

A Theory of the Contract of Employment

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ABSTRACT

The law of the contract of employment has been described as a field based on the idea of contract but shaped by the influence of labour legislation. The article proposes a theory that justifies a specific version of this fusion, offering a principled foundation for the judicial development of the law and for interpreting contracts of employment. It starts by explaining why contracts of employment are unique and why the general law of contract cannot apply. I then argue that the law of the contract of employment should be understood as advancing two sets of goals, those of contract law and those of labour law, proposing a different hierarchy between them in different situations. Some substantive principles are then derived from this general structure: a duty of good faith; preventing evasion from legal obligations; the primacy of reality; the limits of consent; respect for human rights; non-symmetry in applying contract law; and the importance of specialised labour courts or tribunals.

1. INTRODUCTION

It is widely recognised that contracts of employment are different from other contracts. The ‘law of the contract of employment’ can be described as a branch of contract law, or even a separate, autonomous field of law.¹ Either way, it is clear that it contains at least *some* elements from contract law, and at the same

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¹See, M. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003), ix; A. L. Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *ILJ* 328, 344; H. Collins, ‘Contractual Autonomy’ in A. Bogg et al. (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), 45; D. Brodie, ‘The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract’ in M. Freedland et al. (eds), *The Contract of Employment* (Oxford: OUP, 2016), 124. Collins and Brodie both reflect on the difficulties of creating an autonomous law of the contract of employment, but they also acknowledge and discuss its distinctiveness.

time, it is an important part of the field of labour law. The law of the contract of employment sits somewhat uncomfortably between those two fields. This article aims to propose a theory that makes this sitting more comfortable. Put another way, the contract of employment has been described as a conjunction of contract and status,² or as a field based on the idea of contract but at the same time shaped by the influence of labour legislation.³ The article aims to propose a theory that explains this fusion and justifies a specific version of it. The goal is to offer a principled foundation for the judicial development of the law of the contract of employment, and for interpreting such contracts. An added advantage is to improve legal coherence.

It should be clarified at the outset that the focus of this article—and the proposed theory—is the sphere of issues *not* already addressed by labour legislation. My goal is not to explain and offer a theory of labour law (or individual labour law) as a whole, but rather only the part that is seemingly left for the parties to determine by contract. Admittedly, employment relations are highly regulated, and some might say that this significantly reduces the importance of the contract in those relations. The floor of rights secured through labour legislation prevents the parties from agreeing on a wage below a certain minimum, or agreeing on continuous work without any leave, or agreeing that the employee cannot join a union, and so on. In unionised workplaces, additional terms are set by collective agreements, without any need for individual bargaining or consent. Nonetheless, the contract of employment is still highly important for two main reasons. First, some issues are not regulated. This may be because the legislature does not see a need to intervene, or—perhaps more often—because new problems arise all the time and legislatures are slow to respond. There are constantly technological developments, societal changes, and new ideas (for example, new management techniques) that raise questions about employment rights with no answer in existing legislation. This opens up broad room for the contract of employment to set the terms of the engagement. In theory, this challenge can be addressed by collective bargaining rather than individual contracts. But with the decline of union density over the last few decades, in the UK and all over the world, most workers are not subject to collective

²See, for example, Freedland (n.1) 3–4; S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: OUP, 2005), 25–26, 37; R. Dukes and W. Streeck, *Democracy at Work: Contract, Status and Post-Industrial Justice* (Cambridge: Polity Press, 2023), 10.

³M. Freedland, 'The Legal Structure of the Contract of Employment', in Freedland et al. (n.1) 28, 34.

agreements. The diminishing coverage of collective agreements strengthens the role of individual contracts of employment, whether we like it or not.

Second, just like the legislature, the parties themselves cannot foresee in advance every new development—whether these are general developments or specific to the workplace. Employment contracts are long term, usually continuous for a period of time not specified in advance. Such contracts necessarily need to include a method for ongoing changes regarding some aspects of the relationship, and employers often use their superior bargaining position to secure broad unilateral powers to themselves. These contractual terms can have an enormous impact on the rights of employees. In fact, even in the absence of explicit contractual stipulations concerning managerial powers (an absence more likely with small employers), the managerial prerogative is assumed by courts as an implied term.⁴ The contract of employment is, therefore, still highly important, notwithstanding the existence of extensive labour legislation. There are often questions about what types of contract terms are prohibited; which terms are implied into the contract; when do custom and practice become part of the contract; and how various contractual provisions should be interpreted (including the boundaries of the managerial prerogative). All of these questions are answered according to the ‘law of the contract of employment’.

Originally, the law of the contract of employment was used mainly to strengthen the power of employers over employees; to bring into the supposedly free agreement some of the core elements from the old master and servant laws, such as a strong duty of obedience and loyalty. In more recent years, the same juridical platform has been used in the UK and other countries to impose limitations on the power of employers, requiring some degree of good faith.⁵ But these later developments have not been applied consistently; the courts seem to retreat, from time to time, to the general law of contract.⁶ The aim of this article is to offer a theory that can support the development of unique contract of employment doctrines.

The next section summarises the features making contracts of employment unique, different from other contracts. This foundation is then used to show, in Section 3, why the general law of contract cannot apply, even after considering the adoption of the relational contracts concept. The interim

⁴See J. R. Munton, ‘The Managerial Prerogative and Variation of the Employment Contract’, in G. Davidov, B. Langille and G. Lester (eds), *The Oxford Handbook of the Law of Work* (Oxford: OUP, 2024), Ch 19.

⁵On this legal evolution, see Freedland (n.1); Deakin and Wilkinson (n.3).

⁶For a recent example, see *Independent Workers Union of Great Britain v. CAC*, [2023] UKSC 43.

conclusion is that a separate theory for contracts of employment is necessary; I then turn to propose such a theory. Section 4 is devoted to the sources and structure of the theory. Generally speaking, I argue that the law of the contract of employment should be understood as advancing two sets of goals, those of contract law and those of labour law. I then discuss how this can work in practice, including in terms of the hierarchy between goals in different situations. Section 5 moves to offer some substantive principles that can be derived from the general structure: good faith; preventing evasion from legal obligations; the primacy of reality; the limits of consent; respect for human rights; non-symmetry in applying contract law; and the importance of specialised labour courts or tribunals.

2. THE UNIQUE CHARACTERISTIC OF CONTRACTS OF EMPLOYMENT

There are three main characteristics that make contracts of employment unique, different from other contracts to an extent that justifies special treatment: questionable consent, subordination and dependency. This section briefly describes each of them in turn, as a basis for the following discussion.

Contracts are generally understood to represent the voluntary, free will of the parties. Moreover, according to economic theory, prices are determined in a free and competitive market by supply and demand rather than the bargaining power of each party. In real life, however, we know that power matters. Markets are rarely 'free'; there are often market failures (or 'frictions'), and in labour markets, such frictions are systematic and prevalent.⁷ As a result, employers often have some monopsony power, which can be abused at the expense of employees. Moreover, the previous allocation of resources in society matters and impacts our ability to secure fair terms in contracts. Employees rarely have the resources to wait for the best offer, and might have to settle for less-than-optimal terms. When entering employment, they are often faced with a 'take it or leave it' offer, with minimal ability to negotiate the terms. This has often been described as inequality of bargaining power.⁸

⁷See, for example, A. Manning, *Monopsony in Motion: Imperfect Competition in Labour Markets* (Princeton: Princeton UP, 2003); E. A. Posner, *How Antitrust Failed Workers* (New York: OUP, 2021), Ch 1; S. J. Schwab, 'Monopsony, Sticky Workers, and Bargaining Power', in Davidov et al. (n.4), 143.

⁸See P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (London: Stevens & Sons, 1983), Ch 1; D. Cabrelli, 'Traditional Justifications of Labour Law', in Davidov et al. (n.4), 103. This has also been recognised by the courts; see, for example *Autoclenz Limited v Belcher*, [2011] UKSC 41, para 34–35 (Lord Clarke).

The situation could have been different if employees had more capital to wait, or if they would always get an offer from another employer giving them the terms that fit their abilities and contribution—as assumed by the idea of perfect competition. But this is a far cry from the actual reality of labour markets. And the power imbalance continues during the employment relations, when the employer wishes to insert changes to the contract. Although there is some degree of mutual dependence built over time, the dependency is usually much stronger for the employee, creating significant costs for a decision to refuse to a proposed change and leave. It is thus misleading, in the context of employment, to assume full and genuine consent of both parties to the terms of the contract.

