous reports relied upon by Government), 'Policy Report: Zero-hours and short-hours contracts in the UK: Employer and employee perspectives' (December 2015): '[o]nly 6% of employers using zero-hours contracts even occasionally prohibit them from working for another company', at 25.
[168] Freedland and Kountouris (2011), n 3 above, Conclusion: Mutualization and Demutualization in the Legal Construction of Personal Work Relations.
[169] Eg N. Pickavance, 'Zeroed Out: The Place of Zero-hours Contracts in a Fair and Productive Economy' (April 2014) 8.

consider the possibilities at common law.[170] To combat this 'demutualisation of risk', the two pressing questions are: whether a duty of fairness could have any impact on the right of zero hours workers, first, to work and, second, to pay. One can see as well here the benefits of the suggested duty of fairness over the conventional trust and confidence analysis.[171]

Government Guidance likens zero hours work to the modern day equivalent of 'piece work'.[172] The leading case on piece work is the still the 1905 and 1906 case of *Devonald v Rosser and Sons*.[173] Jelf J, and subsequently the Court of Appeal, held that Mr Devonald, a piece worker, in this 'test case', had an implied right to be provided with a reasonable amount of work while the contract lasted.[174] As a piece worker has such an implied right, this would surely indicate that a zero hours worker too has a right to be provided with a reasonable amount of work.[175] This could help to satisfy a concern of the Trades Union Congress as to under-employment of zero hours workers.[176] On the other hand, the statements in *Devonald* were subject to 'unless there is a custom to the contrary'.[177] With zero hours contracts, the express terms of contract will always, or nearly always, negative any such implied right.[178] But, as against that, a duty of fairness could certainly help 'mollify' the strictness of any such express term.[179] There are already existing cases, even before explicit recognition of a duty of fairness, where courts have read clauses such as 'casual as required' subject to good faith, or subject to providing casuals with a reasonable share of work as it becomes available and subject to considering casuals ahead of offering work to newcomers.[180]

Devonald is also interesting because it can be seen almost as a very early prototype of the suggested duty of fairness. It supports the idea of judicial intervention and creativity where there is 'patent unfairness' by employers. As stated

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[170] House of Lords Hansard, Volume 773 Column 1640 (29 June 2016). (Compare this to the Labour Party's plans to 'ban' zero hours contracts in its manifesto for the General Election of 2017.)
[171] In terms of fit of language and more specifically, eg, if alleged inequity is with 'regular' workers, it was important in *O'Brien*, n 75 above, that the claimant was the same type of worker (permanent).
[172] Above n 163.
[173] [1906] 2 KB 728 (HC and CA).
[174] Ibid 742 ('test case': 729).
[175] Cf *Ekwelem v Excel Passenger Service Ltd* (2013) UKEAT/0438/12 [18] (but only a submission by counsel and not argued).
[176] 'Ending the Abuse of Zero-hours Contracts' (March 2014), 5.
[177] *Devonald*, n 173 above, 731 (and 733-735, 743).
[178] Eg from Pickavance, n 169 above: '[Y]ou acknowledge… the Company has no obligation to provide you with work…'
[179] *Carmichael* [1998] IRLR 301 (CA) [69] (but n 129 above, [21] and [29]).
[180] *ABC News Intercontinental Inc v Gizbert* (2006) UKEAT/0160/06/DM [21]; ibid and [104].

very memorably by Jelf J, whose judgment was subsequently upheld by the Court of Appeal, '[a]part from authority, it would be strange if such a right is not implied; for otherwise the bargain is of a very one-sided character.'[181] Jelf J continued, '[t]he workman must be at the beck and call of the master whenever required to do so, and yet he cannot, though ready and willing to work and to earn his pay, earn a single penny unless the master chooses; and this state of things may go on for a period of nearly two months...'[182] This 'state of things' can go on indefinitely for a zero hours worker. Moreover, *Devonald* supports the argument made in this article that a duty of fairness should also help the lower earning and lower status.[183] Courts intervened in Mr Devonald's case, when he was a 'workman',[184] which at the time was the equivalent of today's statutory 'worker',[185] which is relevant if zero hours workers generally lack the mutuality of obligation necessary to be considered an employee.[186]

Devonald is normally seen to establish a separate rule for piece workers. An alternative argument for zero hours workers would be not to rely on their difference but to argue for assimilation. As suggested by Freedland, the House of Lords in *Miles v Wakefield Metropolitan District Council* applied the previously benevolent principle established in sick pay cases, that there is an implied right to payment if a worker is ready and willing to work, to deprive an employee of his right to payment when the employee was engaging in industrial action.[187] The principle that the consideration for remuneration is being ready and willing to work rather than actual performance is normally thought to apply to salaried employees as opposed to those who work on task performance contracts. However, Lord Templeman did also state there was 'no logical distinction' between a 'superintendent register' salaried employee and a 'municipal dustman' paid a wage.[188] If there is no distinction between different types of worker when deciding what is the consideration for remuneration, this could be

[181] *Devonald*, n 173 above, 731 (and in the Court of Appeal: 740 and 743).
[182] Ibid.
[183] Plus n 123.
[184] See S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: OUP, 2005) chapter 2.
[185] Eg Truck Act 1940, s 1(3). (Employment Rights Act 1996, s 230(3)(b).)
[186] Eg the Government's preliminary definition: 'a zero hours contract is an employment contract in which the employer does not guarantee the individual any work, and the individual is not obliged to accept any work offered' (Consultation, December 2013, [11]). Cf CIPD, n 167 above: 67 per cent of employers apparently classify zero hours staff as employees.
[187] [1987] IRLR 193 (HL) ([49]; cf [27]). Freedland (2003), n 3 above, 219 (and 220-223).
[188] Ibid [15]. Moreover, as argued by Freedland (2003), n 3 above, 216-7, courts had already extended the cases on sick pay from salaried employees to other types of wage-earners.

