

Square peg versus a round hole? The Necessity of a Bill of Rights for Workers

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Abstract

The exercise of human rights is put at risk by the creation, conduct, and termination of employment relationships. For this reason, we often find that fundamental rights arguments are invoked in disputes between employers and workers and the mechanisms of labour and employment law are pressed to vindicate those rights through a process of ‘constitutionalisation’. Notably, the European Convention on Human Rights, through the doctrine of positive obligations, places important demands upon national legal systems, their legislators and their judges, to protect the rights of individuals against other private parties. Taking the law of dismissal in England & Wales as an illustrative example, this article argues that the current approach to safeguarding workers’ rights and complying with the Convention’s positive obligations is inadequate. Making adjustments to the existing structure of employment rights will always be insufficiently radical as those structures are ill-suited to performing this function, their limitations are systemic and furthermore the judiciary is unwilling to disrupt the established analytical approach. Instead, I propose and detail an alternative solution: introducing a Bill of Rights that would render the rights of the European Convention enforceable between worker and employer.

Keywords

Human rights, employment law, dismissal, constitutionalisation, European Convention on Human Rights

In modern life, it is clear that private actors, not traditionally bound by constitutions or international rights declarations, pose a significant threat to an individual’s exercise of their human rights.¹ It is not novel to observe that healthcare and transport providers, insurers and banks,

1. See the powerful expositions by Summers and Thomas: Clyde W. Summers, ‘The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law’ (1986) *University of Illinois Law Review* 689, 692-3; and Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015) 5-11.

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retailers and service providers all have the capacity to have an impact upon a person's enjoyment of their fundamental rights. We have decades of case law as well as many anecdotes, reports and investigations that show that relationship of employment similarly puts one's rights at risk. Some have even gone as far as to argue that there is an inherent conflict between the subordination of an individual to another via an employment contract and the free and autonomous exercise of fundamental rights.² Through their power of dismissal, employers are able to enforce their preferences and demands upon their workforce, on many occasions expanding their authority well beyond the boundaries of working time and influencing the most fundamental choices made by their workers.

In recognition of the threat posed by employers to the exercise of human rights by individuals in work, the labour relations context has been a key area of activity in the 'constitutionalisation' of the private sphere across many jurisdictions. Here, by 'constitutionalisation', I mean the extent and means by which *vertical* rights usually held in relation to the state become actionable or influential in *horizontal* relationships.³ Across European jurisdictions, a number of general approaches can be identified towards this phenomenon although the fundamental rights at stake may come from a variety of sources, national, regional or international. A general divide has been drawn between direct effect, which pushes aside existing private law rules or doctrines to ensure that human rights are adequately secured; and indirect effect.⁴ The latter is a process whereby the existing private law is interpreted and shaped (to varying degrees) to reflect and enforce fundamental rights in private litigation. Common pathways to the horizontal effect of human rights include: constitutional review of a private law decision or statute; an obligation or willingness to interpret existing legislation in accordance with fundamental rights; the pervasion of human rights through general clauses of a civil code; and the evolution of case law in a manner reflective of those rights. Each route, or combination of routes, holds vast potential to reshape the established rights, rules and decisions of labour law.⁵

The course taken in each jurisdiction is intimately linked to its judicial and constitutional apparatus.⁶ For example, the rights contained in the German Constitution are considered to be a set of values which have a radiating effect throughout the legal system, including private law.⁷ In Greece, the applicability of human rights between private parties was acknowledged in the 2001 Constitution and the courts have adopted a range of approaches including direct horizontal effect

2. Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds.), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 58.

3. See Hans W. Micklitz, 'Introduction' in Hans W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford University Press, 2014). In labour law discourse, 'constitutionalisation' can also refer to the elevation of rights previously seen as labour rights to the status of fundamental human rights: see, for example, Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 *Comparative Labor Law and Policy Journal* 29; and Harry Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 *Social & Legal Studies* 403.

4. See Alison Young, 'Mapping horizontal effect' in David Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011); and Aharon Barak, 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez, *Human Rights in Private Law* (Hart Publishing, 2001).

5. We may wish to query whether labour law or employment law can or should be considered private law, despite their traditional classification as such: Mark Freedland, 'Employment Law' in John Bell, Sophie Boyron and Simon Whitaker (eds.), *Principles of French Law* (2nd edn, Oxford University Press, 2008).

6. See the exploration in Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in Hans W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford University Press, 2014).

7. BVerfGE 7, 198 ff of 15 January 1958 (Lüth).

and indirect effect through general clauses and statutory interpretation.⁸ Within Europe, the UK is unique. Important contributors to the constitutionalisation process, a written constitution or a civil code, are both absent. For this reason, it is an interesting case study to examine. In common with other jurisdictions, statutory interpretation has been a key element in seeking to reflect human rights in private relationships. The Human Rights Act 1998 mandates that statutes should be interpreted compatibly with the European Convention on Human Rights ('the ECHR' or 'the Convention') as far as it is possible to do so.⁹ In the labour and employment sphere, where statutory regulation dominates,¹⁰ this obligation is a powerful tool for litigators. How far this obligation has resulted in true compliance with the Convention, however, is the topic of this article.

The European Convention provides a common standard across most European jurisdictions regarding the safeguarding of human rights in the private sphere, although its impact undoubtedly varies per jurisdiction.¹¹ The role of human rights in disputes between private actors has been advanced through the European Court of Human Rights' ('the ECtHR' or 'the Court') doctrine of positive obligations.¹² Where many of the rights contained in the Convention consist of a negative prohibition upon the state, an obligation not to infringe a particular right, positive obligations require some action. Amongst other obligations, the state is mandated to put in place measures to ensure that individuals' rights are safeguarded from infringement by other private actors.¹³ Without undertaking these steps, the protection of human rights in a jurisdiction would be incomplete and flawed. Just as a direct infringement by a Member State of an Article of the European Convention on Human Rights leads to a finding of breach, so too would a failure to comply with the state's positive obligations.

Below, I will develop an account of three key positive obligations that the Council of Europe Member States are subject to as a result of the Court's jurisprudence. The main body of this article will focus on assessing the approach adopted by the English legal system in attempting to comply with these obligations. Here, I argue that the method adopted by the courts, the legislator and the commentators is an 'adaptive' one. Where litigation or analysis exposes the existence of a gap or inadequacy in the protection of Convention rights in dispute about work, either the judges,¹⁴ or occasionally Parliament,¹⁵ are called upon to rectify the problem. For specific problems, specific

8. Christina Akrivopoulou, 'Taking Private Law Seriously in the Application of Constitutional Rights' in Dawn Oliver and Jörg Fedtke (ed.), *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, 2007).

9. Human Rights Act 1998, section 6.

10. ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland (ed.), *The Contract of Employment* (Oxford University Press, 2016).

11. Contrast, for example, the 'Conventionalisation' of private law in France with the lack of emphasis on the ECHR in Germany and Greece: see Myriam Hunter-Henin, 'France - Horizontal Application and the Triumph of the European Convention on Human Rights'; Jörg Fedtke, 'Drittwirkung in Germany'; and Christina Akrivopoulou, 'Greece - Taking Private Law Seriously in the Application of Constitutional Rights' in *Human Rights and the Private Sphere*, n. 8 above.

12. For a detailed discussion of the doctrine of positive obligations, see Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016).

13. A number of prominent cases regarding the doctrine of positive obligations were set within an employment dispute: see *Young, James and Webster v United Kingdom* (1981) 3 EHRR 20; *Wilson v United Kingdom* (2002) 35 EHRR 20; and *Sánchez v Spain* (2012) 54 EHRR 24.

14. See, for example, *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634; *Vining and others v London Borough of Wandsworth* [2017] EWCA Civ 1092, [2017] IRLR 1140; and *Gilham v Ministry of Justice* [2019] UKSC 44, [2020] 1 All ER 1.

15. See the amendment to unfair dismissal law made in Enterprise and Regulatory Reform Act 2013 after the ECtHR's decision in *Redfearn v United Kingdom* (2013) 57 EHRR 2.

solutions are found. The academic commentary generally adopts the same process: the existing law is probed for deficiencies, and amendments are proposed to fix the problem.¹⁶ My argument is that the adaptive approach is doomed to fail. It fails to confront the fundamental and systemic tensions between the origins, design and judicial approach to the enforcement of employment and labour law and the demands of human rights documents, in this case the positive obligations under the European Convention on Human Rights.

What, then, can colleagues from other jurisdictions learn from the challenge levelled here? Firstly, the targeted nature of the modifications prioritised by an adaptive approach is likely to be common to a number of jurisdictions. To assess fully a system of labour law and ensure that individuals receive appropriate protection of their human rights at work, a rounded view of the whole regime is needed. In practice, however, litigation is often the driving force of the analytical process. Litigation focuses on specific facts and confined legal issues. It side-lines a far-reaching evaluative process, such as the one embarked upon here. Within each jurisdiction, we must ask: have we done enough to ensure that workers' human rights are safeguarded? Secondly, some of the tensions exposed below between the Convention's positive obligations and the existing labour law regime of England & Wales may be replicated in other countries. For example, labour law's traditional focus on subordinate and dependent work relationships will be explored below, as well as the clear challenge posed to this confined scope by the Convention's universality. Where the private law regime in question has been designed in accordance with specific purposes and through a process of political compromise, limitations are bound to arise when it is examined from a fundamental rights perspective. This piece focuses on the challenges that arise in the UK, and in England and Wales (E&W) specifically, but many of the deficiencies exposed may have counterparts in other jurisdictions that are subject to, and in tension with, the same obligations under the European Convention.