At the same time, it would be highly misleading to view employment as an act of coercion. There is still a degree of choice to enter the relationship and accept the terms, and it must be acknowledged that choices are almost always made under some external constraints. The stark dichotomy between consent and coercion does not fit the reality of employment relations. Rather, consent by employees is better described as being in the middle of a continuum between consent and coercion.⁹ This can be called *questionable consent*.¹⁰

A second important characteristic is the fact that employees submit themselves to the control of the employer, agreeing (explicitly or implicitly) to a broad managerial prerogative. The fact that one party gives the other party almost *carte blanche* to make decisions about the actual performance of the contract is extremely peculiar compared to most other contracts. It is often described as *subordination*, which can be understood as a structure of governance with democratic deficits.¹¹ Importantly, contracts of employment are personal (requiring the employee to perform the work in person).¹² Personal subordination means that contracts of employment create relations of authority which are in constant tension with liberal values.¹³ They have also been described, more bluntly, as a totalitarian regime¹⁴ and

⁹Maayan Niezna and Guy Davidov, 'Consent in Contracts of Employment' (2023) 86 *MLR* 1134. See also Aditi Bagchi, 'Voluntary Obligation and Contract' (2019) 20 *Theoretical Inquiries in Law* 433 (discussing 'degrees of voluntariness' in contracts).

¹⁰Niezna and Davidov (n.9).

¹¹G. Davidov, *A Purposive Approach to Labour Law* (Oxford: OUP, 2016), Ch 3.

¹²For an extensive discussion of the personal dimension, see M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP, 2011).

¹³H. Collins, 'Is the Contract of Employment Illiberal?' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018), 48.

¹⁴J. Gardner, 'The Contractualisation of Labour Law', in Collins et al. (n.13), 33.

a dictatorship.¹⁵ Although some argue that the whole idea of a managerial prerogative is unacceptable,¹⁶ the common view among labour law scholars (which I share) considers it to be an acceptable—perhaps even necessary—feature of economic organisation.¹⁷ At the same time, it is widely accepted that the prerogative must be tamed by regulations to prevent abuse of power and opportunism by the employer. Those who believe that labour markets are ‘free’ tend to downplay such risks, arguing that an employee is free to end the contract at any time. In theory, this can indeed create some balance and prevent abuse. But in practice, exit from the relationship is usually costly because of the same market failures mentioned above.

A third characteristic of employment contracts is based on their importance to the employee. The engagement with an employer is crucial for the ability to make a living, to subsist, and to improve one’s quality of life and support one’s family. It is also highly important for non-economic reasons. We rely on employment for self-realisation, self-fulfilment, social status, social relations and so on. Overall, the fact that employment is so important for employees leads to *dependency* on the continuation of this relationship. This is not to suggest that such dependency is complete; if someone is dismissed from one job, they will usually find another one. But this might take time, and will often involve some economic loss as well as the need to build new relations with co-workers and establish one’s place in a new organisation. When employment ends at an inconvenient time for the employee, these costs can be significant. This explains why a degree of dependency exists. Together with subordination, these two vulnerabilities explain much of the need for labour law.¹⁸

3. WHY THE GENERAL LAW OF CONTRACT IS NOT FIT FOR PURPOSE

Conservative economists and libertarians would argue that we do not need a theory for contracts of employment, because they are not different from

¹⁵E. Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton: Princeton UP, 2017), Ch 2.

¹⁶G. Racabi, ‘Abolish the Managerial Prerogative, Unleash Work Law’ (2022) 43 *Berkeley J of Emp & Lab L* 79.

¹⁷Such a system saves transaction costs, it is necessary for the effective operation of the workplace, and it helps both parties manage long-term economic risks. See S. Deakin, ‘The Many Futures of the Contract of Employment’, in J. Conaghan, R. M. Fischl and K. Klare (eds), *Labour Law in an Era of Globalization* (Oxford: OUP, 2000), 177, 179; Davidov (n.11) 37ff and 172ff; A. Bogg and C. Estlund, ‘Between Authority and Domination: Taming the Managerial Prerogative’ (2024) 44 *CLL & PJ* 237.

¹⁸Davidov (n.11) Ch 3.

any other contract, in the sense of being (by definition) beneficial to both parties.¹⁹ The argument is based on the assumption of the classical law of contract that markets are generally free and power disparities are irrelevant. This assumption is crucial for the field of contract law, which is usually explained and justified on two bases: autonomy and efficiency. Some scholars advance one of these justifications (in different ways), while other theories espouse both.²⁰ We can assume, for current purposes, that a contract is supported and enforced by the state because this respects the autonomy of the parties and also enhances efficiency. Both justifications rely on the idea of free will; if a contract does not represent the voluntary choice of both parties, there is no reason to believe that it advances autonomy or efficiency, quite the contrary. But as we have seen, labour markets suffer from systematic market failures, and the contract is characterised by questionable consent on the part of the employee. This crucial difference from ‘regular’ contracts makes the general theory of contracts ill-suited for contracts of employment.

Admittedly, there are several doctrines within the general law of contract designed to deal with problems of consent—in particular economic duress and unconscionability. When a contract falls within the scope of these doctrines, it will not be enforced.²¹ However, such doctrines are reserved for very exceptional situations, and the burden to convince a court to invalidate

¹⁹See, for example, A. A. Alchian and H. Demsetz, ‘Production, Information Costs, and Economic Organization’ (1972) 62 *American Economic Review* 777; R. Epstein, ‘The Classical Liberal Version of Labor Law: Beware of Coercion Dressed Up as Liberty’ (2023) 24 *Theoretical Inquiries in Law* 97.

²⁰See, for example, M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard UP, 1993); J. S. Kraus, ‘Philosophy of Contract Law’ in J. L. Coleman et al. (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: OUP, 2004), 687.

²¹Duress requires a specific threat (illegitimate pressure) from one party, leading to a disadvantageous result to the other party. Using your market power is not considered illegitimate pressure. See, for example, *Pakistan International Airlines Corp v Times Travel (UK) Ltd*, [2021] UKSC 40. And see generally, H. G. Beale (ed.), *Chitty on Contracts, Vol I: General Principles*, 32nd edn (London: Sweet & Maxwell, 2015), 8-032; E. Peel, *Treitel on The Law of Contract*, 14th edn (London: Sweet & Maxwell, 2015), 10-008. It is very rare for the doctrine to be applied in the context of employment; see a recent special issue on this topic, with contributions from different legal systems: 34 *CLL&PJ* (2024). Unconscionability puts more focus on the gross unfairness of the contract terms—the unconscientious result—but also requires to show that this was caused by overwhelming inequality of power, creating a vulnerability which the stronger party knowingly took advantage of. See, for example, *Strydom v Vendside*, [2009] EWHC 2130 (QB). And see M. A. Eisenberg, *Foundational Principles of Contract Law* (New York: OUP, 2018), 74.

a contract is very high.²² These doctrines are not helpful in the context of employment relations, where questionable consent is the norm.

Another relevant doctrine is ‘public policy’, which in the context of employment has been used to invalidate unreasonable non-compete clauses,²³ and potentially can also be used to scrutinise other provisions, for example, those undermining human rights and those designed to evade employment laws. This argument has been advanced forcefully by Alan Bogg.²⁴ In theory, public policy can be a route to invalidate provisions agreed by employees under questionable consent. However, given that this doctrine contradicts the basic idea of contract law—freedom of contract—courts are unlikely to expand it, certainly not significantly. In order to make significant use of this doctrine in the context of employment, courts will have to rely on a theory of contracts of employment that is separate from the general theory of contracts. And if such a theory is adopted—as proposed in this article—the public policy doctrine might not be the best route to develop the common law of the contract of employment.

In addition to the problem of questionable consent, the subordination and dependency characterising employment raise significant doubts about the ability to protect the autonomy of employees through the law of contracts. Employment contracts are strongly ‘relational’, meaning complex, long-term, personal, with unforeseen implications and non-economic aspects. As shown by Ian Macneil, classical contract law is designed for discrete transactions and does not fit relational contracts such as employment.²⁵ This was also recognised by courts, marking a notable departure of extant contract law from the classical origins.²⁶ The concept of relational contracts has thus arguably transformed into a legal doctrine.²⁷ Does it provide a solution for the unique characteristics of employment contracts, within the confines of general contract law?

²²On the narrowness of the doctrine of duress, see, for example, O. Gan, ‘Contractual Duress and Relations of Power’ (2013) 36 *Harvard J of Law & Gender* 171.

²³See D. Cabrelli, ‘The Effect of Termination upon Post-Employment Obligation’ in Freedland et al. (n.1) 561.

²⁴Most recently, in A. Bogg, ‘Default Norms in Labour Law: From Private Right to Public Law’ in B. Hacker and J. Ungerer (eds), *Default Rules in Private Law* (Oxford: Hart, 2025).

²⁵I. R. Macneil, ‘The Many Futures of Contract’ (1974) 47 *S Cal L Rev* 691; I. R. Macneil, ‘Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law’ (1978) 72 *Northwestern U L Rev* 854.

²⁶See *Yam Seng PTE Ltd v International Trade Corporation Ltd*, [2013] EWHC 111 (QB); *Bates v Post Office Limited (No.3)*, [2019] EWHC 606 (QB). In the specific context of employment, see *Johnson v Unisys Limited*, [2001] UKHL 13 (Lord Stein); *Braganza v BP Shipping Limited*, [2015] UKSC 17.

²⁷H. Collins, ‘Employment as a Relational Contract’ (2021) 137 *LQR* 426.