used by zero hours workers to argue for payment also if they are 'on call'.[189] On call appears to mean when the worker or employee promises to remain ready and available for work.[190] Going back to the duty of fairness, it could theoretically be described as 'patently unfair' that the employer gets something essentially for nothing: the zero hours worker, if not offered work, gives up their time for nothing.[191] Against this, one might run into the problem here of 'constitutional principle' from *Johnson*, as national minimum wage legislation makes clear that if a worker is at home or allowed to sleep at or near the place of work, they will not need to be paid the minimum wage unless actually working.[192] A first response might be that the *Johnson* analogy is not necessarily apt, as unlike with unfair dismissal law, courts are indirectly told to take an interest, at common law, in low rates of pay by virtue of the contractual term imposed by legislation that workers will not be paid below the minimum wage.[193] A more radical response might be to try to challenge the 'constitutional principle' in *Johnson* itself. Earlier scholarship on *Johnson* indeed did so (and with which this author is still inclined to agree).[194] There might well be good motivation to do so now, in light of active deregulatory Governments. Regardless, one can imagine that in this type of scenario, when deciding if full contractual pay would be applicable, courts would also look to 'recognised custom and practice',[195] and certainly case law indicates that where payment is made, it tends to be for a lesser amount than either full contractual pay or the national minimum wage.[196]

A final consideration would be if the contract were explicitly either to preclude payment for 'on call' time or to exclude the suggested duty of fairness. Statements by the House of Lords in both *Malik* and *Johnson* suggest that it would

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[189] Collins argues that the promise to remain available distinguishes zero hours contracts from casual work ('Progress Towards the Right to Work in the United Kingdom' in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2015) 236). (Cf n 163.)

[190] See eg C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] IRLR 804 (ECJ). *Whittlestone v BJP Home Support Ltd* [2014] IRLR 176 (EAT) emphasises there is no statutory definition of 'on call'.

[191] Even though the claimant during his notice period had no right to payment in *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] IRLR 57, the situation there was very different: [26] '…he was not entitled to be paid because he was not ready and willing to work' (and [30]).

[192] National Minimum Wage Regulations 2015, regs 27 and 32 (previous incarnations have led to a complicated jurisprudence on what it means to be 'working': eg *Whittlestone*, ibid).

[193] National Minimum Wage Act 1998, s 17. (Similarly, if equal pay is used as an example, Equality Act 2010, s 66: see n 161.)

[194] Above n 22. (Employment legislation in the UK is normally characterised as a 'floor of rights'.) The latest edition of Deakin and Morris would seem still to support the earlier viewpoint: n 23 above, 459.

[195] Albeit, if equal pay is used as an example, this may not be helpful.

[196] As in *O'Kelly v Trusthouse Forte plc* [1983] IRLR 369 (CA), albeit this might be criticised. (In *Whittlestone*, eg, the employer tried, unsuccessfully, to pay a cheaper 'fixed fee' during the night.)

indeed be possible to 'contract out' of the implied term of mutual trust and confidence.[197] However, if Leggatt J was correct in *Yam Seng* that few companies, for reputational reasons, would seek to oust good faith, employers would surely be just as unlikely to commit explicitly to a statement that something as basic as fairness does not apply.[198] 'Despite the orthodox view being against it', Collins has written recently in favour of non-derogability of the trust and confidence implied term.[199] If the reason for saying that trust and confidence should be henceforth non-derogable is because it is 'core', a similar or possibly stronger argument can be made for the right to pay.[200]

8. CONCLUSION

Most labour law scholars currently are disillusioned with recent judicial decisions by the House of Lords and Supreme Court on the contract of employment. The argument made in this article was that although there are good reasons for disillusionment with the *Johnson v Unisys* progeny, there have been potentially some very positive developments for employees in recent decisions. These have been largely overlooked. On procedural fairness, the High Court has read in principles of 'natural justice' to the contract of employment, whereas both High Court and Court of Appeal decisions seem to see courts intervening in the employment relation also on the ground of substantive fairness. These developments could be seen as an extension of the implied term of trust and confidence or as the application of an obligation of good faith. However, it was contended here that a preferable portmanteau term would simply be a duty of fairness. In favour of that language, this wording has been expressly used in judicial dicta. This article explored the potential scope of an implied term of fairness. The problems of regarding legislation as the only answer to resolving problems of imbalance in the employment relationship were seen with the example of zero hours contracts.[201] Legislative intervention here has been very limited, even though this type of work is almost universally seen as controversial. This article suggested different

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[197] *Malik*, n 12 above, [53]; *Johnson*, n 11 above, [18].
[198] *Yam Seng*, n 124 above, [150].
[199] Above n 44, 489 (and 483-490).
[200] Eg *Cantor Fitzgerald International v Callaghan* [1999] IRLR 234 (CA) [35].
[201] This article was written before the General Election of 2017. Subsequently, it might however be added that legislation also may not always be the answer if it is more difficult for a minority Government to pass new laws.

ways in which the suggested duty of fairness could, if logically followed through, potentially also help zero hours workers. Ultimately, if a judge in 1905, before the 'employment law revolution' was able to intervene on the grounds of 'one-sidedness', the available tools at common law are now much wider. [202]

[202] *Devonald*, n 173 above (and reference to 'revolution' in *Johnson*, n 11 above, [36]).