As it is the ultimate threat and the most severe way in which an employer could infringe upon the human rights of an individual worker, this article focuses on the regulation of dismissal. There are two ways in which the law in E&W regulates the employer's right to terminate employment: via statute (unfair dismissal) and via the common law of the contract of employment (wrongful dismissal). Both, it has been argued, could be adapted and amended to reach a point at which they are able to vindicate the fundamental rights of individuals and comply with the European Convention. Section I will introduce both branches of dismissal law and give examples of ways in which the adaptive model could be applied to make adjustments to their operation to improve the standard of fundamental rights protection. In section II, I draw upon ECtHR case law to formulate three key positive obligations imposed upon Member States in the employment sphere, focusing particularly on those associated with the qualified rights in the Convention. Here, I begin to expose some of the difficulties and limitations of the 'adaptive model' when applied to the law of dismissal.

The third section turns to dismissal law and conducts a comprehensive evaluation of whether it is capable of fulfilling the role of properly safeguarding human rights. From the origins and purposes, to the operation and design of the causes of action, there are deep-seated tensions

16. See, for example, Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland (ed.), *The Contract of Employment* (Oxford University Press, 2016), in particular 202-207; Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48 ILJ 515; and Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909.

between dismissal law and the demands of the Convention. This section concludes with an argument that the judges who develop or apply the law are either confident that dismissal law has *already* achieved compliance or reluctant to engage fully with the human rights dimensions of dismissal cases. This polarity of judicial viewpoints presents a very particular challenge to the standards of Convention protection: difficulties with effective enforcement in the lower courts and tribunals but a lack of urgency regarding judicial intervention at the senior level.

In the final part of the piece, I propose an alternative solution to the problem of non-compliance: a legislative framework that would render the Convention rights enforceable between worker and employer. It thus firmly adopts a doctrine of horizontal direct effect, albeit tailored specifically for the employment context.¹⁷ The suggested framework goes beyond providing retrospective intervention upon a dismissal: other forms of detriment would be included in addition to mechanisms to challenge prospectively employer practices or contractual terms that undermine the exercise of fundamental rights at work. In extending the regulatory proposal beyond the events surrounding dismissal decisions, I move past the current literature's focus primarily on dismissal law and provide a means of ensuring consistent compliance with the Convention. I focus on the mechanisms of protection available under the Bill, drawing upon the regulatory techniques of human rights law and discrimination law in particular. The concluding section will note avenues for expansion of the legislative proposal.

I. The current approach: Reshaping the hole to fit the peg

In dismissal proceedings, there are two ways in which an employer could infringe upon one's fundamental rights. The reason for the dismissal might relate to how the individual has exercised those rights or, in the process of investigating or making the decision, a right may be infringed upon. If the worker is a trade union member or representative and faces detriment as a result of that membership or status, they could look to the Trade Union and Labour Relations (Consolidation) Act 1992. If the reason for the dismissal or ill-treatment is related to one's gender, sexual orientation, manifestation of a religious belief or other protected personal characteristic, the Equality Act 2010 may provide a remedy. Other specific events attract particular safeguards, such as whistleblowing¹⁸ or a breach of data privacy.¹⁹ But not all human rights infringements are matched with specific protection. For example, Mr Redfearn sought to challenge his employer's decision to dismiss him as a result of his activities as a member of the right-wing British National Party,²⁰ and Mr Williams was subject to an invasive electronic investigation by his employer, in breach of his Article 8 right to privacy.²¹ These claimants were unable to turn to a specific cause of action. In these circumstances, there are two main routes through which a worker could attempt to vindicate their human rights.

17. See Collins' concerns regarding the unmodified transplantation of vertical human rights into a horizontal private setting: Hugh Collins, 'On the Incompatibility of Human Rights Discourse and Private Law' in Hans W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford University Press, 2014) 34-6.

18. Public Interest Disclosure Act 1998.

19. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L-119/1.

20. *Redfearn v Serco Ltd* [2006] EWCA Civ 659, [2006] ICR 1367.

21. *Williams v Leeds United Football Club* [2015] EWHC 376 (QB), [2015] IRLR 383.

The first is to rely on the statutory claim of unfair dismissal and argue that either the reason or the manner of the dismissal was unfair in light of the employer's infringement upon the worker's human rights. The statutory right not to be unfairly dismissed requires the employer to produce a fair reason for a dismissal, such as a lack of capability or misconduct on the employee's part,²² and to convince an Employment Tribunal that they acted reasonably in treating that reason as a justification for the dismissal.²³ If the employer is not successful in either endeavour, the employee can request to return to their old job or, most commonly, receive an award of compensation.²⁴ As a right derived from statute, it has been accepted that the law of unfair dismissal must be read and applied in a manner compatible with the Convention due to the operation of section 6 of the Human Rights Act 1998 ('the HRA').²⁵ This statutory route is the one most tested by litigation thus far and demonstrates the acceptance in English law of the statutory form of indirect horizontal effect.²⁶

The second route through which one could seek to incorporate human rights components is contractual, arguing that the employer has committed a breach of the contract of employment through their decisions and entitling the worker to damages at common law. A common law claim would arise in response to disciplinary actions that are not in accordance with the terms of the contract²⁷ or conduct in breach of an obligation implied by law into contracts of employment, such as the implied term of mutual trust and confidence.²⁸ For a time, it was considered possible that the manner of a dismissal could result in breach of this same implied obligation but this was closed off in *Johnson v Unisys Ltd*,²⁹ discussed further below. Currently, a dismissal is mostly likely to be wrongful if it is in breach of the entitlement to a notice period. A successful claimant is entitled to damages or, in an appropriate case, an injunction to end a continuing breach of contract. It has been suggested that the open-ended range of implied terms could be developed to provide protection for the Convention rights of workers,³⁰ disclosing a common law route to the fulfilment of the positive obligations that those rights entail.

These alternatives are examples of the currently dominant method of providing a resolution for claimants who have had their human rights infringed upon by their employer. Here, I label it 'the adaptive model'. We take the mechanisms outlined above and tweak, adapt or extend them in suggested ways and thereby ensure that the claimant has an adequate route to challenge their employer's rights-infringing behaviour or decisions. For example, we might recommend that, as there is no express term in the contract of employment that employers must respect the human rights of their employees, the range of terms implied by law should be expanded to encompass these rights.³¹ Discussion then focuses upon whether such a development is likely and what

22. Employment Rights Act 1996, section 98(2).

23. *ibid*, section 98(4).

24. *ibid*, sections 113-123.

25. See *X v Y*, n. 14 above.

26. See also the notable case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

27. For example, *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2012] All ER (D) 201.

28. See *Malik v Bank of Credit and Commerce International S.A.* [1998] AC 20; *Bliss v South East Thames Regional Health Trust* [1985] IRLR 308; *TSB Bank Plc v Harris* [2000] IRLR 157; *Stevens v University of Birmingham* [2015] EWHC 2300 (QB), [2015] IRLR 899.

29. *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518.

30. Bob Hepple, 'Human Rights and Employment Law' [1998] *Amicus Curiae* 19; and Bob Hepple, *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell, 2005) 56.

31. See Collins and Mantouvalou, 'Human Rights and the Contract of Employment', n. 16 above, 205 and Atkinson, n. 16 above.

specific form it could most desirably take. With regard to unfair dismissal law, it has been argued that, where a claimant has been dismissed for a reason related to an exercise of their Convention rights, the usual qualifying period that bars a claim by new employees should not apply to the case.³² Other suggestions in line with an adaptive approach can be found across the growing literature in this area.

The difficulty that this piece exposes with this model for compliance with the Convention is that it simply does not go far enough. Whilst each proposal responds to a particular problem or a specific statement by the ECtHR, a step back is required. The Convention's demands upon the domestic framework present a clear and systemic challenge to the foundational assumptions underlying the mechanisms as they stand and the extent to which UK employment law currently underperforms when analysed from this perspective is not fully recognised. Minor changes to the structure of protection and the approach of the courts are insufficient to achieve full compliance: it is the argument of this article that a legislative solution is required, designed in light of the requirements of the Convention and dedicated to the effective enforcement of the human rights of workers.

