

The Mythical Contract of Employment

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“Lawyers specialising in labour law agree that the individual contract of service is ‘the corner stone of the edifice’ of labour law.”¹

It can be no surprise that this should be so in respect of the individual relationship between a worker and the employer: it is much harder to envisage the individual contract of service controlling, or perhaps more accurately greatly influencing, the collective relationships between trade union and employer. Labour law has been a slow, evolutionary growth, depending on an often unhappy mixture of common law and statute. In a very English way the basic principles, though much talked about,² have neither authority nor do they guide the legislator, who is normally wearing political blinkers and rushing to remedy a perceived abuse,³ or the courts who tend to busy themselves interpreting the documents put before them as literally as possible, be they contracts or statutes.⁴

There is a generally accepted tendency to make an important basic classification between individual and collective labour law. Although it is an obvious and a sensible classification for overall purposes and for teaching, it is not a clear and precise distinction and so can often be misleading. There are several complications. For example, the individual contract of service, when collective bargaining is established, is largely derived from the collective bargain between the employer and trade union which has as its principal purpose the fixing of at least the central terms of the individual worker's contract of employment. Happily, as far as the individual worker is concerned, the legal doctrine of incorporation is called in aid to marry the two, for without such wedding the terms

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1. Charles G. Hanson and Graham Mather, *Striking Out Strikes*, IEA, Hobart Paper 110, 1988. The phrase quoted is from O. Kahn Freund.

2. The discussion of ‘the right to strike’ is the best example of the difference between the political and the legal approach in Great Britain.

3. The industrial legislation since the Employment Act 1980 clearly shows this approach, especially when compared with the Industrial Relations Act 1971.

4. A series of three cases reaching results by means of interpretation of statute which ran completely counter to what was expected are *NWL Ltd. v. Nelson* [1979] I.C.R. 867, *Express Newspapers Ltd. v. McShane* [1980] I.R.L.R. 35 and *Duport Steels Ltd. v. Sirs* [1980] I.R.L.R. 116.

agreed collectively would fail to secure his position, since it is traditional that the collective bargain is not to be regarded as legally binding.⁵

History shows that employment relations emerged from status and have been, for a very long time, firmly rooted in contract. The theory of contract gave the employer and worker (the contemporary jargon was master and servant) the power to determine in detail the particular terms that would apply to their relationship. In practice, such has been the general neglect of strict legal processes, only a handful of terms were in fact specifically agreed.⁶ The contract has been traditionally 'filled in' by the implication of either 'customary terms' or terms which have obviously been assumed to exist in practice and so have been deemed to be implied into the agreement and in that way become part of the contract and legally binding. In practice this has meant that the judges, in the name of public policy, 'discovered' a framework of standard terms which were applied to different types of contract. Outside the field of collective bargaining the employer was often merely offering a 'contract of adhesion' with virtually no chance for the terms to be bargained. The fundamental notion that a contract is the freely accepted result of a detailed bargaining process was, therefore, though correct in theory nonetheless a relatively inaccurate way of indicating what was happening in practice, especially where collective bargaining was absent. Real agreement was illusory for even within the ambit of collective bargaining the terms agreed were by no means comprehensive and much of importance was left uncovered.

Collective bargaining is the normal expression of a positive relationship between a trade union, and by implication its members, on the one hand and an employers' association or individual employer on the other. A strike, that is to say the co-ordinated withdrawal of labour, is the ultimate result of a fractured relationship. It is the workers' counter to the power of an employer to impose terms and conditions of work. Without such action being protected, it has been generally recognised, the safeguard of collectivism is seriously emasculated and will fail to protect the worker. This is not the place to discuss whether strikes should be allowed, or if allowed how they should be regulated. There has been, for much of this century and in most of the industrialised world, a consensus that labour needs the protection of such 'right to strike'. The inverted commas are necessary because to some the phrase means an unfettered right, although prudence would suggest that there must be some reasonable limitations. The most comprehensive statement of the generally accepted position are the key I.L.O. conventions,⁷ ratified by a very large number of states⁸ and discussed fully in a

5. A challenge to this assumption, based on the attitude in the U.S.A., by Ford Motors failed: *Ford Motor Company v. AEUF and TGWU* [1969] 2 Q.B. 303. Perhaps surprisingly this assumption has not been seen as an object for change.