It should be noted that *all* contracts have a relational aspect, so the key challenge—as Hugh Collins explained—is to integrate all the contractual dimensions when analysing them.²⁸ But Collins agrees that there is benefit in designating contracts of employment as ‘relational’, at least for the purpose of implying a good faith duty (or ‘mutual trust and confidence’) into the contract, and for adapting the approach to interpretation.²⁹

One might argue that the same sensitivity to the unique features of contracts of employment can be achieved without the ‘relational’ designation, given the general contractual approach of contextual interpretation.³⁰ Douglas Brodie has argued that the implied duty of mutual trust and confidence was adopted in contracts of employment as a result of developments in the general law of contracts, unrelated to the concept of relational contracts.³¹ And he believes more generally that there is sufficient flexibility for development and adaptation within the general law of contract, describing himself as a ‘relational sceptic’.³² However, as Hugh Collins has pointed out, contextualism in the general law of contract ‘is far narrower than the approach advocated in the theory of relational contracts’.³³ Whether the title of ‘relational’ is necessary or not, at the very least, it seems helpful to alert judges to the fact that the general law of contract would not be appropriate, as is, to analyse some particular contractual relationships.

As a corrective to the classical law of contract, the idea of relational contracts is useful, with an obvious fit for contracts of employment. But it cannot provide a sufficient solution for two reasons. First, it is very general, covering a wide range of long-term relations. Inequality of bargaining power is not a necessary component; relational contracts can also be between parties of equal power.³⁴ Although contracts that are ‘incomplete by design’³⁵ are

²⁸H. Collins, ‘The Contract of Employment in 3D’, in D. Campbell, L. Mulcahy and S. Wheeler (eds), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Houndmills: Palgrave Macmillan, 2013), 65.

²⁹Collins (n.27).

³⁰On the contextual approach to contract interpretation and its application in employment cases, see A. Bogg and D. Brodie, ‘Every Little Helps: Permanent Benefits, Contract Interpretation, and ‘Fire and Rehire’’ (2023) 52 *ILJ* 246.

³¹D. Brodie, ‘Relational Contracts’, in Freedland et al. (n.1) 145, 152.

³²D. Brodie, *The Future of the Employment Contract* (Cheltenham: Edward Elgar, 2021), vii. And see part VI of this book, as well as Brodie (n.31), for explanations of his position.

³³Collins (n.27) at 435.

³⁴D. Brodie, ‘How Relational Is the Contract of Employment?’ (2011) 40 *ILJ* 232, has argued that Macneil’s relational contract theory does not sufficiently take account of power relations to be useful as a prescriptive theory of contracts of employment.

³⁵H. Collins, *Regulating Contracts* (Oxford: OUP 1999) 161.

paradigmatic relational contracts,³⁶ a crucial feature of contracts of employment is that any incompleteness is ‘solved’ by the managerial prerogative, giving the employer unilateral powers to address unexpected developments, thereby shifting the costs of unforeseen risks to the employee.³⁷ Legally speaking, the contract is complete. The concept of ‘relational contract’ can accommodate these characteristics, of course.³⁸ But they are not inherent in the basic idea of relational contracts, so further distinctions are necessary between different types of relational contracts, in order to ensure that contracts of employment are understood properly. It seems preferable to develop the law of the contract of employment separately, rather than consider it a sub-category of relational contracts (itself a sub-category of contracts). The relational contract theory can still serve as inspiration for these purposes.

A second and more fundamental difficulty is the exclusive focus of the relational contract theory on the agreement between the parties. The emphasis is shifted to unstated assumptions and values, and to implicit or implied obligations.³⁹ It is also possible to use the standard of ‘reasonable expectations’ as a guide to interpretation or to impose more duties on the stronger party.⁴⁰ But the focus remains on what the parties themselves have presumably wanted. What if the employer explicitly disavows duties of good faith or mutual trust in the written contract? Moreover, what if employees know in advance that an employer is only interested in exploiting them and they have no implicit expectations of good faith from that employer? And what if this is also the social norm (imposed by employers) in this sector? Commentators have argued that the duty of mutual trust and confidence should be non-waivable, but have struggled to accommodate this approach with the contractual idea of implied terms.⁴¹ The relational contract theory, with its focus on implied and implicit duties (as opposed to externally imposed regulations), cannot offer a solution in this regard.

³⁶ Collins (n.27).

³⁷ See Collins (n.35) 169–79; Collins (n.27) 432.

³⁸ See I. R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale UP, 1980), 31–35.

³⁹ See I. R. Macneil, ‘Values in Contract: Internal and External’ (1983) 78 *Northwestern U L Rev* 340; H. Collins, ‘Is a Relational Contract a Legal Concept?’ in S. Degeling, J. Edelman and J. Goudkamp (eds), *Contract in Commercial Law* (Sydney: Thomson Reuters, 2016).

⁴⁰ Collins (n.35) 143–8; Collins (n.27).

⁴¹ See on this question Freedland (n.1) 161, 164; D. Brodie, ‘Beyond Exchange: The New Contract of Employment’ (1998) 27 *ILJ* 79, 83ff; H. Collins, ‘Implied Terms in the Contract of Employment’ in Freedland et al. (n.1) 471, 483ff; Brodie (n.32) 15–17; Bogg (n.24).

4. A THEORY OF THE CONTRACT OF EMPLOYMENT: STRUCTURE AND SOURCES

The conclusion from the previous sections is that we need a theory for contracts of employment. Mark Freedland has developed such a theory. Freedland argues that the contract of employment is based on three principles: exchange, integration and reciprocity.⁴² Integration is mostly relevant for identifying whether the contract is a contract of employment. Reciprocity focuses in particular on the need to support ongoing co-operation, through duties such as maintaining mutual trust and confidence. The third principle—exchange—was further developed by Freedland together with Simon Deakin to include two ideas: fair exchange and stability.⁴³ Recently, Hugh Collins has developed ‘a theory of justice in work’,⁴⁴ which focuses on the interpersonal relationship and can be understood as a theory of the contract of employment as well. He argues that because of their characteristics as relational (in particular ‘incomplete by design’) and associational (work is usually performed as part of an association), employment contracts are subject to good faith duties, as well as several principles of associational justice: ‘desert, treatment as an equal, protection from unfair exclusion, and a right to participate and exercise voice’.⁴⁵ I will use these two theories as my starting point for the discussion. The substantive principles at the heart of these theories will be considered in the following section. The current section lays the ground by discussing the structure and sources of such a theory.

One preliminary point is important: a separate theory for contracts of employment is required because of the unique features of those contracts, not the titles that were given to them. The contract between an employer and a ‘limb (b) worker’⁴⁶—the intermediate category in the UK—is very similar, and has many of the same features (and sometimes all of them). Much of the discussion below is therefore relevant to such contracts as well, though not necessarily all.

⁴²Freedland (n.3) 28.

⁴³M. Freedland and S. Deakin, ‘The Exchange Principle and the Wage-Work Bargain’ in Freedland et al. (n.1) 52.

⁴⁴H. Collins, ‘Relational and Associational Justice in Work’ (2023) 24 *Theoretical Inquiries in Law* 26, 47.

⁴⁵*Ibid.* 42.

⁴⁶Employment Rights Act 1996, s 230(3).

A. The Structure: Dual Purpose

Theories of law often strive to achieve a degree of ‘fit’ (with existing laws) alongside ‘justification’.⁴⁷ Such theories are sometimes called ‘interpretive’, and can be described as a combination of descriptive and prescriptive.⁴⁸ The goal is not to invent something entirely new, but rather to explain and rationalise an existing phenomenon (a field of law, or part of it), while at the same time to provide an explanation that is normatively appealing and justified. Such a theory can be used to criticise specific aspects of the law that fail to follow the proposed organising idea, or otherwise suggest improvements to better conform with the theory (and achieve the goals articulated by it). Such a theory also helps to improve coherence and determinacy, offering guidance to courts on how to make sense of the law and further develop it in line with the organising ‘story’, which was already implicit behind the main parts of the law. The theories of Freedland and Collins both fall within this general structure.⁴⁹ I share this general approach and adopt it as well.

Where does one look for organising principles of a field of law, specifically the law of the contract of employment? Collins points to two alternative approaches: the first relies on moral philosophy, whether theories of justice or values such as autonomy or equality; the second, which he calls ‘internal critique’ and adopts from critical theory, discerns norms from the *practice* of employment relations.⁵⁰ Collins finds the second approach—which can be described as ‘bottom-up’ instead of ‘top-down’—to be more useful, stressing that the focus is not on practices imposed unilaterally by employers, but more generally the reality as manifested through claims made by workers and employers, and also as created through legislative interventions. He applies this methodology to the distinctive characteristics of employment that he identified—relational contracts and being part of an association—to deduce the relevant organising principles. It seems to me that focusing on practices and claims raised by the parties is problematic (for current

⁴⁷ See R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard UP, 1986), Ch 7.

⁴⁸ See generally S. A. Smith, *Contract Theory* (OUP, 2004), Ch 1; T. Khaitan and S. Steel, ‘Theorizing Areas of Law: A Taxonomy of Special Jurisprudence’ (2022) 28 *Legal Theory* 325.