II. The ECHR's positive obligations in the employment sphere

To assess the national standard of protection of human rights in the workplace, we must have an understanding of the expectations placed upon the legal framework by the Convention. Here, my focus is particularly upon the qualified rights of the Convention, which are commonly invoked in employment litigation and are incorporated into UK law through the HRA 1998. It is the HRA that generates, under domestic law, an expectation of compliance with the Convention that extends well into private law mechanisms³³ and the ECHR's doctrine of positive obligations which gives classically vertical rights a 'horizontal dimension'.³⁴ Rather than simply requiring inaction or non-interference from Member States' authorities, positive obligations require action to ensure the enjoyment and protection of Convention rights in their jurisdiction, particularly for our purposes when a right has been violated by another private parties such as an employer. Articles 8 (respect for private life), 9 (freedom of thought and religion), 10 (freedom of expression) and 11 (freedom of association) entail a number of comparable positive obligations upon Council of Europe Member States, which can be derived from ECtHR case law. I argue here that there are three key obligations: to reflect the universality of human rights by providing all individuals with an opportunity to challenge a potential Convention infringement; to incorporate the Convention's principles through the application of an aim/necessity analysis; and to recognise the seriousness of a Convention infringement by offering the individual an adequate remedy. A failure on the part of the

32. Collins and Mantouvalou, 'Redfearn v UK: Political Association and Dismissal', n. 16 above, 916.

33. The two most noted examples are *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, where the tort of breach of confidence was 'radically remodelled to protect privacy' and the values of Article 8 (see G. Phillipson, 'Privacy: the development of breach of confidence – the clearest case of horizontal effect?' in David Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 163); and *Ghaidan v Godin-Mendoza*, n. 26 above, in which the legislation was re-interpreted to extend the right to succeed to a partner's tenancy to same sex couples.

34. Olha Cherednychenko, 'Towards the control of private acts by the European Court of Human Rights?' (2006) 13 *Maastricht Journal of European & Comparative Law* 195, 197.

UK to comply with any of these positive obligations could result in a successful challenge before the ECtHR.

The first requirement is that an individual who believes that their Convention rights have been infringed upon must be able to make a complaint to a court or tribunal and receive a ruling from that court. The Convention's safeguards are universal and in cases where a violation of a qualified right has been found, it is 'decisive' in the context of the state's positive obligations 'that the domestic courts or tribunals be allowed to pronounce on whether or not, in the circumstances of a particular case, the interests of the employer should prevail over the [Convention] rights asserted by the employee'.³⁵ This entitlement to review does not attach to individuals by reason of their employment, their occupation or their contractual status and the ECtHR does not take account of how national systems may demarcate and distribute rights amongst the workforce.³⁶ The universal obligation to protect, the Court's inclusive approach to identifying individuals as entitled to its attention,³⁷ and the requirement not to discriminate between individuals in the enjoyment of their Convention rights³⁸ (for example, on the ground that they are not classified as 'employees' by the national courts) present a stark challenge to the boundaries of domestic employment law.

The Convention's inclusivity conflicts with the exclusivity of employment rights: the statutory and common law protections at issue here are available only to the tightly confined category of 'employees'. Defined by a battery of constricting tests and indicators,³⁹ the 'contract of employment' has proved to be an effective exclusionary devise.⁴⁰ Where the domestic tribunals seek 'control', 'integration' and a lack of economic risk in order to hear an employee's case, the ECtHR pays no regard to these factors before considering an individual's complaint. A chasm between the two systems is therefore exposed, but the adaptive method is yet to confront fully the tension between the dominant position of the contract of employment and the Convention's universality. An entrenched and central element of employment law structures, Lord Justice Elias recently issued a powerful reminder that there are limits to the judges' competences in re-moulding the doctrines of the contract of employment: 'it does not follow that because there is a problem, the judges can fashion the solution. There is a limit to how far they can develop or modify established doctrines.'⁴¹ There seems to be a stalemate. The narrow strictures of the relational scope of employment rights is contrary to the Convention, but the judges may be unable or unwilling to alter it, exposing a deficiency in the adaptive approach.

The second obligation falls upon courts and tribunals: to engage with a Convention infringement where it has occurred and to assess its necessity and proportionality in accordance with the Convention text and the Court's case law. Adequate weight must be given to the rights of the individual in the justification exercise,⁴² which includes consideration of the legitimate aim, the necessity of the infringement and whether a less severe alternative would have achieved the

35. *Redfearn v UK*, n. 15 above, [56].

36. *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10, [140].

37. See the discussion of *ibid* and other ECtHR cases in Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 ILJ 504, 512-515.

38. ECHR, Article 14.

39. Simon Deakin and Gillian S Morris, *Labour Law* (6th edn, Hart Publishing 2012) 159-171.

40. Einat Albin and Jeremias Prassl, 'Fragmenting Work, Fragmented Regulation' in Mark Freedland (ed.), *The Contract of Employment* (Oxford University Press, 2016) in particular 218-224.

41. Patrick Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 OJLS 869, 886.

42. *Schüth v Germany* (2011) 52 EHRR 32, [67].

same aim. This process examines the substance of the decision and can constitute a fairly invasive standard of review. It similarly applies to any contractual terms or employer-generated rulebook,⁴³ where such documents have an impact upon the enjoyment and exercise of Convention rights in the working relationship. Given that those documents grant an employer the powers and discretion to manage and discipline a worker, it would render the Convention ineffective if judicial authorities were not mandated to be cautious regarding their interaction with the exercise of fundamental rights. Previously, some of the difficulties with the law of unfair dismissal's compliance with these obligations have been exposed,⁴⁴ even many years after the Court of Appeal accepted that a Convention-style justification process is required in cases where an infringement has been found.⁴⁵ Similarly, the contractual derivation of the common law and its association with freedom of contract sit uncomfortably with a requirement to scrutinise the content of a contract of employment and potentially override that contract if its terms or the consequences of its enforcement is found to be an unjustified breach of a Convention right. Again, we may begin to question whether minor adjustments to the legal framework of protection will be sufficient to ensure full compliance with the need to respect the human rights of workers.

If an infringement upon a Convention right is found not to be justified, the final positive obligation upon Member States is to offer a remedy to the individual. An element of the broader requirement that states should 'set up a system for [the right's] effective protection and implementation in cases of unlawful interference falling within its scope',⁴⁶ there is a clear requirement to offer an adequate remedy.⁴⁷ Components of the remedy should include pecuniary and non-pecuniary losses, including for 'moral injury', hurt feelings, distress and anxiety.⁴⁸ Here, the adaptive approach could bring unfair dismissal law close to compliance, albeit with some fairly significant amendments:⁴⁹ the removal of the cap on compensation and of some of the means by which the claimant's compensation can be reduced,⁵⁰ as well as the reversal of the well-established position that non-pecuniary losses are not recoverable.⁵¹ The remedies at common law are, however, severely inadequate, limited as they are to wages for a short notice period. A complete overhaul of the remedial dimension of this mechanism would be required, if the adaptive route is to be followed.

Before moving on from the Convention's framework, it must be acknowledged that the above expectations arise in conjunction with the Member State's margin of appreciation. In the context of qualified rights, the Member States have an opportunity to balance the protection of an individual's right against the interests of the community. When examining the balance that has been struck in a particular instance, the intensity of review by the ECtHR can vary depending on the context. Lighter touch review occurs where the Member State has a wide margin of appreciation, affording the authorities of the jurisdiction discretion in deciding how and in what form human rights should

43. *Bărbulescu v Romania* [2016] IRLR 235.

44. P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law', n. 37 above.

45. *X v Y*, n. 14 above.

46. *Kyriakides v Cyprus* [2008] ECHR 39058/05, [53]-[54]. This obligation is also reinforced by Article 13 ECHR which provides the right to an effective remedy where the Convention has been violated.

47. *ibid*.

48. See P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law', n. 37 above, 526-8.

49. See *ibid* and Collins and Mantouvalou, '*Redfearn v UK: Political Association and Dismissal*', n. 16 above, 921.

50. ERA 1996, section 123(6) and *Polkey v AE Dayton Services Ltd* [1987] 3 WLR 1153, [1988] AC 344, which establishes a reduction in compensation where the claimant would have been dismissed shortly after the unfair dismissal.

51. See *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45; and *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36, [2005] 1 AC 226.

be safeguarded, and in particular whether an infringement upon a right answers a pressing social need within that state.⁵² One might argue that, despite the arguments below, the UK is within its margin of appreciation with regard to the protection of the qualified rights in the workplace. My response would be two-fold. Firstly, the margin of appreciation ‘goes hand in hand with a European supervision’⁵³ and it is not within the discretion of the Member State authorities, be they legislators or adjudicators, to offer *no* or *very limited* protection to those rights. Secondly, once we have ascertained the expectations and demands of the Convention through a reading of its case law, the margin of appreciation has no role to play in the domestic enforcement and consideration of Convention rights.⁵⁴ The domestic courts thus cannot avail themselves of the margin of appreciation to avoid scrutinising an infringement or complying with the positive obligations set out above. The margin of appreciation has no role to play in resolving a domestic dispute between an employer and employee.

III. The tensions between dismissal law and the Convention’s expectations

Having begun to expose the difficulties of making adjustments to the existing mechanisms to bring them into line with the Convention’s expectations, this section turns to the specifics of dismissal law. Whilst others have been optimistic and creative in proposing incremental ways forward, I offer a contrasting perspective. Elsewhere I have previously observed the barrage of practical obstacles that face an individual aiming to utilise unfair dismissal law to realise their human rights arguments,⁵⁵ but this section takes a different approach. It examines the underlying tensions between the Convention’s expectations and these causes of action as they have developed. My analysis focuses in particular on the deficiencies of design of the two remedial mechanisms with respect to dismissal; on the ‘double subordination’, firstly of the judiciary to the employer and secondly of the employee’s fundamental rights to the contract of employment; and also on the reluctance of the judiciary to take into account the continuing necessity of protecting human rights through dismissal law. This exposition leads to the suggestion, made in section IV, that the optimal approach is to adopt a dedicated legislative solution, designed to comply with the positive obligations set out above and to offer a high standard of protection to the Convention rights of individuals at work.