6. Until the Contracts of Employment Act 1963 it was not necessary for the worker even to be given a record of the principal terms of his contract.

7. The principal Conventions are No. 87, No. 98 setting out fundamental rights and the more recent No. 151 dealing with the public sector.

8. There are over 100 ratifications of Conventions No. 87 (1948) and No. 98 (1949) and about 20 of the much more recently promulgated No. 151 (1978).

general survey by that body's Committee of Experts.⁹ The reader who looks at footnotes will however have noted the title of the academic pamphlet quoted at the outset which reflects a more hostile attitude – *Striking out Strikes*, indicating that there is another view, one which appears to be growing strongly in some countries at the present time.

It has already been indicated that phrases such as 'the right to strike' have no real place in the Anglo-Saxon type legal system. Even where such a right appears to exist it will be found to be considerably hedged about. Since collective withdrawal of labour is in certain circumstances inevitable, English law has naturally regulated striking by way of statute. The first principal modern statute was the Trade Disputes Act 1906, which though both regulatory and restrictive, proved to be so wide as to require little in the way of reform until modern times.¹⁰ It was inevitable, even without a shift in political opinion, that changes in patterns of work and in the organisation of industry into larger units would lead to reforms involving more restrictive rules, always advocated by some. The discussion started in the late 1950's,¹¹ reached a climax in the Report of the Donovan Commission¹² and the White Paper – *In Place of Strife*,¹³ which led to a debate giving a clear indication of the lack of agreement in the Cabinet of what should be done.¹⁴ After the change of Government there was an abortive attempt to put in place a radical new system, by means of the Industrial Relations Act 1971, repealed in 1974.¹⁵ This failure gave a temporary respite from the demand for change but since 1979 there has been a steady flow of legislation by the Conservative governments pursuing a self-proclaimed 'step by step' series of reforms.¹⁶ The aim of this legislation was to remedy what were perceived as abuses. Secondary action, picketing and the closed shop are notable examples of the targets for reform.

The changes have, as was to be expected, met with fierce opposition from the trade unions who have found their powers very severely reduced, as was the intention. The way in which the changes have been initiated, although typically British in their pragmatic form, have created a serious problem. The rules seek to regulate the actions of trade unions and their members and the approach to this has been to make certain conduct hazardous, that is to say no longer protected by the exemptions from the normal rules of law which has been the essential underpinning of the right of trade unions to act and without which they could

9. A General Study was made on Conventions 87 and 98 in 1973.

10. The structure remained basically unaltered until 1971 and was restored in its fundamentals for the period 1974 to 1980.

11. *A Giant's Strength*, Inns of Court Conservative and Unionist Society, 1958.

12. Royal Commission on Trade Unions and Employers' Associations 1965–1968, Cmnd. 3623.

13. *In Place of Strife: A Policy for Industrial Relations* (1969), Cmnd. 3888.

14. Entertainingly recorded by Peter Jenkins and Charles Knight, *The Battle of Downing Street* (1970).

15. Trade Union and Labour Relations Act 1974. Although s. 1 resoundingly repeals the earlier Act, a significant part of it dealing with individual rights in respect of unfair dismissal was retained, substantially unchanged.

16. The first Green Paper, *Trade Union Immunities* (1980), is also the last such Government publication of this nature that has frankly put the differing arguments.

never have been of any real effect. The contrast with the Industrial Relations Act 1971 is marked, for that statute attempted to lay down a coherent and systematised set of rules which would clearly define the legitimate actions which a trade union could take in pursuance of its policies. There has been no overt overall pattern to the recent reforms which, as has already been emphasised, have been 'abuse driven', defining what cannot be safely done but failing positively to indicate what is permissible. It has become well-nigh impossible to answer the question, from perusal of the legislation: when is a trade union able to organise a strike which will enjoy legal protection? It may be possible to do so in the most general terms, but practical detailed advice anticipating the legal consequences will be both extremely complicated and hedged about with uncertainty.