⁴⁹ Freedland makes this point explicitly, albeit by using somewhat different terms; see M. Freedland, ‘General Introduction – Aims, Rationale, and Methodology’, in Freedland et al. (n.1) 3, 19; Freedland (n.3) 41; Freedland and Deakin (n.43) 65. See also Freedland (n.1) 195. Collins is slightly less explicit but frames his question as ‘what principles of justice should apply to work’ (n.44 at 26)—clearly with a prescriptive element—while at the same time searching for those principles in existing laws.

⁵⁰ Collins (n.44) 35ff.

purposes) in two respects: it would not necessarily be descriptive of existing laws, nor tell us enough about what laws are justified. However, the reliance on labour legislation as one of the sources of the theory seems entirely justified. Freedland similarly points to the impact of labour legislation on the law of the contract of employment, as a descriptive matter which he also strongly supports.⁵¹

The influence of labour legislation is justified because the contract of employment is heavily regulated by legislation. The law of the contract of employment, in the sense discussed in this article, can be described as *residual*; it covers only those aspects that were not already covered by the legislature. This description is not meant to be dismissive in any way; as explained at the outset, I see the law of the contract of employment as highly important. It is also not meant to deny the foundational role of the contract in creating the relationship. The point is simply that in this highly regulated field, the *law* of the contract of employment plays a supporting role to labour legislation, to complete what the legislation failed to address. What, then, should courts do when faced with questions not addressed by the legislature? There are two options: either to apply the general law of contract, or to examine the remaining issues in light of the same principles behind the legislation. But the first option was already rejected in Section 3. This leads us towards the second option (I discuss separately, in sub-section (C) below, situations in which the legislation addresses closely related issues, and whether it should be seen as pre-emptive of judicial developments). At the same time, the contractual nature of the relations cannot be ignored. The logical conclusion from this analysis is that the law of the contract of employment should be conceptualised as designed to achieve two sets of purposes: the purpose of contract law and the purpose of labour legislation (which can also be described as the purpose of labour law). This is necessary because of the unique characteristics of contracts of employment, and the need to give full effect to—and fill gaps in—the body of labour legislation.

By ‘purpose’, I do not mean to suggest the concrete intention of the legislators enacting a piece of labour legislation, or the concrete intention of judges adopting a common-law contract doctrine. The purpose is an explanation of the law at a more abstract level, which offers a normative justification for the main elements of existing law. An attempt to articulate the purpose would often engage with philosophical ideas about values that the law promotes, while at the same time relying on sociological and economic

⁵¹Freedland (n.3) 29, 34.

accounts that explain the need for legal regulation. The purpose is thus both descriptive (at a relatively high level of abstraction) and normative.⁵²

This argument about dual purposes may seem obvious, but with this simple articulation, it aims to bring clarity to an area fraught with vagueness. It is often noted that legislation influences (and should influence) the development of the common law, but without sufficient clarity about how this influence should come about. I argue that the law of the contract of employment—being at the intersection of contract law and labour law—should advance the purposes of both fields. This can serve as general guidance for interpretive or gap-filling questions. Otherwise put: when judges are faced with a new problem in contract law, they ask themselves—whether explicitly or more often implicitly—what is the purpose of contract law, and what solution would advance the same goals (or justifications). Or at least they should. When faced with a new problem concerning the contract of employment, I argue that they should broaden this inquiry to include the goals of labour law as well, and make this exercise explicit.

The argument is first and foremost normative. It is a claim about what the law *should* be. At the same time, it is not detached from existing legal norms. It offers an explanation for many developments in the law of the contract of employment over the last three decades, while calling (in Section 5) for some further developments along the same lines.

B. The Integration of Conflicting Goals

Theories of contract law and theories of labour law can be monist or pluralistic. The former type argues that there is one single principle (or goal, or value or justification) behind the entire field, while the latter type recognises a multiplicity of values or justifications.⁵³ In my own writings about the purpose of labour law, I advocated a pluralistic view.⁵⁴ When focusing more specifically on the law of the contract of employment, the structure I have proposed above is inherently pluralistic. The challenge for any pluralist theory is that different goals can sometimes be in conflict, each pushing towards a different solution to a legal question. This is especially likely—indeed

⁵²For a fuller discussion, see Davidov (n.11), Ch 2.

⁵³For discussion and support of the pluralist view, see, for example, Eisenberg (n.21), Ch 2.

⁵⁴See Davidov (n.11), Chs 3–4; G. Davidov, 'The Capability Approach and Labour Law: Identifying the Areas of Fit', in B. Langille (ed.), *The Capability Approach to Labour Law* (Oxford: OUP, 2019), 42.

expected—when combining the seemingly contradictory goals of contract law and labour law. While it is possible to perform ad-hoc balancing of goals in each particular case or context, the theory will be much stronger if it includes principled guidance on how to choose or balance between them in any given context. Otherwise put, a crucial question is how to integrate the various goals.⁵⁵

At this point, it would be useful to take inspiration from consumer law and borrow a distinction between core contract terms and other terms (which, for convenience, can be called periphery).⁵⁶ The ‘core’ terms of the contract of employment are the wage, the place of work, the general job description, hours of work and possibly additional basic elements which parties normally agree upon orally, in concrete terms, when someone is accepted to work. As long as these elements do not contradict specific protections in labour legislation, or are otherwise designed to undercut those protections, I argue that they should be honoured. These core provisions are what the parties relied upon when deciding to conclude the agreement. For the employee, they often represent the result of constrained choices, but as explained in Section 2, ‘real’ choices nonetheless.

In contrast, the periphery includes all those terms that are not normally discussed between the parties, but rather appear (usually) only in writing as drafted by the employer’s lawyers. In addition, any term that is not fixed and concrete but rather open-ended, giving discretion to the employer on how to apply it, must be understood as part of the periphery. Such terms should enjoy less deference and higher scrutiny to ensure consistency with labour law goals. To clarify, the fact that a term was actually discussed between the parties does not automatically make it part of the core. In particular, the agreement to be subject to the instructions of a boss is considered the very core of employment relationships, but the *boundaries* of this managerial prerogative are vague; they should therefore be considered part of the periphery.⁵⁷ Admittedly, the line between core and periphery will not always

⁵⁵See, in the context of contract law theories, A. Bagchi, ‘Pluralism’, in M. Chen-Wishart and P. Saprai (eds), *Research Handbook on the Philosophy of Contract Law* (Cheltenham: Edward Elgar, 2025), 135.

⁵⁶This distinction appears in the Unfair Terms in Consumer Contracts Regulations 1999, reg 6; Consumer Rights Act 2015, s 64; Unfair Terms in Consumer Contracts Directive 93/13/EEC, Art 4. According to the Act, unfair terms will not be enforced, but the ‘main subject matter of the contract’ and the price—which have been described in commentaries as the ‘core’—are immune from such examination, provided they are transparent and prominent.

⁵⁷On the need to subject discretionary contractual powers to good faith and additional duties, see *Braganza v BP Shipping Limited*, [2015] UKSC 17.

be clear. Consider, for example, a provision requiring the employee to give a certain period of notice before resignation. Generally speaking, this is not an issue normally discussed and agreed upon when someone is offered a job; it is rather a peripheral term added at a later stage by the written contract. However, in exceptional cases, because of the nature of particular work and particular workplace setting, the notice period could be a basic element, discussed and agreed by the parties. In such cases, depending on the specific objective circumstances, it could be justified to treat such a provision as part of the core.

It should be clarified that the argument does not imply that core elements are less important for the employee. Issues of wage and working hours are highly regulated by legislation, and for good reason. The point is rather that these issues are also at the core of the agreement between the parties, forming the basis for the decision of both parties to enter the contractual relationship. Therefore, when considering issues left open by legislation (within the core)—and only then—priority should be given to the goals of contract law.

I realise that in the context of consumer law, the UK Supreme Court has interpreted the core broadly, thereby enlarging the scope of exemption from a legislative fairness requirement.⁵⁸ Obviously, I do not propose to adopt such an approach. It appears to be driven by traditional ideas of freedom of contract,⁵⁹ without giving sufficient weight to the purpose of consumer laws.⁶⁰ This can be seen as further verification for the necessity of adopting a separate theory to guide decisions in the particular context of employment. I borrow only the general distinction; there is no suggestion here to adopt the full details of consumer legislation and case law on this matter.

My proposal for integrating the goals of contract law and labour law thus combines a vertical element with a horizontal one.⁶¹ There is *horizontal* separation between core, specific terms of the contract on the one side, versus peripheral and open-ended terms on the other side. For each type, there is a different *vertical* hierarchy. For the first group, in case of conflict, priority should be given to contract law goals, as long as the legislative protections

⁵⁸ See especially *Cavendish Square Holding v El Makdessi*, [2015] UKSC 67.

⁵⁹ J. Spooner, 'Contract Law When the Poor Pay More' (2024) 44 *OJLS* 257, 273.

⁶⁰ On the justifications for the distinction, see M. Dellacasa, 'Judicial Review of 'Core Terms' in Consumer Contracts: Defining the Limits' (2015) 11 *ERCL* 152.