A) The difficulties of ‘repurposing’: The origins and design of dismissal law

When critiquing employment law’s lack of compliance with Convention rights and expectations, it is difficult to avoid the counter-argument that this function was well outside the contemplation of those responsible for designing the protections at the point of dismissal. The origins and purpose of dismissal law, in both its forms, were far-removed from the positive obligations that have since

52. *Handyside v United Kingdom* (1979) 1 EHRR 737, [48].

53. *ibid* [49].

54. David Pannick, ‘Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment’ [1998] PL 545, 548; and Keir Starmer, *European human rights law: the Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, 1999) 190 and see *R. (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [63] (Lord Hoffman).

55. P. Collins, ‘The Inadequate Protection of Human Rights in Unfair Dismissal Law’, n. 37 above.

been imposed upon the UK through the European Convention. This historical context also informs many of the other disjuncts between employment law mechanisms and fundamental rights that are explored below.

The first observation is the narrow focus of employment law, when contrasted with the universality obligation outlined above. Both the statutory and common law dismissal protections were conceived of within the established confines of employment law. It includes a concern for the safeguarding of a particular type of individual within a particular type of working relationship. The ‘central case’ that has attracted employment law’s attention is the subordinated and dependent worker who works full-time for a single employer for an indeterminate period of time. Taking a historical and comparative view, Mark Freedland observes:

‘There is no doubt that most employment law systems reflect a strong intuition that there is a strong and clear distinction between dependent employment and independent working, and moreover that employment law is concerned with the former kind of work and not the latter.’⁵⁶

In English law, the bilateral divide between the ‘contract of service’ and ‘contract for services’ determined the availability of workplace rights. Wrongful dismissal law, in particular the protection of the terms implied by law,⁵⁷ and the law of unfair dismissal are only applicable to individuals who work under a ‘contract of employment’.⁵⁸ As a result, agency workers, office holders, casual workers and many others have been excluded from the entitlement to challenge ill-treatment by their employer.⁵⁹ The instinct to confine employment law’s personal scope has also been seen in relation to subsequent, broader statutory definitions.⁶⁰ The strength of this implicit commitment to exclude those whose working arrangements are not aligned to the paradigm model of an employee conflicts with the universality of the Convention’s positive obligations outlined above.

Within that narrow relational focus, each stem of dismissal protection has arisen in a unique way, with important effects for the feasibility of these mechanisms fulfilling a Convention-based function. The law of unfair dismissal was created to improve upon the very limited protection offered to workers by the common law.⁶¹ ‘An important catalyst’ for the consensus regarding the necessity of legislative intervention was the UK’s adoption of the International Labour Organisation’s Recommendation 119 concerning Termination of Employment at the Initiative of the Employer,⁶² whilst the Donovan Commission in a report recommending the introduction of statutory dismissal protection observed that the number of unofficial strikes may be reduced by the availability of quick and impartial dispute resolution where a dismissal was perceived as unjust by the workforce.⁶³ The Industrial Relations Act 1971 thereafter introduced a right not to be unfairly dismissed, providing job security to all employees, regardless of whether they also benefitted from

56. Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 20.

57. See *Malik v BCCI*, n. 28 above.

58. ERA 1996, sections 94 and 230(1).

59. See, amongst others, *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467; *Sharpe v Worcester Diocesan Board of Finance Ltd and another* [2015] EWCA Civ 399, [2015] ICR 1241; and *O’Kelly and Others v Trusthouse Forte Plc* [1983] 3 WLR 605, [1984] QB 90.

60. *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 WLR 1872; and *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2017] 3 All ER 568.

61. See the account by Lord Hoffman in *Johnson v Unisys Ltd*, n. 29 above, 543.

62. Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press, 1993) 195.

63. *Report of the Royal Commission on Trade Unions and Employers’ Associations 1965–68* (Cmd 3623, 1968) [528].

collective bargaining, by requiring a valid reason for a dismissal. The purpose of the legislation was not, however, to provide safeguards for the fundamental rights of all individuals at work. In fact, despite offering an interpretation of unfair dismissal law based upon the autonomy and dignity of the employee, Hugh Collins noted in 1992 that '[a] failure to respect civil liberties constitutes one of the principal sources of injustice in the law of unfair dismissal.'⁶⁴

The legislative origin of unfair dismissal law also precipitated compromise in the operation of the right. The compensation available to claimants is subject to an upper limit,⁶⁵ which, although substantial, may deprive some claimants of the full amount to which they would otherwise have been entitled. In addition, the right not to be unfairly dismissed is only available to a sub-group within the already narrow category of employees discussed above. The requirement that an individual must have completed a number of months of service with the employer was originally introduced to slow the pace of the workload of the Industrial Tribunals upon the creation of its new jurisdiction.⁶⁶ Since then, the length of the 'qualifying period of continuous employment' has become a political football used to indicate a government's stance on the regulation or deregulation of employing enterprises.⁶⁷ Currently set at two years, this mechanism deprives individuals of the opportunity to challenge their employer's decisions or behaviour solely on the ground that they joined the enterprise too recently.⁶⁸ Thus, the instinct to confine employment law to a specific model of work provision is aggravated by the vagaries of political compromise to generate a legal mechanism with a narrow reach, destined to be insufficient when compared to the inclusive approach of the ECtHR and the positive obligations it has set out.

The common law of wrongful dismissal, a termination of employment in breach of contract, developed from the general law of contract with elements of the old master and servant law.⁶⁹ Freedom to contract and to determine the terms of a contract in many contexts is liberating for the parties, but in the employment context, it brings well-known challenges. The employer usually unilaterally determines the terms and conditions offered, with the individual worker rendered powerless to resist the contractual imposition.⁷⁰ Although some safeguards are provided by statutory regulation, the employer's dominance commences at the point of contract and is reinforced throughout the relationship until it is terminated. In addition, the judicial viewpoint from which the common law was, and continues to be, developed is quite particular. Lord Wedderburn highlighted the importance of the training and legal background of the judges responsible for setting the direction of the common law. By reason of the English system of judicial selection, he noted that High Court judges are more likely to be acclimatised to the viewpoint of the employer, embedded

64. Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford University Press, 1992) 185.

65. ERA 1996, section 124.

66. Davies and Freedland, n. 62 above, 205, 555.

67. Davies and Freedland, *ibid* at 555, note the deployment of an idea that a shorter qualifying period would decrease the disincentive of small employers deter employers from hiring new staff and this was echoed in the most recent extension of the qualifying period by the Coalition government: Department for Business, Innovation and Skills, *Resolving workplace disputes: A Consultation – Impact Assessment* (January 2011) available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31436/11-512-resolving-workplace-disputes-impact-assessment.pdf (last accessed 12 April 2019) 147.

68. See *Redfearn v United Kingdom*, n. 15 above.

69. Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) Chapter 2.

70. A sentiment powerfully expressed recently by the majority of the Court of Appeal in *Uber BV and others v Aslam* [2019] IRLR 257, 274.

particularly within the ‘ideas of contract, property and employer’s prerogative that are central to the common law.’⁷¹ Thus, where a human rights lens would place the individual’s fundamental rights at the centre of the dispute and scrutinise any infringements upon them, the common law is framed from almost the opposite perspective: the enforcement of contractual terms and the guarantee of employers’ property rights and prerogative is of prime importance.

The development from a contractual starting point and a desire to preserve the employer’s disciplinary freedom give rise to serious remedial limitations under the common law. Although the use of injunctions in some cases gave hope of a willingness to tackle breaches of contract on the employers’ side,⁷² the damages available are limited. The application of the expectation measure – what the claimant would have received had the contract been performed – combined with an employer’s right to terminate by giving a period of notice leads to a minimal sum.⁷³ For example, in *Smith v Trafford Housing Trust*, the individual was permanently demoted in breach of contract and in breach of his human rights but received only £98 in damages: the difference between his previous wage and his new wage for the duration of his notice period.⁷⁴ The old rule, established in *Addis v Gramophone*,⁷⁵ that contractual damages do not include injury to feelings caused by the breach of contract still stands. On this basis, both the pecuniary and non-pecuniary limitations of contract-based damages are significant when examined in light of the obligation to provide a remedy for a Convention infringement. But a more serious problem in terms of the common law granting an effective remedy is the decision in *Johnson v Unisys Ltd*.⁷⁶ The claimant sought damages for a breach of the implied term of mutual trust and confidence for the manner in which he had been dismissed. The majority of the House of Lords held that, for a variety of reasons, such a breach of the implied term is not actionable in this way – a breach by the manner of dismissal does not sound in damages. The contractual derivation of wrongful dismissal law results in serious concerns regarding its capacity to fulfil the positive obligation to offer any real remedy, let alone an effective one. There is therefore a serious limitation upon the common law’s capacity to offer appropriate compensation to a claimant, if it were pressed to perform a human rights protective function.