The purpose of this article is to draw attention to the fundamental underlying uncertainty which arises from the traditional shape of English law in this area. It is apparent that without positive rules the basic law of contract inevitably presents an insuperable obstacle to 'safe' strike action. Yet many legal commentators, coming as they do from an examination of the history of the question in the courts, reject radical change. They are right, as we shall see, in indicating that such change is likely to be beset with a number of problems but they are not really problems that cannot be overcome provided that a comprehensive approach is adopted and protected from erosion by the inevitable flow of litigation. For that reason it is important first to look at what is done in practice and on what assumptions.

Strikes and contract in practice

Although, because of the diversity of employment, it is never possible to put forward a completely accurate account of what happens in practice there are some fairly clear fundamental 'rules' as to what the parties to industrial conflict traditionally expect.

At the heart of the matter is the determination of the workforce, as a group and usually led by a trade union, to put pressure upon an employer to change his ways by withdrawing labour. The object in the vast majority of strikes is a 'trial by strength'. The economic fortitude and the moral resolve of both sides will be tested. The workers through the trade union are seeking an improvement in the contract position of its members, the employer is wholly or partly resisting this.

It immediately becomes obvious that if all the variations are at this stage incorporated into the equation the exercise of analysis gets completely out of hand. There are, for example, a range of actions that apply similar pressure without going as far as a strike; some strikes are only indirectly connected with terms and conditions of employment, such as the attempt to have a dismissed colleague, thought to be unfairly treated, reinstated; action can be taken abruptly or with a semblance of legality - honouring the spirit of the contract of service by giving 'strike notice', or making the intention clear by holding discussion of the problem at length with the employer.

Yet the underlying attitudes are consistent and clear in the vast majority of cases. The workers, with a genuine feeling of injustice – (again to talk of political and other motives at this stage unnecessarily blurs the issue), exasperated at the inflexibility of the employer – (again ‘wildcat strikes’ have to be acknowledged as a considerable feature of the scene but require separate treatment as excesses whatever the rules), are prepared to risk their future employment prospects by strike action. They are testing the employer’s power and resolve, just as the employer in many cases may be deliberately delaying improving the contracts of service until he sees ‘a pressing need to do so’. The workers, believing that they have a genuine grievance, which may of course not necessarily be soundly based, plainly expect the trial of strength to result in such improvement in their contractual rights. Although there will always be militant workers and enthusiastic trade unionists who, firmly wedded to the ‘justice’ of their cause, regard compromise as ‘sell out’, compromise is the most likely outcome of these battles of will to such an extent that it may be said to be the objective. Indeed the claim will often recognise this by being pitched higher than the expectation.

Another set of variations, fatally attractive to the legal commentator, arises from the form of the strike. It may be ‘wildcat’, that is to say taken by a group of extremist workers without regard to any machinery available for settlement of disputes; it may be ‘official’ but taken without regard to notice to the employer; or it may be initiated only after the period of notice in the contract of employment has been allowed to lapse. Each variation, and there are many others, has its own legal conundrums, with precedents which tend to be sparse, contradictory and ‘on their own facts’. It is a morass to be avoided where an overview is sought.