⁶¹ On horizontal and vertical integration of justifications within contract law, see J. Kraus, 'Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy' (2001) 11 *Philosophical Issues* 420, 421.

are not circumscribed in any way (directly or indirectly). For the second group—of peripheral or open-ended terms, including their use in practice—the hierarchy should be inverted, with priority given to labour law goals in case of conflict. That opens the door for more scrutiny over the use of the managerial prerogative; for interpretation that advances the goals of labour law; and for filling gaps in the legislation (but not about the core terms of the agreement). These hierarchies are proposed to provide guidance, but they do not mean to suggest that one set of goals takes complete priority and the other can be completely ignored. The proposed hierarchy is designed to help the task of *balancing* between the goals, without suggesting that one of them should be completely abdicated in some contexts.⁶²

In a recent review of pluralism in contract law theory, Aditi Bagchi distinguished between two general types: structural and democratic. Structural theories can be horizontal or vertical (or, as I suggested above, some combination of both). In contrast, some contract law scholars argue that the choice of goals and the balancing between them is a matter for democratic decision-making and therefore changes according to time and place, based on the preferences of the people in a given political community. This can be called ‘democratic pluralism.’⁶³ If the law of contract is ‘democratically responsive,’⁶⁴ it can enjoy greater legitimacy. My proposal, although structural, is also democratically responsive in the sense that the goals of labour law are deduced from labour legislation. Admittedly, the connection is made at a relatively high level of abstraction and not according to very specific choices of a given legislature at a given time. In that respect, the democratic attributes are more limited. This choice is explained and justified in the next sub-section.

C. The Relation Between Common Law and Statutes

In common-law systems, the relationship between judicially developed laws of contract and legislation relevant to the same field is subject to ongoing

⁶²For a sophisticated proposal regarding the integration of moral and economic concerns, by way of integrating deontological thresholds into cost-benefit analysis, see E. Zamir and B. Medina, *Law, Economics, and Morality* (Oxford: OUP, 2010). My proposal here is at a more general level of abstraction, which seems to me sufficient to derive useful substantive principles as discussed in the next section.

⁶³Bagchi (n.55). For key examples of this approach, see P. Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford: OUP, 2019); M. W. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford: OUP, 2021).

⁶⁴Bagchi (n.55).

debates. The issue is especially thorny in the specific context of contracts of employment.⁶⁵ One option which may have been accepted in the past but seems to be broadly rejected today, and rightly so, is to interpret labour legislation in light of the common law—in a way that gives preference to freedom of contract, thereby minimising the impact and scope of the legislation.⁶⁶ Another option is to insist on complete separation, but if one accepts the need to update and develop the common law (rather than succumbing to perpetual stagnation), it would be odd to just ignore the surrounding legal norms when engaging with such developments.⁶⁷ This leaves us with two main options: one is to develop the common law in a way that takes inspiration from the legislation and strives to advance the same goals, for example, by filling gaps; the alternative is to stay clear from areas tackled by legislation, thereby avoiding any development of the common law—even if such development is a natural extension of previous doctrines—when considering questions that the legislature has already addressed.⁶⁸

While the two options may seem contradictory, as a matter of fact they co-exist, as Anne Davies and Alan Bogg have shown.⁶⁹ The key question is how to draw the line between them and decide which approach is suitable in each particular context. To take an easy example, imagine that there is no legislation setting holiday entitlements. It is possible, in such cases, to develop such a right as part of the common law; whether a court decides to do so or not, there is no statutory pre-emption. In contrast, if there is a legislated entitlement to X days of paid holiday, it seems quite obvious that courts have no legitimacy to use the common law to turn X into X + 1. The more difficult questions arise in between these two extremes, for example, whether the existence of legislation about holiday rights precludes any

⁶⁵ See Freedland (n.) 3–4; Deakin and Wilkinson (n.2) 298ff; A. C. L. Davies, 'The Relationship Between the Contract of Employment and Statute' in Freedland et al. (n.1) 73; A. Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 *CLP* 67.

⁶⁶ Davies (n.65) describes the primacy of contract as the 'old' approach to the relations between common law and employment statutes.

⁶⁷ See *Johnson* (n.26) para 37, Lord Hoffman ('[J]udges, in developing the law, must have regard to the policies expressed by Parliament in legislation').

⁶⁸ Davies (n.65) describes these two alternatives as statutes being either 'permissive' or 'restrictive' of common law development. Bogg (n.65) described them as either 'stimulus' or 'pre-emptive', and argues that there is a third alternative: to develop the common law protection of fundamental rights, which will also have an impact on labour rights. While I generally agree with his normative conclusions, I see this third option as part of the *substance* of the common law, rather than a separate option concerning the relationship with statutes.

⁶⁹ Davies (n.65); Bogg (n.65).

development of common law rights related to holidays, even in questions not directly regulated by the legislation. Such was the question before the House of Lords in *Johnson v Unisys*.⁷⁰ Some commentators thought that the Court erred when refusing to provide a common law remedy for wrongful dismissals because of the existence of a statutory scheme against unfair dismissals.⁷¹ Others support the decision.⁷² For current purposes, the point is just that both options—pre-emption or inspiration—are sometimes applicable; the question is which one should apply in a particular case. When dealing with issues that are not directly addressed by legislation, there are no constitutional (democratic) reasons to refuse to develop the common law. In other cases, in contrast, courts would rightly feel pre-empted from contradicting the legislature's specific choices. This is entirely consistent with the general claim made here that the law of the contract of employment should advance both labour law and contract law goals. The question of where to draw the exact line in terms of democratic legitimacy is a separate one and out of the scope of this article.

Even in situations where there is no pre-emption, there is another possible objection to relying on inspiration from labour legislation for common law developments. It has been suggested that it would be undesirable to 'link the development of the common law to the shifting patterns of potentially highly political legislation'.⁷³ This is certainly true. Judge-made law cannot continuously change according to momentary majorities in the legislature. It has to be more stable. But as already noted, the goals of labour law must be understood at a higher level of abstraction. It is not about the concrete intent of the legislators.⁷⁴ Even if a specific protection is reduced in terms of the level of protection, or in contrast expanded, it does not change the purpose of that legislation, and certainly not the purpose of labour law as a whole. The basic reasons explaining why the law is needed—or the field as a whole is needed—are still the same. And this is the level that should guide the courts when developing the law of the contract of employment.

⁷⁰Johnson (n.26).

⁷¹See, for example, Freedland (n.1) 162ff; L. Barmes, 'The Continuing Conceptual Crisis in the Common Law of the Contract of Employment' (2004) 67 *MLR* 435.

⁷²Davies (n.65); Bogg (n.65).

⁷³P. Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 *OJLS* 869, 874.

⁷⁴See Davidov (n.11) 17–18 and reference therein.

5. A THEORY OF THE CONTRACT OF EMPLOYMENT: SUBSTANTIVE PRINCIPLES

The structure proposed in the previous part suggests that the goals of specific legislation can play an important role. For example, when facing questions related to interpretation or gap-filling in the context of dismissals, courts should pay attention to the goals of regulations limiting dismissals, alongside the goals of contract law. As suggested above, since the power to dismiss is an open-ended term and therefore not part of the 'core', the goals of labour law should assume more importance. In the particular context, this means that the goals behind unfair dismissal laws should provide guidance to courts when interpreting a related contractual provision or contemplating a related development in the law of the contract of employment. At the same time, there are also general goals behind the field of labour law as a whole, which can explain and justify more than one specific regulation. These will also be helpful and relevant in most cases. My discussion here is limited to such *general* goals.

I have argued that the law of the contract of employment should be based on (and developed to advance) the purposes of both contract law and labour law. The purpose of contract law has traditionally been to protect and advance the autonomy of the parties, and to enhance efficiency.⁷⁵ Recent academic contributions advance alternative ideas about the meaning of autonomy in this context, with some theories limiting the protection of the law to contracts that respect the self-determination and equal standing of both parties.⁷⁶ There are also views that consider it part of the purpose of contract law to ensure a degree of fairness in agreements,⁷⁷ and even to ensure some degree of distributive justice.⁷⁸ If these alternative theories are accepted, the conflict between the goals of contract law and those of labour law will be reduced. Still, some level of conflict is unavoidable.

What is the purpose of labour law? This question attracted a lot of academic attention in recent years. There are two general approaches that are

⁷⁵ See n.20 above.

⁷⁶ H. Dagan and A. Dorfman, *Relational Justice: A Theory of Private Law* (Oxford: OUP, 2024). And see an attempt to apply these ideas in the specific context of employment in H. Dagan and M. Heller, 'Can Contract Emancipate? Contract Theory and the Law of Work' (2023) 24 *Theoretical Inquiries in Law* 49.

⁷⁷ See, for example, J. Gordley and H. Jiang, 'Contract as Voluntary Commutative Justice' (2020) *Michigan State L. Rev* 725.