B) Double subordination: The subordination of dismissal law to the employer’s prerogative and the subordination of workers by contract

There is a fundamental tension between the Convention-derived expectations of thorough, proportionality-style judicial review and the long-standing adjudicative approach in dismissal law. The ECtHR investigates the legitimate aim pursued by the infringement and particularly asks whether a less severe disciplinary measure could have been pursued or a less pervasive or rights-intrusive policy could have been adopted. In contrast, the common law and statutory mechanisms discussed here have evolved in manner that preserves a wide area of freedom for

71. Lord Wedderburn, ‘Labour Law: Autonomy from the Common Law?’ (1998) 9 CLLJ 219, 234.

72. See *Irani v Southampton and South West Hampshire HA* [1985] ICR 590; and *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] 1 All ER 943.

73. *Gunton v Richmond upon Thames LBC* [1980] ICR 755, 772.

74. *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch).

75. *Addis v Gramophone Company Ltd* [1909] AC 488.

76. *Johnson v Unisys Ltd*, n. 29 above.

employers to establish a ‘miniature legal system’⁷⁷ of contracts and rulebooks and make decisions in accordance with these rules and their own interests. Only ‘egregiously unreasonable treatment’ will result in a finding against an employer.⁷⁸ In turn, I argue that these mechanisms permit workers’ fundamental rights to be subordinated to their employer’s prerogative and an expansive range of judicially-accepted powers. This double subordination poses a severe threat to the proper enjoyment of fundamental rights at work and the fulfilment of the UK’s positive obligations under the qualified rights.

Possibly as a result of the legal and educational background of the judiciary noted by Lord Wedderburn, the common law judges have been very willing to prioritise employer prerogative and limit the effectiveness of the safeguards available to workers. Rather than using the doctrines of contract law to offer an external, objective assessment of the reasonableness of a term or situation,⁷⁹ the courts consistently limit their own role and preserve the legal dominance of the employer. We can take two examples to demonstrate this tendency. In *Addis v Gramophone Company*,⁸⁰ the liability of employers who had dismissed an employee in breach of their contract was deliberately minimised by the House of Lords. Their Lordships excluded the possibility of employees receiving compensation for injured feelings, for the manner of dismissal and for the loss sustained because dismissal makes re-employment more difficult.⁸¹ The decision demonstrated a ‘contractual entrenchment of the employer’s disciplinary powers in the twilight of the Master and Servant legislation’.⁸² More recently, in the case of *Johnson v Unisys Ltd*,⁸³ it was decided that a breach of the implied term of mutual trust and confidence that occurred as a result of the manner of dismissal is not actionable under the common law. The employer’s express right to terminate by giving notice was considered to be in conflict with such a development and the express term was cited as a reason to prevent the common law development that would have offered additional protection at the point of dismissal.⁸⁴ The judiciary thus displays a continuing tendency to prioritise the terms of the contract, which are usually unilaterally determined, whilst minimising the extent of protection available to employees. As there is no express requirement upon employers to take into account the fundamental rights of their employees, the refusal to develop protection alongside the express terms of the contract is particularly concerning.

The judicial reluctance to challenge employers’ decision-making is at its most prominent in unfair dismissal law. Whilst the importation of public law standards, such as requirements of natural justice and rationality, into dismissal law may have originally been greeted with optimism that it may temper the employer’s exercise of their powers,⁸⁵ its effect in unfair dismissal law has been a renunciation by the tribunals of their capacity to set standards for employer

77. Hugh Collins, ‘Market Power, Bureaucratic Power and the Contract of Employment’ (1986) 15 ILJ 1, 4.

78. Steven Anderman, ‘Termination of Employment: Whose Property Rights?’ in Catherine Barnard, Simon Deakin and Gillian S Morris (eds.), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Hart Publishing, 2004) 111.

79. A rare example of such an exercise is Briggs J’s judgment in *Smith v Trafford Housing Trust*, n. 27 above.

80. *Addis v Gramophone Company Ltd*, n. 75 above.

81. *ibid*, 491.

82. Alan Bogg and Mark Freedland, ‘The Wrongful Termination of the Contract of Employment’ in Mark Freedland (ed.), *The Contract of Employment* (Oxford University Press, 2016) 543.

83. *Johnson v Unisys Ltd*, n. 29 above.

84. *ibid* [38]–[42] (Lord Hoffman).

85. See John Laws, ‘Public Law and Employment Law: Abuse of Power’ [1997] PL 455; and Paul Davies and Mark Freedland, ‘The Impact of Public Law on Labour Law, 1972–1997’ (1997) 26 ILJ 311, 325.

behaviour.⁸⁶ In ascertaining whether a dismissal was fair, the legislation asks whether the employer was reasonable or unreasonable in treating the reason cited as sufficient to justify the dismissal.⁸⁷ In judicial hands, this question has morphed into a ‘range of reasonable responses’ test: the employer must only satisfy the tribunal that the dismissal decision fell within a range of reasonable responses that a reasonable employer could have made in the circumstances.⁸⁸ The deference shown by tribunals through the use of this test has been consistently questioned by observers.⁸⁹ Its implicit submission to employer expertise on managerial questions, when combined with the acquiescence of the adjudicators to the terms of the employer’s rulebook, leads to a severe lack of scrutiny under the statutory mechanism. In contrast, a human rights approach would require detailed review of the *substance* of an employer’s decision to dismiss, thoroughly examining whether the reason given was sufficient to justify a severe infringement upon the individual’s rights and whether an alternative measure could have been appropriate.

The entrenched judicial acceptance that employers are able to introduce a wide range of rules and provisions that regulate the workplace and employee behaviour developed well before the need to take human rights into account within private relationships was realised. Once the same types of terms and internal regulation have been enforced by courts time after time, the judges struggle to see that they amount to or provide capacity for employers to infringe upon Convention rights. For example, it is now assumed by many (including the judiciary) that managerial control and influence, already secure during working time, can legitimately be extended to the individual’s activities outside of work.⁹⁰ In the interests of protecting its business reputation, an employer may investigate an employee’s social media presence and discipline them if the content is considered to pose even a remote risk of reputational harm. This intrusion of employers into the personal lives of employees amounts to an infringement upon their Article 8 rights at the very least,⁹¹ but the judiciary seem to be blind to their obligation to examine the rights violation.⁹² With regard to the exercise of human rights in the workplace or during working time, cases regarding a clash between human rights and the employer’s powers have a sense of *fait accompli*. This inevitability was amply shown in an EAT decision regarding the potential Article 8 dimension of a case in which the employee had been subject to extensive covert surveillance arranged by his employer. Langstaff J, then President of the EAT, stated that:

‘It is a feature of an employment contract that an employee is subject to the reasonable direction of his employer. An employer is thus entitled to know where someone is and what they are doing in the employer’s time. An employee can have no reasonable expectation that he can keep those matters

86. For an analysis of the ‘self-restraint’ of the judges in unfair dismissal law, see ACL Davies, ‘Judicial Self-restraint in Labour Law’ (2009) 38 ILJ 278, 291-294.

87. ERA 1996, section 98(4)(a).

88. *British Leyland UK Ltd v Swift* [1981] IRLR 91, 93 (Lord Denning MR).

89. Anderman, n. 78 above, 127; Mark Freedland and Hugh Collins, ‘Finding the Right Direction for the ‘Industrial Jury’’ (2000) 29 ILJ 288; Andy Freer, ‘The Range of Reasonable Responses Test - From Guidelines to Statute’ (1998) 27 ILJ 335; and Davies, n. 86 above.

90. See commentary by Astrid Sanders, ‘The law of unfair dismissal and behaviour outside work’ (2014) 34 LS 328; and Virginia Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’ (2008) 71 MLR 912.

91. See Virginia Mantouvalou, ‘“I Lost My Job over a Facebook Post: Was that Fair?” Discipline and Dismissal for Social Media Activity’ (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations* 101, 112-113.

92. See, for example, the first instance decisions in *Gibbins v British Council* (2017) ET 2200088/2017, *Plant v API Microelectronics Limited* (2016) ET 3401454/2016 and *Burns v Surrey County Council* (2017) ET 2301665/2016.

private and secret from his employer at such a time. To do so would be to run contrary to the contract he had entered with his employer.⁹³

Systematic enforcement of the contractual terms and powers of the employer by the common law over a period of years has led to a similarly systematic failure to comply with the positive obligation to examine an infringement of a Convention right for its aim, necessity and proportionality.

This statement also shows the dominance of the terms of the contract over the exercise of human rights whilst at work and the subordination of the employee's enjoyment of their fundamental rights to the employer's prerogative. If an employee wishes to retain their employment, they must submit to the employer's rules and systems and thereby implicitly sacrifice their ability freely to exercise the fundamental rights set out above. The common law has played a role in reinforcing the employer's jurisdiction over its workers, implying duties to obey the employer's orders, to co-operate in the employer's enterprise and to maintain the employer's trust and confidence into the contract of employment.⁹⁴ It is argued here that by placing their expertise in a secondary position to that of the employer, and failing to challenge or re-interpret terms that limit or prevent the exercise of fundamental rights by individuals, the courts have created a situation in which the enjoyment of those rights is subordinated to the contract of employment and managerial prerogative. This degradation of the position of workers' rights in the employment context is in opposition to the expectations upon Member States of the Council of Europe.