The lack of clarity in the industrial relations ‘rules of engagement’ – the phrase is used in its military rather than employment sense – has always been fuel for political debate, much of it extreme and devoid of reality. Reformers, believing that they are dealing with a legal topic, soon find themselves in a veritable slough of despond or a fascinating logical exercise, according to taste. It will be always so unless there is a clear underlying consensus on what is sought. Those who seek an end to disruption ignore history, ignore the fact that there are bad, ruthless employers ready to exploit and above all they ignore the fact that industrial relations is dynamic and will by the very process of the lapse of time produce problems that require attention to and revision of the contract of employment. Indeed it is interesting to note that the need for change will be felt more widely by the employer than the worker, who will tend to concentrate upon a narrow range of terms such as pay and hours of work. Equally those who would see a general ‘right to strike’ are reluctant to admit the necessity for a system that seeks to ensure as far as possible that change is achieved as peacefully as possible and tend to reject, as derogation, procedures or interventions by third parties which seek to ensure that open strife occurs only where it is unavoidable. Strikes, however regulated, should be regarded as pathological whereas some would wish to see them as an important feature of a progressive system.

That accepted, it is relatively simple to devise a sensible outline for the relationship. It would involve, as can be found in most industrial countries, a legally binding collective agreement of reasonable length – practice would favour one or two years. That contract would determine the principal, general terms and conditions of workers without inhibiting a second level of group or individual terms being added as agreed. It would end on the due date and there would be a set period, prior to that date set aside for negotiation. That period would be subject to outside constraints – the need to use, where appropriate, third party intervention and so on. If the matter remained deadlocked, then strikes would be permitted, within a framework of safeguard and controls – such as ballots and protection of essential services.

One of the weaknesses of legally binding collective agreements of a set term is that they tend to inhibit change. Circumstances will force either side, at any time, to feel that it would be wrong to wait until the contract ends for revision of some of the terms of the agreement. Here the British problems come to the fore. It might be felt necessary that the ‘end of contract’ position could, in proper circumstances, be put into play – to allow action against refusal to amend working practices enshrined in the collective agreement where the employer’s business would be under real threat without change, or to allow an allegedly dangerous practice introduced into a workshop. Both might be felt to need action before the collective agreement allowed it.

Once that is accepted, the individual contract of service has to be so constructed as to support that system, rather than provide a separate method of challenge to it. The law has so far under the present rules made no clear effort to achieve this co-ordination, presumably because the matter has never been seriously addressed in this way.

The Law

Not surprisingly the basic assumption is that the parties to the employment contract have set out the principal terms they deem to be necessary. Yet this is rarely so and great reliance is placed upon terms applied by implication, often under the guise of ‘custom and practice’. For example, the employer on occasion will have no work for the employee and ‘lay him off’. Such a situation is often covered in a collective agreement, as the relevant trade union attempts to give some limited measure of protection to its members, which will by incorporation form part of their contracts of service. Failing such provisions the common law position depends upon implication by the courts of a term and can be said to be ‘unclear’.¹⁷ This lack of clarity cannot be allowed to pass without the remark that it is an outrageous *lacuna* in the law which ‘the law’, whatever that might be, has

17. See, e.g., the discussion in Smith & Wood, *Industrial Law* 4th Ed., at p.389 *et seq.* on lay off and short time – a typical ‘custom and practice’ area.

failed to fill. To leave it to the parties, well knowing that they are not likely in very many cases to give it attention, calls out for a legal rule rather than a *post hoc* implication of a term.¹⁸ It is becoming less and less satisfactory to say that the matter can be left to collective bargaining as the number of workers covered declines.

The same uncertainty applies to strikes, except that it is much harder to imagine the courts implying a contractual term giving some measure of contractual protection to the striking worker. Indeed Wedderburn says "in Britain it is rare to find they have not occasioned breaches of contract".¹⁹ The widespread use of strike notices has no marked impact on the legal position despite their common use. Again in Wedderburn's words, "there is no belief more widespread, more reasonable, but legally more erroneous, than that held by many managers and most workers that a strike notice, equivalent in length to that needed to end the contract, makes industrial action lawful."²⁰

Individual precedents are of limited value since they arise in special situations and concern a contract shaped personally by the parties. Thus the most recent case to look generally at the problem, concerned the right to a redundancy payment that would depend on there being a continuing contract, despite a strike. After a review of the precedents it was accepted that going on strike could be treated by an employer as a breach of contract, irrespective of strike notice having been given. The possibility that the contract should be regarded in those circumstances as suspended was put to the court but rejected.