⁷⁸ See, for example, A. Bagchi, 'Distributive Injustice and Private Law' (2008) 60 *Hastings LJ* 105; Z. X. Tan, 'Where the Action Is: Macro and Micro Justice in Contract Law' (2020) 83 *MLR* 725.

not contradictory, but rather complement each other, and often represent the same ideas at different levels of abstraction.⁷⁹ One way to understand the goals is by focusing directly on the problems and vulnerabilities discussed in Section 2: questionable consent, subordination and dependency. The purpose of labour law can be articulated as addressing these vulnerabilities and the problematic implications flowing from them. The second approach puts the focus on the abstract values or ideas of justice that labour laws can be seen to advance. Labour law scholarship, and sometimes case law, refer in this context to dignity, equality, human rights, distributive justice, democratisation of the workplace (including ‘voice’), emancipation, stability, security, social inclusion, capabilities, non-domination and personal fulfilment.⁸⁰ Additional goals, or different articulations of the same ideas, are of course also possible.

What are the implications of these goals, given the structure proposed above? What guiding principles for the law of the contract of employment can be inferred, bearing in mind the proposed hierarchy between labour law and contract law goals?⁸¹ Below I make some suggestions, although this is not intended to be a complete list. I focus on good faith, preventing evasion from legal obligations, the primacy of reality, the limits of consent, respect for human rights, non-symmetry in applying contract law, and the importance of specialised labour courts or tribunals. As noted above, Mark Freedland (partly together with Simon Deakin) proposed the following substantive principles for the contract of employment: reciprocity (leading most notably to ‘mutual trust and confidence’), fair exchange and stability;⁸² while Hugh Collins proposed the principles of good faith, equality and voice.⁸³ A duty of good faith (or the UK variation of mutual trust and confidence) is

⁷⁹Davidov (n.11) 31.

⁸⁰For a review and discussion, see Davidov (n.11), Ch 4; see also H. Collins, ‘The Many Ideas of Labour Law’, in Davidov et al. (n.4), 157.

⁸¹On the idea of ‘guiding principles’ or ‘structural principles’ see Freedland (n.1), 127–9; Freedland (n.3).

⁸²See notes 42–43 above. The latter two are part of the exchange principle (developed by Freedland and Deakin together). Reciprocity is discussed by Freedland separately. An additional principle identified by Freedland is integration, which I do not mention here because, as he notes, it is relevant mostly for deciding questions of scope. In previous writings, Freedland proposed a somewhat different (though similar) list of principles: mutuality and reciprocity, care and co-operation, trust and confidence, loyalty and freedom of economic activity, fair management and performance (Freedland (n.1) 127–8).

⁸³See notes 44–45 above. I use ‘equality’ as shorthand for several issues Collins sees as part of associational justice: desert, treatment as an equal, protection from unfair exclusion; and I use ‘voice’ as shorthand for ‘a right to participate and exercise voice’.

thus shared by both theories, and I join them on this point. With regard to stability, equality and voice, in my view, they are part of the general goals of labour law and should be advanced in line with the proposed structure, alongside the other goals.⁸⁴

With regard to fair exchange,⁸⁵ the examples discussed by Freedland and Deakin do not suggest that they support a general requirement of fairness regarding the terms of the contract of employment, as opposed to concrete instances. The interventions they discuss under this heading seem to fall either within the duty of good faith in the performance of the contract (specifically when applying discretionary powers) or within the principle of preventing evasion from legislative obligations, which I propose below. As I have argued above, given the need to consider not just the goals of labour law but also the goals of contract law, it seems justified to give effect to the core provisions of the agreement—pay, hours, etc.—as long as they do not contradict labour legislation. The hierarchy of goals is reversed when scrutinising open-ended provisions giving the employer discretionary powers, but as far as the core provisions are concerned, the law does not (and should not) require them to be ‘fair’ according to an external standard, beyond the demands of specific labour legislation.

A. Good Faith

The good faith standard is commonly used by courts around the world to scrutinise the decisions and actions of employers.⁸⁶ In the UK, the ‘mutual trust and confidence’ doctrine is used in a similar way.⁸⁷ I argue here in favour of a strong version of it (which might be better described as good faith, although the title is less important). The key characteristic of employment contracts that explains the need to impose good faith duties is the fact that

⁸⁴For Hugh Collins, the difference appears to be that some goals or principles of justice are integral to the contract of employment—embedded in this branch of private law—while other justified goals, such as distributive justice and protecting fundamental rights, are imposed externally (Collins (n.44) at 48). According to the structure proposed here for the law of the contract of employment, this distinction does not seem important. This is not to deny the difference between internal and external perspectives; the point is merely that in the specific context they converge. On the possibility of ‘hybrid’ internal-external approaches in private law analyses, see A. S. Gold, ‘Internal and External Perspectives: On Methodology in the New Private Law’ in A. S. Gold et al. (eds), *The Oxford Handbook of the New Private Law* (Oxford: OUP, 2021), 3.

⁸⁵Freedland and Deakin (n.43) 56 ff.

⁸⁶Davidov (n.11) Ch 7.

⁸⁷See Collins (n.41).

they create a structure of governance. One party to the contract secures the power to govern; the other party—who is subordinated to the employer—is being governed. Labour law accepts the legitimacy of this basic agreement, but a private government should not be immune from scrutiny. The party holding the power, who governs others, should be subjected to duties of fairness in the way it treats those under its control (the employees). According to the theory advanced here, open-ended provisions of the contract should be regulated to advance first and foremost the goals of labour law (with the goals of contract law taking secondary importance). The open-ended contractual right of government secured by the employer should thus be interpreted and bounded in light of the goals of labour law. It is therefore clear that, at least in the context of contracts of employment, the duty of good faith must be mandatory and non-waivable. To avoid confusion, it is better to avoid conceptualising it as an implied term, instead treating it as a duty imposed by law on the parties (or specifically the employer). Moreover, given the proposed justification for the duty, there is also no reason to limit it to specific contexts. Employer decisions about terminations, like all other decisions, should be subject to the good faith standard.⁸⁸

A principle of good faith includes duties of procedural fairness as well as substantive fairness. Unless one adopts a very narrow understanding of good faith as subjective (focusing on bad intentions), there is little difference between good faith and fairness, at least at the normative level.⁸⁹ The difficult question is what degree of fairness (procedural and/or substantive) should be required, and what specific rules should be derived from the open-ended standard.⁹⁰ Without getting into much detail, it should be noted that a good faith principle must include, in this particular context, at least *some*

⁸⁸On this point, see the opinion of Lord Leggatt in *Tesco Stores Ltd v USDAW*, [2024] UKSC 28, para 114ff. Note, however, that my argument assumes no contradiction with specific statutes.

⁸⁹For an argument that a duty of fairness is implicit in some UK cases, and should be made explicit as a separate duty from good faith/mutual trust and confidence, see A. Sanders, 'Fairness in the Contract of Employment' (2017) 46 *ILJ* 508. For an argument in favour of an implied duty of *procedural* fairness, see P. M. Collins and G. Golding, 'An Implied Term of Procedural Fairness during Disciplinary Processes: Into Contracts of Employment and Beyond?' (2024) 53 *ILJ* 125. In contrast, D. Brodie, 'Disavowing an Implied Term of Fairness' (2024) 53 *ILJ* 157, objects to such a new implied term, arguing that it will not add to existing protections under 'mutual trust and confidence' and other doctrines.

⁹⁰For discussions, see, for example, Freedland (n.1) 186ff; Davidov (n.11) Ch 7. For a recent discussion with regard to the content of good faith in contract law more generally, see Dagan and Dorfman (n.76), Ch 10. One of the questions raised is whether the standard is similar to that required from administrative authorities as part of public law, or not. See on this question, for example, *Braganza v BP Shipping Limited*, [2015] UKSC 17.

duty to take the interests of the employee (or: the impact of a decision on the employee) into account.⁹¹

As noted above, Freedland deduced the duty of mutual trust and confidence from the idea of reciprocity. But once we focus on the need to place limits on a (private) government, reciprocity seems less fitting to describe the justification for (or content of) good faith. At a general level, every contract is, of course, reciprocal. With regard to employment contracts, we can certainly say that an employee agrees to subordination and should get some protection or security in return.⁹² And it has been claimed more specifically—at least implicitly—that because an employee is expected to be cooperative and show loyalty to the employer, the employer should treat them fairly in return.⁹³ Historically, given the courts' propensity in the past to understand the contract of employment as mostly creating one-sided obligations on the employee, it is understandable that developments of employer duties were justified by reliance on the idea of reciprocity—a reasoning stressing the need to ensure more balance. This may have been a necessary strategy at the time. But in fact, these are not reciprocal obligations; the level of protection is not (and should not be) connected to the level of subordination or expected co-operation or loyalty. Moreover, the protection is imposed externally by the law. It would be artificial to consider it as part of the agreement between the parties. While there is mutuality in the sense that an employee has to perform the contract in good faith as well, the reasons are different (being an agent, performing tasks on behalf of the employer), and the content of the duty is different as well.⁹⁴

⁹¹In other contexts, a good faith duty does not always extend to having regard to the interests of the other party. See, for example, *Re Compound Photonics Group Ltd*, [2022] EWCA Civ 1371.