C) A conflicted judiciary: Confidence and reticence combined

All of the above is compounded by the current judicial attitude towards human rights arguments in the sphere of employment law. Whilst there are highlights of proactive judicial engagement with Convention rights,⁹⁵ most judgments show a lack of urgency in ensuring that the structures and decisions made when applying dismissal law comply with the Convention. There is a perception that the mechanisms of employment law already provide an adequate standard of protection for human rights.⁹⁶ One judge has gone so far as saying that dismissal law offers a more stringent standard of scrutiny than the ECtHR.⁹⁷ This perception goes against the weight of academic opinion and can be questioned in light of Strasbourg's case law.⁹⁸ Its effect, nonetheless, is to leave dismissal law somewhat stuck in a rut, complacent in its supposed successes and failing to recognise its own flaws.

93. *City and County of Swansea v Gayle* (2013) UKEAT/0501/12/RN, [15].

94. Respectively, *Laws v London Chronicle Ltd* [1959] 1 WLR 698, 700; *Secretary of State for Employment v ASLEF* [1972] ICR 19 and other cases discussed in Freedland, *The Personal Employment Contract*, n. 57 above, 147-149; and *Malik v BCCI*, n. 28 above.

95. See *Vining and others v London Borough of Wandsworth*, n. 14 above; *Hill v Governing Body of Great Tey Primary School* [2013] ICR 691; and *Gilham v Ministry of Justice*, n. 14 above.

96. See judicial statements of this kind, of a more or less explicit nature, in *X v Y*, n. 14 above, [59] (Mummery LJ); *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 525, [52] (Elias LJ) and [75] (Sir Stephen Sedley); and *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789, [89] (Neuberger LJ).

97. *Turner v East Midlands Trains Ltd*, *ibid*, [56].

98. Collins and Mantouvalou, 'Redfearn v UK: Political Association and Dismissal', n. 16 above, 921; David Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 ILJ 146, 163; and Collins and Mantouvalou, 'Human Rights and the Contract of Employment', n. 16 above, 205.

With regard to the common law, rulings are handed down that demonstrate a disparity between dismissal law and the Convention standards. For example, in *Ahmed v Amnesty International*,⁹⁹ despite holding that the employee had been racially discriminated against under the Equality Act, Ms Ahmed's argument that her employer had breached the implied term of mutual trust and confidence was unsuccessful. The Employment Appeal Tribunal held that the discriminatory behaviour, a clear breach of the fundamental right to be treated equally, did not breach the implied term. The EAT considered that the employer's conduct was simply not grave enough to seriously damage the relationship of trust and confidence between the employer and employee.¹⁰⁰ Similar outcomes have occurred in other discrimination-related complaints,¹⁰¹ as well as cases regarding potential whistleblowers,¹⁰² which engages the individual's Article 10 right to freedom of expression.

The same issue also arises in the reverse: employers can discipline on the basis of the implied term of mutual trust and confidence, even where the criticised conduct of the employee is an exercise of their Convention right. For example, five years before his dismissal, Mr Williams had sent a supposedly humorous, but pornographic, email to a number of contacts through his work account. When the employer hired forensic investigators to find a reason to justify his dismissal, they argued that the sending of this email amounted to a breach of the implied obligation of sufficient seriousness to warrant dismissal without notice. The High Court found in favour of the employer,¹⁰³ disregarding both the fact that the employment relationship had continued for five years after the correspondence and that the employer's own Code of Conduct indicated that such an incident would be considered a serious disciplinary offence, rather than gross misconduct. The court in *Williams v Leeds United* should have engaged with the Article 8 aspects of the case, and also Article 10 which protects offensive expression as well as widely accepted views.¹⁰⁴ By permitting the implied term of mutual trust and confidence to be used in this fashion, the courts undermine the enjoyment and protection of Convention rights in the workplace. These cases demonstrate that the common law regulation of dismissal, in particular the implied obligation that is central to many claims, falls well short of complying with the Convention's requirements.

Under the Employment Rights Act 1996, it has been accepted for a number of years that a Convention-style proportionality analysis is necessary when a human right is infringed upon by a dismissal.¹⁰⁵ Examining cases where the tribunal judge does engage with that justification process, I have not yet found one in which the ultimate result was altered by its integration.¹⁰⁶ The overall

99. *Amnesty International v Ahmed* [2009] ICR 1450.

100. *ibid* [72].

101. *Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493, [2005] ICR 481; and *Grant v South-West Trains Ltd* [1998] IRLR 188.

102. *Ministry of Justice v Sarfraz* [2011] IRLR 562.

103. *Williams v Leeds United Football Club*, n. 20 above.

104. *Handyside v United Kingdom*, n. 52 above, [49].

105. See Lord Justice Mummery's 'long answer' in *X v Y*, n. 14 above.

106. See *Pay v Lancashire Probation Service* [2004] ICR 187; *McGowan v Scottish Water* [2005] IRLR 167; *Fosh v Cardiff University* (2008) Appeal No. UKEAT/0412/07/DM; *Henderson v London Borough of Hackney* (2009) Appeal No. UKEAT/0072/09/JOJ; *A v B* (2010) Appeal No. UKEAT/0206/09/SM; *Preece v JD Wetherspoons* [2011] ET 2104806/10; *Crisp v Apple Retail UK Ltd* [2011] ET 1500258/11; *City and County of Swansea v Gayle* (2013) UKEAT/0501/12/RN (*obiter*); *Barton v Royal Borough of Greenwich* (2015) Appeal No. UKEAT/0041/14/DXA; *A v B Local Authority* [2016] EWCA Civ 766, [2016] IRLR 779; and *Garamukanwa v Solent NHS Trust* [2016] IRLR

picture that one receives when reading the case law is that the standard analysis noted above – the ‘range of reasonable responses’ test – is applied to the facts and a conclusion that the dismissal was fair is reached. At this stage, the tribunal considers briefly, and not always by asking the correct questions,¹⁰⁷ whether the Convention is relevant and, if so, whether the infringement was justified. In light of the ready judicial acceptance of the rules and the decisions made by employers and the view that the mechanisms of employment law already achieve Convention compliance, the ultimate outcome of the case is unchanged. It is also compounded by a narrow conceptualisation of the Convention rights themselves.¹⁰⁸ I would argue that, in many of these cases, a different conclusion could have been reached. One point highlighted by the ECtHR in its consideration of employment disputes is whether a less severe sanction could have been a viable alternative.¹⁰⁹ This question is never seriously considered by the tribunals, even though it could pose a serious challenge to the employer’s decision and reverse the outcome of the case. The absence of any sincere attempts to re-evaluate the proportionality and necessity of a dismissal in light of the Convention leaves serious questions with regard to the current and future compliance with the UK’s obligations set out in section II.

IV. A legislative solution: Introducing a Bill of Rights for Workers

Although there is optimism in some quarters regarding the capacity of the mechanisms and doctrines of employment law to fulfil a new function, that of protecting the fundamental rights of individuals, I have argued that this optimism is misplaced. In essence, the current approach is attempting to fit a square peg in a round hole. From the origins of dismissal law and employment law’s established concerns, issues of design arise: a narrow scope of protection, the contractual basis of wrongful dismissal and the legislative compromises of unfair dismissal law. We can also see evidence of entrenched and uncritical acceptance of the extent of employer’s disciplinary powers and judicial restraint in reviewing how they are exercised. These deficiencies are compounded by a more recent perception that employment law already offers sufficient safeguards for Convention rights and a reluctance amongst adjudicators to engage in anything other than a perfunctory check upon their prior conclusion. These trends and problems indicate that, not only is the UK currently offering an insufficient standard of protection for the fundamental rights of individuals at work, but it is unlikely to do so if attempted within the current framework. In what follows, I propose an alternative way forward. The legislative solution offered below would break apart from the patterns that have been explored above, giving dedicated and direct horizontal enforcement to the human rights of individuals at work.

476. One exception may be *Hill v Great Tey Primary School*, n. 95 above, where the EAT remitted the case to a Tribunal with explicit instruction to consider the text of Article 10 of the Convention.

107. See the criticism of the Tribunal’s decision in *Hill v Great Tey Primary School*, n. 95 above, and the brief analysis of the Article 10 point in *Preece v J D Wetherspoons*, n. 106 above, [40].

108. See for example the conceptualisation of Article 8 in *Pay v Lancashire Probation Service*, n. 106 above, commented upon by Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’, n. 90 above, 919-921.

109. The Court indicated in *Pay v United Kingdom (Admissibility Decision)* (2009) 48 EHRR SE2 that a less severe sanction may have been appropriate but the decision was ultimately decided under the less searching standard of scrutiny entailed by the margin of appreciation, mentioned above.

A) *The nature of the proposal and the necessity of new legislation*

The current focus of the debate in this area is upon how existing mechanisms could be ‘re-purposed’ to protect Convention rights. Prospects for judicial development, of the common law or of statutory interpretation and application, and arguments in favour of legislative amendments, have been put forward.¹¹⁰ I note several key problems with this type of approach. First, it maintains continuity between the existing doctrines and approach and the refreshed, Convention-compliant mechanism. Given the entrenched tensions and deficiencies noted throughout this piece and the unfortunate persistence of both a complacent and unenthusiastic judicial attitude towards the incorporation of the Convention in dismissal law, this is a significant limitation of this route to compliance with the positive obligations above. Section 3 of the Human Rights Act 1998 has been in force for twenty years, and there is no evidence that it has prompted a major change in consideration of dismissals that infringe upon the worker’s human rights. Amendments that have been made to the law of unfair dismissal have also been noted for their minimalism.¹¹¹ Further amendments and developments could be considered to be both unlikely to occur, in light of the understanding of employment law as already compliant, and unlikely to result in genuine and effective protection of Convention rights.