Morgan v. Fry

The concept of the suspended contract forms an important part of the earlier case of *Morgan v. Fry*.²¹ There had already been a recognition by Lord Devlin in *Rookes v. Barnard*²² that in reality the striker hoped to keep the contract alive for as long as possible. This point was developed by Lord Denning. The crux of the case was the effect of the strike notice, of a week's duration, that had been given. It had indicated an unwillingness to work with non-union labour. In a previous case, Lord Denning had dealt with a similar situation and had considered that such a notice on the part of a trade union official was a threat to induce the members to break their contracts and was intimidation of the employer. Although logical, Lord Denning saw the flaw – saying "if that argument were correct, it would do away with the right to strike in this country." He took the view that for over 60 years there had been a right to strike provided that sufficient notice was given. He

18. For a fairly recent example, see *Puttick v. John Wright & Sons (Blackwall) Ltd.* [1972] I.C.R. 457.
19. *The Worker and the Law* 3rd. Ed., at p.191.

20. *Ibid.* See, *supra*, n. 19.

21. [1968] 2 Q.B. 710.

22. [1968] 2 Q.B. 710.

cited instances to be found in reported case law.²³

Lord Denning set out clearly the legal basis for his decision:

“The men can leave their employment altogether by giving a week’s notice to terminate it. That would be a strike which would be perfectly lawful.

. . . The truth is that neither employer nor workmen wish to take the drastic act of termination if it can be avoided. The men do not wish to leave their work for ever. The employers do not wish to scatter their labour force to the four winds. Each side is, therefore, content to accept a ‘strike notice’ of proper length as lawful. It is an implication written into the contract of modern law as to trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike and revives again when the strike is over.”

This view was, to say the least, controversial. Although Davies LJ appears to have agreed on the point with Lord Denning, Russell LJ said:

“I would not go so far as to say that a strike notice, provided the length is not less than that required to determine the contracts, cannot involve a breach of those contracts, even when the true view is that it is intended while not determining the contract not to comply with the terms or some of the terms of it during its continuance.”

Lord Denning’s view did not prevail. It did not even get a warm welcome. The leading writer on the contract of employment, Freedland, said “The view of Lord Denning is questionable upon historical grounds, though defensible upon policy grounds.”²⁴ Not surprisingly in a legal text, “historical grounds” means what is to be found in the reports rather than how employers generally behaved. There had been a rejection of the view, later put by Lord Denning, in *Parkin v. South Hetton Coal Co. Ltd.*²⁵ Lord Wedderburn, having looked at the complexity of such a rule in his evidence to the Donovan Commission, took the view that Denning’s approach had too many complexities to be workable. His conclusion, in his text book, is that it was “a bold if misconceived effort to invent a doctrine whereby, in the modern law of trade disputes, a term is implied into contracts such that, after a strike notice, the contract is suspended during the strike and revives again when the strike is over.” This is difficult to reconcile with the further expression of opinion that “even so, he was right to say there cannot be a right to strike without

23. *Allen v. Flood* [1898] A.C. 1; *White v. Riley* [1921] 1 Ch. 1 – cases which were not disapproved in *Rookes v. Barnard*. An inadequate notice would not have this effect according to two Irish cases: *Cooper v. Millea and Ors* [1938] I.R. 749 and *Riordan v. Butler and Ors* [1940] I.R. 347. The notice in *Rookes v. Barnard* was also of inadequate length.

24. *The Contract of Employment*, Oxford (1976), at p.103.