⁹²See S. Deakin, 'Concepts of the Market in Labour Law' in A. Numhauser-Henning and M. Rönnmär, *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford: Hart, 2013), 141, 149–50; G. Davidov, 'In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws' (2007) 23 *IJCLIR* 117.

⁹³See, for example, J. Riley, 'Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts' (2012) 36 *Melbourne U L Rev* 521, 526.

⁹⁴It is possible to use the idea of reciprocity, or mutuality, as a normative ideal; Freedland and Kountouris (n.12) at 439ff refer to mutualisation of risks between the employer and the employee along these lines. It seems to me, however, that most regulatory interventions (whether existing or proposed) cannot be understood by reference to mutualisation or reciprocity.

B. Preventing Evasion From Legal Obligations

Non-waivability is a fundamental principle of labour law. It is required first and foremost because of the inequality of bargaining power, coupled with the inherent interest of employers to minimise the costs and inflexibility associated with regulations, including labour regulations.⁹⁵ For this reason, minimum standards imposed by labour laws cannot be waived (with some small exceptions explicitly determined in legislation). If employers would be allowed to contract out of labour law obligations, these obligations would remain meaningless for the workers who need them the most—and the goals of labour law would be frustrated. Given the focus of the proposed theory on the need to advance the goals of labour law, non-waivability must be seen as a guiding principle for the law of the contract of employment. This should be understood broadly; not only as a prohibition on contracting out of legislation—a prohibition which is usually included explicitly in the legislation itself⁹⁶—but also as a general principle against any attempt to evade or undercut legislative obligations or common-law obligations through legal manipulations. If a contract term—even within the core—is designed to evade a legal liability or responsibility towards the employee, it should not be enforced.⁹⁷ This applies also to the basic question of whether the worker is an ‘employee’ or not.⁹⁸

The proposed non-evasion principle can be used to invalidate contractual provisions designed to ‘outsmart’ the legislature, when there is no real business reason behind them other than evading employer responsibilities. Zero-hour contracts are one such example. Substitution clauses inserted for the purpose of evading ‘employee’ status are another. Employment through temporary employment agencies, when the work is not of a temporary nature, is yet another example. In all of these cases, the contract is dictated one-sidedly by the employer in order to evade obligations imposed by the

⁹⁵G. Davidov, ‘Non-waivability in Labour Law’ (2020) 40 *OJLS* 482. An additional reason for non-waivability is paternalistic: employees will often make bad choices because they lack information or for reasons of bounded rationality (see *ibid.*). For a recent overview of the principle and its justifications (and possible exceptions), see C. Estlund, ‘Waivability of Employment Rights: New Frontier or Road to Perdition?’ in Davidov et al. (n.4) 323.

⁹⁶See, for example, Employment Rights Act 1996, s 203.

⁹⁷For a similar argument, see Bogg (n.24), arguing that such evasion should be considered void for reasons of public policy, and that this solution requires ‘a specifically tailored category of public policy for employment contracts’.

⁹⁸See *Uber BV v Aslam*, [2021] UKSC 5, para 80.

legislature. This is a direct assault on the goals of labour law, which should not be allowed.

The principle proposed here will often rely on appropriate remedies to be effective. To prevent evasion, it is not enough to declare that something is wrong. Courts also need to attach a remedy that will create the incentive structure to stop using evasion practices. This is far from easy, to be sure, but at the very least, it should be a guiding principle when courts consider questions of remedies.⁹⁹ For similar reasons, the possibility of suing the employer must always be available. Therefore, any limitation on access to justice, such as the arbitration clauses common in the USA,¹⁰⁰ should be seen as another illegitimate method to evade legislative obligations.

C. Primacy of Reality

Closely related to the non-evasion principle, and required for the same reasons, is the principle of primacy of reality (or primacy of fact). It is very easy for employers to draft contractual provisions intended to evade legal obligations, including attempts to evade the ‘employer’ status entirely. Employees will usually sign those contracts, whether because they fail to understand the implications or for lack of bargaining power to object. When such written provisions do not represent the real agreement between the parties, courts should ignore those provisions, or at least interpret them based on how they apply in reality, rather than how they appear on paper.

This principle has long been recognised in many legal systems.¹⁰¹ In recent years, it has been adopted in the UK as well.¹⁰² This is a much-welcome development, after many years in which concepts such as ‘mutuality of obligations’ have been misused in a way that opened an easy route for employers

⁹⁹For a recent analysis of remedies and a critique of their ineffectiveness in UK labour law, see A.C.L. Davies, *Valuing Employment Rights: A Study of Remedies in Employment Law* (Oxford: Hart, 2024). For an overview of enforcement challenges and methods, see G. Davidov, ‘Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges’ (2021) 3/2021 *Soziales Recht* 111.

¹⁰⁰Approved by the US Supreme Court in *Epic Systems Corp v Lewis*, 138 S Ct 1612 (2018).

¹⁰¹On this principle in European countries, see B. Waas, ‘Comparative Overview’ in B. Waas and G. Heerma van Voss (eds), *Restatement of Labour Law in Europe—Vol I: The Concept of Employee* (Oxford: Hart, 2017), xxvii, at li. In Latin America, see S. Gamonal and C. Rosado Marzán, *Principled Labor Law: U.S. Labor Law Through a Latin American Method* (New York: OUP, 2019), Ch 3.

¹⁰²*Autoclenz* (n.8); *Uber v Aslam* (n.98). For an illuminating discussion of these cases, see Bogg (n.41).

to evade.¹⁰³ However, the principle is still not being applied consistently, or at least not fully. A key example is substitution clauses. Employment relations are personal, requiring an employee to perform the work by themselves, as opposed to providing a service by employing others and sending them to do the work. Lawyers representing employers are trying to use this basic characteristic as an escape route, inserting a contractual provision suggesting that the worker is allowed to send others to do the work. The UK Supreme Court has explained in *Autoclenz* and in *Uber* that provisions misrepresenting the true agreement between the parties should be ignored. However, in the case of *Deliveroo*, the Court determined that using others to perform deliveries was really allowed, leading to a conclusion that the relationship was not one of employment.¹⁰⁴ This was unfortunate, because as the Court itself has acknowledged,¹⁰⁵ the substitution option was only very rarely used. Indeed, it made no economic sense for a Deliveroo driver to employ others, given the meagre income earned from deliveries. A focus on the reality of the relationship makes clear that the work is performed almost entirely (and usually entirely) in person. There was no reason to deny employment rights just because the employer inserted a substitution clause, which did not represent the true nature of the relationship.¹⁰⁶

D. The Limits of Consent

As we have seen, a key characteristic of contracts of employment is that consent by employees is questionable. The main solution to this problem is labour legislation securing minimum standards, thereby invalidating some contract provisions which society finds unacceptable. But the problem of questionable consent does not disappear with regard to issues not covered in legislation. It can be addressed by way of procedural rules designed to increase the chances of consent being free and informed, or substantive

¹⁰³ See N. Countouris, 'Uses and Misuses of 'Mutuality of Obligations' and the Autonomy of Labour Law', in A. Bogg et al. (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), 169. In recent years, the approach of the courts has changed, and the test of 'mutuality of obligations' is given much less weight; see, for example, most recently, *HMRC v Professional Game Match Officials Ltd*, [2024] UKSC 29.

¹⁰⁴ *Deliveroo* (n.6).

¹⁰⁵ *Ibid.*, para 27.

¹⁰⁶ For a fuller discussion of the case, see G. Davidov, 'Platform Workers, Autonomy, and the Capability Approach', in W. Chiaromonte and M. L. Vallauri (eds), *Trasformazioni, Valori e Regole del Lavoro, Volume III—Scritti per Riccardo Del Punta* (Florence: Firenze UP, 2024), 335.

standards such as proportionality, which can lead to invalidation of consent in some cases.¹⁰⁷ Based on the proposed hierarchy of goals, it is suggested to apply only minimal constraints on consent related to the core provisions of the contract of employment. Minimal constraints can include, for example, a procedural rule requiring changes to the core provision (such as the wage) to be explicit and in writing.¹⁰⁸ In contrast, when dealing with peripheral and open-ended provisions, much stronger scrutiny is justified, including the imposition of substantive standards. Moreover, an employer should not be allowed to create for itself a power to unilaterally change the core provisions of the contract (such as the wage). So-called ‘variation clauses’ should be voided altogether; changes to the contract cannot be based on consent that is hypothetical and in advance. Rather, variation of the contract of employment requires actual, real-time consent to specific changes.¹⁰⁹ To clarify, this is separate from the existence of a managerial prerogative, giving the employer discretion to make managerial decisions. The managerial prerogative does not—and should not—apply with regard to specific contractual terms.

The dividing line between the managerial prerogative and other contractual terms is not always clear and obvious. When an employer wishes to introduce some change that affects the employee, the question will often arise: is it part of the managerial prerogative—and therefore allowed, subject to limitations such as good faith as discussed above—or rather a change to the contract itself, which cannot be introduced unilaterally? Some decisions are easy to classify; a wage reduction is clearly an attempt to change the contract, while a decision to appoint a new manager to an employee’s department is clearly within the managerial prerogative. But some decisions/changes are less obvious. For example, if the employer wants to move the business (and place of work) to another city, is it part of the prerogative, or does it require consent from the employee (and absent consent, a need to follow the procedures for dismissals)? I have argued elsewhere that the concept of the managerial prerogative is itself an open-ended legal standard allowing courts to regulate the limits of the prerogative.¹¹⁰ The important point for current purposes is that an employee should not be assumed to have consented to an unlimited managerial prerogative or to granting the

¹⁰⁷Niezna and Davidov (n.9).