The second concern with this idea of adjusting existing structures to play this new role is that of a tiering of cases within employment law and a neglect of arguments for reform of these rights and mechanisms to better achieve their original purpose. With regard to the first, we can already see the evidence of the differential treatment of claimants able to raise human rights arguments when compared to those who are not. We might contrast, for example, the result in *Redbridge LBC v Dhinsa and MacKinnon*¹¹² with the outcome in *Vining v London Borough of Wandsworth*.¹¹³ In *Dhinsa*, the claimants were members of the parks police, employed to patrol the parks and open spaces of the area. After their dismissal and resignation respectively, they sought to claim unfair dismissal. Section 200 of the ERA excludes from the right to claim unfair dismissal those working under ‘contract of employment in police service’.¹¹⁴ The Court of Appeal, upon examining the nature of the claimants’ occupation, held that section 200 operated to preclude them from bringing a claim challenging the fairness of their dismissal.¹¹⁵ In contrast, Mr Vining’s union, when making a complaint regarding the lack of collective consultation regarding parks police redundancies, was permitted to progress its claim despite an equivalent provision. The Court of Appeal, after a consideration of Article 11 ECHR and through an application of section 3 HRA, reached the conclusion that the exclusion should not apply to parks police such as Mr Vining.¹¹⁶ The union’s case could therefore be heard by an Employment Tribunal. This comparison demonstrates the impact that a human rights argument can have (in rare cases) for some individuals. My concern with using existing mechanisms for human rights purposes, however, is that the likes of Mr Dhinsa and Mr MacKinnon are left with inadequate safeguards and unable to challenge their treatment by

110. See the works cited at footnote 16 above.

111. See Collins and Mantouvalou, ‘*Redfearn v UK: Political Association and Dismissal*’, n. 16 above, 915.

112. *Redbridge London Borough Council v Dhinsa and another* [2014] EWCA Civ 178, [2014] ICR 834.

113. *Vining and others v London Borough of Wandsworth*, n. 14 above.

114. ERA 1996, section 200.

115. *Redbridge v MacKinnon*, n. 112 above, [70].

116. *Vining and others v London Borough of Wandsworth*, n. 14 above. For an in-depth analysis of *Vining*, see Philippa Collins and Paul Fradley, ‘Policing the Boundaries of Articles 8 and 11 ECHR’ (2019) 48 ILJ 225.

their employer. Individuals who do not have human rights arguments on their side are unable to persuade the courts to re-shape the law in their favour, leading to a division or a 'tiering' of protection between groups of workers.

This practical differentiation in treatment is a symptom of a more abstract issue: if the focus is trained upon how dismissal law can be adapted in order to fulfil a human rights function, its capacity - or lack thereof - to perform its original purpose may be overlooked. A comment by Fenwick and Novitz is interesting in this regard:

'understanding the protection of workers' interests as human rights is likely to broaden their appeal at a time of marginalisation of trade unions as antiquated and outdated organisations. What may be problematic... is that one may implicitly denigrate the status of workers' claims where it is more difficult to phrase them in terms of human rights.'¹¹⁷

The higher normative status of human rights claims attracts attention and rightfully leads to demands for action where they are not respected. But employment law fulfils functions and pursues purposes far broader than safeguarding individual's fundamental rights. At a more abstract level, values such as social justice,¹¹⁸ equality,¹¹⁹ freedom,¹²⁰ autonomy¹²¹ and dignity¹²² are all aspirations of employment law. At the functional level, we might think of job security, decent and safe working conditions, fair remuneration, and representation and voice at work. A focus on a narrowly defined group of fundamental rights risks neglecting arguments for reform, development and improvement of these mechanisms on their own terms. If critical attention and pressure dissipates on these wider points, it is at least foreseeable that the status quo in employment law would be maintained without the benefit of enhancements and advances that can result from sustained evaluative efforts.

It is therefore argued that a clean break from the prior structures and case law through the introduction of a new legal structure designed specifically to protect human rights at work and comply with the positive obligations under the Convention is desirable. In the UK, a straightforward way of enforcing human rights against employers would be to regulate them in the same way as public authorities through an amendment to the HRA. Such an approach would certainly give direct horizontal effect to Convention rights in the employment relationship. Nevertheless, it is argued here that this route would be inappropriate. There are important differences between employers and the state that mean regulating them in an identical fashion is undesirable.

117. Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' in Tonia Novitz and Colin Fenwick (eds.), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 24.

118. See Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labor Law' (2008) 35 *Journal of Law & Society* 341, 345.

119. Judy Fudge, 'Labour As a 'Fictive Commodity': Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (Oxford University Press, 2011).

120. Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (Oxford University Press, 2011) 112 and Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz (eds.), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 151-159.

121. As in Spector's theory of 'equal autonomy': Horacio Spector, 'Philosophical Foundations of Labor Law' (2006) 33 *Florida State University Law Review* 1119.

122. David C. Yamada, 'Human Dignity and American Employment Law' (2009) 43 *University of Richmond Law Review* 523.

Employers can only be expected to weigh up policies and human rights impact within their own organisation, lacking the broad-ranging expertise and responsibilities of the state. In addition, the employer itself possesses rights that must be weighed in the balance:¹²³ its right to reputation and a right to property, as well as potentially aspects of freedom of association or belief, for example in the case of a religious employer. The contractual underpinning of the whole relationship also provides a new challenge which is not present in the citizen-state relationship regulated under the Human Rights Act. Thus, it is clear that a dedicated approach to introducing direct horizontal duties must be used, which is tailored to the employment context. The proposal here would have autonomy from the existing causes of action, although drawing on their successes in its design, and offers a variety of ways to challenge employer conduct and policies that are incompatible with the human rights of the workforce. The following section begins to sketch out the potential features of a such legislative scheme. In doing so, the paper moves beyond a focus purely on dismissal and includes reference to other forms of detriment that could amount to a human rights infringement or limitation.

B) The central prohibitions: Safeguarding Convention rights through novel means

A legislative system of protection would have to provide a range of safeguards for workers in order to comply adequately with the positive obligations set out above. Enforced by a claim to the Employment Tribunal,¹²⁴ the centrepiece of the mechanism would be a general prohibition of unjustified infringements upon a worker's human rights. Although the focus of this article has been on the qualified rights, there is no reason to exclude the other Convention rights: the right to a fair trial in Article 6 is of relevance to disciplinary processes and the prohibition of forced labour in Article 4 could be expressly protected via statute. At the core of the mechanism would be a prohibition such as the following:

An employer shall not infringe the human rights of its workers, as defined by the European Convention on Human Rights and given further effect by the Human Rights Act 1998.

In accordance with the principles set out in the Convention, where a qualified right has been breached, an infringement will only be justified if it satisfies the requirements set out in this Bill.

This provision sets out a strong link between the national regulatory attempt and the Convention and the detail of the provisions should ensure that the standard of protection does not fall below that which is available to individuals before the Strasbourg Court.¹²⁵

123. See Collins, 'On the Incompatibility of Human Rights Discourse and Private Law', n. 17 above, 50.

124. Employment Tribunals have expertise in hearing complaints relating to employment and there may be concurrent claims, for example, under the Equality Act 2010 or the Employment Rights Act 1996. It could be argued that expertise for interpreting and enforcing the ECHR lies in the Administrative Court, so the Administrative Court may constitute an appropriate forum as well.

125. Any legislative instrument would have to set out the precise nature of the link to the ECtHR's decisions: I would argue in favour of an approach that draws out the broad principles set out through the ECtHR's jurisprudence (for an advocate of a similar approach under section 2 HRA, see Roger Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' [2004] *Public Law* 725, 735-737; and Roger Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (2008) 54 *International and Comparative Law Quarterly* 907) whilst also ensuring that national courts are not held back by the terms of that link to the Convention from providing a greater level of protection to the claimant.

Within the central prohibition, the element upon which the standard of protection for individuals would hinge is the justification process. In light of the ECHR's positive obligations as set out above, the justification process must balance two functions. First, it must ensure that the individual's human rights remain central to the dispute and are not outweighed too readily, particularly by economically-motivated aims.¹²⁶ But secondly, the justification process is also the means by which the employer's rights are given due regard¹²⁷ and it manages the size of the burden imposed upon employers.¹²⁸ The detail, interpretation and application of the process of justification must be fine-tuned to adequately take into account legitimate employer concerns, but not to excuse employers on grounds that are insufficiently weighty.