25. (1907) 97 L.T. 98.

some doctrine superseding the employment contract.”²⁶

The difficulties referred to by Lord Wedderburn are set out in paragraph 943 of the Donovan Report. They appear on reflection precisely the sort of difficulties of detail that are inevitable where a rule of law is meant to apply to the infinite variety of employment contracts. There is no doubt that it is true that “considerable technical difficulties would be encountered”. The law seems to live with technical difficulties, as the case law on unfair dismissal indicates. Indeed, unless it is determined to allow the application of principle, complexity inevitably flows from the attempt to apply a tightly drafted ‘law’ to a multiplicity of varying facts. In conclusion the Commission felt that the undoubted complexities meant that “a unilateral right to suspend a contract of employment should not be introduced except after prior examination of the whole problem and its possible repercussions by an expert Committee.”

Current position

The failure to follow this up has not had too great an effect because of an important rule in unfair dismissal. It has already been explained that where strikes were settled it was usual for the employer and trade union to agree that the workers would be taken back without penalty, such as loss of seniority or continuity of employment for various purposes. The rules of unfair dismissal assisted in this process. Fairness dictated that where a strike had taken place and the disagreement had been settled there should be no discrimination against individuals, whether as ‘ringleaders’, ‘activists’ or whatever. This was enshrined in the original rules laid down by the Industrial Relations Act 1971 and is now to be found in s. 62 of the Employment Protection (Consolidation) Act 1978, amended by the Employment Act 1984. A claim can be brought unless the employer has dismissed all those taking part in the action at the same establishment and has not offered re-engagement to any of them within three months of the date of their dismissal. This rule applies whether the action was official or unofficial. Obviously the inability to target individuals was a fetter on the way some employers would wish to act. In its latest Green Paper, *Unofficial Action and the Law*,²⁷ the Government has announced its proposal to repeal this rule and to re-inforce the employer’s position by providing that the statutory immunities will not be available in respect of industrial action the reason for which is to bring pressure on an employer in support of anyone dismissed while taking part in unofficial industrial action.

In one of the ‘headline’ disputes, that between the printing unions and the Murdoch newspapers it was disclosed by a newspaper ‘leak’ that the employer had been advised of his right to dismiss all his workforce without fear of compensation provided none were re-engaged. Since the plans of the employer involved recruiting at least a number of workers, not being members of the print unions, it

26. *The Worker and the Law*, at p.192 *et seq.*

27. Cmnd. 821, Department of Employment, October 1989, Chapter 3.

was consistent with his aims to follow this advice. Where, however, an employer could not consider losing all or most of his workforce, such action was not practical. Now, however, it is proposed that the employer shall have a free choice as to which of the strikers he will refuse to continue in his employment. The threat will no doubt prove to be a powerful restraint on strike action.

Conclusions

There can, at the present time, be little general agreement as to the desirable position. Few would support an unfettered right to strike, many would want to see striking regarded as a serious challenge to the employer, not to be lightly used, whereas too many appear to regard any rules that make striking difficult or even hazardous as beneficial.

These views are held against a background of law that is, it can be said without exaggeration, unclear, exceptionally complicated, and illogical. It would be, in many situations, hazardous to speculate how the courts may subsequently analyse and react to any particular set of actions. This is no doubt one of the reasons for the hesitation of the Donovan Commission in attempting to suggest a remedy.

It is clear that the idea that the contract be regarded as suspended merits further consideration. The changes in the law of strikes, especially the requirement of a strike ballot as the basis for protection, make it easier to contemplate extension of clearer legal consequences. It can hardly be expected that an ordinary worker, asked by his union to strike on say a simple matter such as a disputed level of pay rise, can contemplate that such action should lead to a loss of his job. Indeed it is unlikely that he will be dismissed, but now that he lacks almost any protection his position must be prudently regarded as precarious.

Judges such as Lord Devlin and Lord Denning, who have the reputation of considering the impact of the law, have, as has been mentioned, both indicated that suspension of the contract of employment more nearly describes the reality of the situation. Such suspension need not be of unlimited duration. It can be refined so as to take into account the difficulties foreseen by the Donovan Commission. It can be limited to meet the objections of those who may see it as an open ended 'right to strike'. The time, however, has surely come to look again at Denning's bold, and perhaps not misguided, opinion.