¹⁰⁸*Ibid.*

¹⁰⁹*Ibid.*

¹¹⁰Davidov (n.11) 172ff. On the regulation of the managerial prerogative, see also Bogg and Estlund (n.17).

employer the power to set these boundaries. The boundaries of the prerogative should be set externally by the law of the contract of employment, and as an open-ended provision, the prerogative should be interpreted first and foremost in light of the goals of labour law.

E. Respect for Human Rights

The question of human rights at work is a crucial and timely one. Take freedom of expression, for example. Employers sometimes prohibit certain types of speech during work, as part of their managerial prerogative. Employers also sometimes dismiss employees because of speech made *outside* of work, relying on a broad contractual right to make termination decisions, or even on specific contractual obligations of the employee to refrain from any controversial statements that might negatively affect the employer's reputation. Assuming there is no legislation directly regulating such practices, how should the law of the contract of employment address them?

It has been argued by several leading labour law scholars that the implied duty of mutual trust and confidence should be understood as requiring some level of respect for human rights.¹¹¹ An alternative is to recognise a separate implied duty to respect the human rights of employees.¹¹² Such developments can be supported by the general obligation to interpret legislation—and also develop the common law—in line with the rights enshrined in the European Convention of Human Rights.¹¹³ Another proposal is to rely on a public policy doctrine to invalidate provisions that undermine fundamental rights.¹¹⁴ According to the theory proposed here, the law of the contract of employment is not limited to doctrines recognised in the general law of contract. It should be possible to adopt separate rules and standards, part of an autonomous law of the contract of employment. All of the options mentioned above are certainly possible, but it should also be possible to adopt a specific duty on employers to respect the human rights of employees, which

¹¹¹See A. Bogg, H. Collins, A. C. L. Davies and V. Mantouvalou, *Human Rights at Work: Reimagining Employment Law* (Oxford: Hart, 2024), 16; B. Hepple, 'Human Rights and Employment Law' (1998) 8 *Amicus Curiae* 19.

¹¹²See H. Collins and V. Mantouvalou, 'Human Rights and the Contract of Employment' in M. Freedland et al. (eds), *The Contract of Employment* (Oxford: OUP, 2016) 188, 205; J. Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48 *ILJ* 515.

¹¹³Human Rights Act 1998, s 3, 6.

¹¹⁴Bogg (n.24).

is not an implied term but a mandatory component of the law of the contract of employment.

Is it justified to impose such a duty on employers? Contractual provisions allowing the employer to limit human rights are not part of the core of the contract. If there are provisions concerning speech or privacy, for example, they are peripheral parts of the agreement according to the distinction proposed above. And in most cases, decisions affecting human rights will rely on open-ended provisions of the managerial prerogative or the power to dismiss an employee. With this in mind, priority should be given to advancing the goals of labour legislation, which include the protection of human rights at work.¹¹⁵

Of course, human rights are not absolute. They can be infringed to some extent for legitimate causes, with proportionality usually used as the standard for balancing the competing considerations. The actual application is often complex and out of the scope of this article. The point is simply that respect for human rights should be considered a guiding principle of the contract of employment.

F. Non-symmetry in the Application of Contract Law

Contract law doctrines are usually applied in the same way to both parties. But contracts of employment are characterised by employee vulnerabilities, as previously described. The vulnerabilities that explain the reason for not using the general law of contract are one-sided. There is no justification not to rely on the general law of contract when this places *more* obligations on the employer.

Consider, as an example, the case of *Tesco*, recently decided by the UK Supreme Court.¹¹⁶ This was a rather unusual situation in which the employer committed to paying a certain supplement to the salary of a group of employees indefinitely, as long as they are employed—a commitment made as an incentive for those employees to agree to relocate to another site. A few years later, the employer tried to escape this commitment by relying on its general power to dismiss employees (a power also mentioned in the

¹¹⁵On this point, see, for example, H. Collins, 'Justice at Work' (2020) 2020 *Revista Forumul Judecatorilor* 59; J. Atkinson, 'Human Rights as Foundations for Labour Law', in Collins et al. (n.13) 122; V. Mantouvalou, 'Advancing Human Rights, Capabilities, and Non-Domination at Work' in Davidov et al. (n.4) 115.

¹¹⁶*Tesco Stores Ltd v USDAW*, [2024] UKSC 28.

employment contract). There was no other reason to dismiss the employees, except for the desire to cut their wages; they were ‘fired and rehired’ on less favourable terms. The Court refused to allow this manoeuvre, ruling that the provision concerning the supplement continued to apply. To reach this conclusion, the Court relied on general principles of contract interpretation, concluding that the supplement provision would not make commercial common sense if the employer is allowed to escape it at any time through dismissals (absent a separate cause for the dismissals). It is perfectly justified, in my view, to treat the employer as a sophisticated commercial party, who should have understood the risks of a commitment for an unlimited time, while at the same time, to give much less weight to such provisions when they work to the detriment of employees.

G. Labour Courts/Employment Tribunals

The final guiding principle I wish to propose is not about the contract of employment itself but rather the legal institutions entrusted with enforcing it. A separate system of labour courts (or employment tribunals) is highly important as a practical matter for the fulfilment of the goals of labour law. In the general court system for civil disputes, judges routinely give effect to contracts based on a strong freedom of contract principle. Adjudicating disputes about contracts of employment requires a mental switch to appreciate that the written contract may not represent the real nature of the relationship; to focus on the reality of the relationship; and to scrutinise decisions of the employer along the lines proposed above. This is certainly not impossible; judges deal with a broad range of issues, applying different types of regulations. But especially in the lower courts, where there is less time for each case, the mental switch between cases is not easy. From a global comparative perspective, legal systems with specialised labour courts or tribunals appear to have a much better record in understanding the unique characteristics of employment and advancing the goals of labour law.¹¹⁷

In the UK, while employment tribunals adjudicate disputes related to labour laws, their jurisdiction regarding claims for breach of the contract of employment is limited to £25,000.¹¹⁸ Higher claims are directed to the general system. There are some additional limitations; a contractual claim can

¹¹⁷There is no empirical evidence to confirm this observation, as far as I know. It is difficult to separate the existence of labour courts from numerous other variables.

¹¹⁸The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

be made to the employment tribunal only after the termination of employment, and some types of claims—notably those related to non-compete covenants—are excluded from the tribunals' jurisdiction. These limitations and exclusions are hard to justify. They have the effect of lowering the potential remedy that employees can get (if they prefer to file the claim before the tribunal), or alternatively, sending the claims to a court not specialising in labour law and likely without sufficient understanding of the law of the contract of employment, as separated from the general law of contracts. I realise that expanding the jurisdiction of labour tribunals might be controversial and involve additional considerations. I do not purport to discuss the issue fully here. My goal is simply to point out that adjudicating disputes concerning contracts of employment is best done in a specialised system, where judges are closely familiar with the unique characteristics of employment relations and the unique features of the law of the contract of employment.

6. CONCLUSION

The employment relationship is highly important for employees; it plays a significant role in their lives. Yet employees are subject in this relationship to the rule of an employer, who has its own interests. It is not surprising, therefore, that there are often disputes about the terms of the engagement as well as the limits of the employer's managerial powers. Although employment relations are heavily regulated, many questions are not addressed by legislation. Courts must turn, in such cases, to the law of the contract of employment for answers; this body of law is different—at least to some extent—from the general law of contract. My goal was to propose a theory to support its development.

The first parts of the article were devoted to making the case for a separate theory of the contract of employment. This was done by explaining how contracts of employment are different, and showing why the general law of contract cannot apply, even after considering various doctrines designed for special situations. Turning to the task of developing the theory, I started with its structure and sources. At the most general level, my argument has been that because the law of the contract of employment has a residual role, complementing labour legislation, it has to be understood as advancing two sets of goals: the goals of contract law and the goals of labour law. This dual-purpose structure is necessary to ensure that the interpretation of employment contracts and gap-filling of the law are based on the same purposes of

labour legislation, giving them further effect, while acknowledging at the same time the contractual aspects. I then relied on literature discussing pluralism of goals to examine possibilities for integration between the different goals, based on the understanding that they can sometimes (perhaps even often) conflict. My proposal is to give priority to contract law goals when considering the ‘core’ elements of the contract—such as wage, hours and place of work—provided that they have been concluded as specific terms. In contrast, contractual provisions that are more peripheral and/or open-ended, should be examined while giving priority to advancing the goals of labour law.

The final section then turned to consider the substantive rules that can be derived from this structure, offering several guiding principles. Most of these principles can already be found, at least implicitly, in UK case law, but I have argued in favour of strengthening them and applying them more explicitly and consistently.