The UK Supreme Court's statement of the elements of a justification/proportionality analysis would be a useful guide for the courts:

- (1) 'whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
- (2) whether the measure is rationally connected to the objective,
- (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
- (4) ... whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.'¹²⁹

How should the assessment at stage (1) be made? Existing rights display a number of approaches, each with benefits and drawbacks. At the level of the Strasbourg Court, any aim cited must fall within the broadly phrased text of the Convention, but both the text and the case law focus upon justifications put forward by Member States, so cannot be directly transferred to the employment context. The Equality Act 2010 leaves the selection of legitimate aims to the courts, which allows for responsiveness to changing circumstances but leaves the possibility that courts could expand the range of accepted aims and thereby diminish the protection for the right not to be discriminated against. Unfair dismissal law contains a list of potentially fair reasons for a dismissal, such as capacity of the individual or their conduct, and adds 'some other substantial reason of a kind such as to justify the dismissal of an employee ...'¹³⁰ The inclusion of 'some other substantial reason' can be interpreted as a 'safety valve, allowing a potentially fair dismissal in situation closely analogous to those listed.'¹³¹

This final style of drafting could be adopted to ensure that an infringement is justified by an important aim, whilst retaining room for manoeuvre for the courts:

Where appropriate, a 'legitimate aim' for the purpose of the Bill is limited to:

126. Manfred Weiss, 'Re-Inventing Labour Law?' in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 50; Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights' (2007) 29 *CLLJ* 29, 39, and Sandra Fredman, 'Equality Law: Labour Law or an Autonomous Field?' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 273.

127. Hugh Collins, 'Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination' in Hugh Collins and Tarunabh Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 269-270.

128. Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 197-8.

129. *Bank Mellat v HM Treasury* [2013] UKSC 38, [2014] AC 700, [74] per Lord Reed.

130. ERA 1996, section 98(1) and (2).

131. Deakin and Morris, n. 39 above, 526.

- (a) the protection or advancement of the employer's fundamental rights as defined by the ECHR; or
- (b) the protection or advancement of the fundamental rights of others as defined by the ECHR; or
- (c) some other similarly substantial aim which is considered sufficiently pressing to justify the limitation of a Convention right.

As we can see from this list, the employer would not in general have recourse to public interests of the kind usually seen in vertical human rights litigation,¹³² but rather it must rely upon the protection of its own rights or that of other affected parties as the justification for its infringement. The latter may include, for example, protecting the right to equality of service users in introducing an equal treatment policy or safeguarding the company's reputation in circumstances where an individual's freedom of expression may negatively affect it. Once a legitimate aim has been accepted, the courts should examine whether the employing entity was responding reasonably to a real risk to their business at the time of the infringement. For example, the ECtHR has emphasised that a 'mere allegation' of a threat to an employer's rights is insufficient: the risk to the employer must be 'real and substantial' and the interference must not serve any other purpose that is unrelated to the employer's cited aim.¹³³ Such a demand would prevent employers taking action on the basis of hypothetical or trivial risks to their business or responding to threats that have since been proved to be benign.¹³⁴

The remaining elements of the proportionality of the employer's actions would then be analysed. The rational connection test will rarely amount to a serious hurdle, whereas the less intrusive means question has the potential to challenge employers. For example, a less absolute policy or a disciplinary warning in place of a dismissal may be judged to have been a reasonable response. This would prompt a finding against the employer. The final limb provides an opportunity to consider the impact of the employer's conduct or policies upon the workforce more broadly. Where the policy has a particularly damaging impact on one individual or indeed a negative impact upon a larger group of current or future employees, this impact must be balanced against, and justified by, clear and definite benefits for the employer. Where the impact of the measure is more severe, this stage will present a higher hurdle. When considered fully, these four stages strike a fair balance between giving respect to the claimant's fundamental rights and permitting the defendant some scope to pursue other, equally important aims.

Alongside this principal prohibition, employment law routinely includes protection for individuals who exercise their rights from retaliation by the employer.¹³⁵ Penalising retaliatory conduct would clearly be essential, assuring workers that they will not face detriment for enforcing their human rights. Similarly crucial would be a section that renders unenforceable any attempt to

132. Subsection (c) could be used for this purpose where the employer is also a public authority: in this event, the employer may, for example, seek to rely on the safeguarding of national security to limit their employees' freedom of expression.

133. *Sindicatul Păstorul cel Bun v Romania*, n. 36 above, [159].

134. Thus preventing instances such as *Williams v Leeds United Football Club*, n. 20 above: Leeds United Football Club dismissed Mr Williams in response to an incident that had occurred five years previously and had not produced any damage to the Club's reputation.

135. See in particular the group of automatically unfair dismissal reasons in the ERA 1996, section 43 M onwards, as well as provisions such as section 27 in the Equality Act 2010.

exclude the legislation's effects or otherwise contradict its provisions.¹³⁶ Another useful tool would be something similar to Gillian Morris' recommendation: 'a mechanism for workers to challenge the propriety of contractual clauses which they consider violate a Convention right without having to await the imposition of a disciplinary sanction for breach of contract'.¹³⁷ Workers should be able to bring a challenge against a particular term, contractual provision or workplace rule before it 'bites' and negatively affects them. Any regulation associated with their employment that removes or restricts an individual's ability to exercise their fundamental rights should be subjected to a justification and proportionality analysis by a court. These provisions would ensure that the courts and tribunals do not unthinkingly enforce a contractual provision which permits an unjustified infringement upon an individual's rights and protect individuals from being targeted by their employer after making a claim.

For these latter provisions, contractual rectification by the tribunal could follow, or a recommendation that the employing entity reconsider their policies and practices in order to avoid the negative impact upon the enjoyment of Convention rights.¹³⁸ For other Convention violations, compensation applying the more generous tortious measure and providing compensation for pecuniary losses and non-pecuniary losses, including injury to feelings, should be available. Although it is unlikely that an individual would want to return to work after a successful claim, it may be desirable to allow the adjudicator to consider whether reinstatement or re-engagement is possible upon the claimant's request. This capacity is little used in unfair dismissal law,¹³⁹ but it may be suitable for rare cases. Similarly, in some cases, interim injunctions could be used to prevent ongoing events within an employing organisation that violate the individual's Convention rights. Examples might include ongoing disciplinary investigations in breach of Article 8, the continuing enforcement of rules that prevent the full exercise of a Convention right or reliance upon a clause prohibiting disclosure of information by an individual in breach of their rights. Such a range of remedial options would ensure that each successful claimant is able to receive an effective remedy for the infringement upon their rights.

Concluding remarks

These proposals are a novel solution to a serious defect of both national employment law and the standard of protection offered therein of human rights in an important context in the day-to-day lives of many. A number of interesting opportunities for expansion could be noted, including, for example, the inclusion of other rights, such as purely procedural 'fair trial' rights or the social and economic rights contained in the European Social Charter. An additional innovation could be to allow challenges to other legislative instruments on the basis that they interfere with, or are inconsistent with, the collection of rights in the Bill. This would negotiate the difficult problem of infringements that are legitimate and lawful based upon standards and procedures contained in other statutes. Drawing upon the mechanics of section 4 of the HRA, a declaration could be the result of such a challenge, and it could be complemented by a more general obligation to read other instruments compatibly with the fundamental rights of workers. These additions would offer more

136. ERA 1996, section 203(1).

137. Gillian Morris, 'Fundamental Rights: Exclusion by Agreement?' (2001) 30 ILJ 49, 70.

138. As in the EA 2010, section 143 and section 124(2)(c) and (3) as originally enacted.

139. See Table 5.5 in Department of Business, Innovation and Skills, *Findings from the Survey of Employment Tribunal Applications 2013* (Research Series No. 117, 2014).

rounded protection to fundamental rights at work and hold legislators to account for ongoing infringements via statutory provisions.

This group of proposals respond to the severe deficiencies in the current approach to providing protection for human rights at work exposed by this piece. Although the gap in the domestic framework was first observed almost thirty years ago,¹⁴⁰ the methods employed by courts or advocated for by commentators are insufficiently radical to meet the requirements of the Convention. It may be that other jurisdictions share some or all of the challenges outlined here. Where the ECtHR examines all infringements, from complainants of all kinds, employment law's scope remains steadfastly narrow. The justification and proportionality assessment entailed by an infringement of a qualified right has the potential to probe decision making, particularly asking whether less severe alternatives would have achieved the same goal. The courts in domestic dismissal cases appear to be incapable of taking such review seriously and of questioning the employer's decision and practices. Finally, the remedial response at both common law and through the statute are seriously deficient. In the face of these systematic limitations, I argue that a new legislative regime is necessary which would place human rights protection on a firm foundation and provide innovative safeguards for individuals at work. Whilst some jurisdictions have moved towards direct horizontal effect of human rights,¹⁴¹ this tailored solution would go beyond general negative prohibitions and could be a useful addition to the regulation of employer power in other labour law systems facing similar difficulties.

In the absence such a statutory intervention, two particular consequences follow. Firstly, employment law's mechanisms fail properly to reflect the humanity of the individuals who make up the workforce. By inadequately recognising and safeguarding the fundamental rights of individuals in the workplace, the law does not manifest the key principle adopted by the International Labour Organisation: 'labour is not a commodity'.¹⁴² Relatedly, as an autonomous discipline, employment law also fails to fulfil a widely accepted purpose of its own. The protection of the humanity, and human rights, of workers is recognised as a crucial agenda of employment law¹⁴³ – not as an imposition or demand of a constitutional statute, but as its own organic concern, alongside striving for dignity, autonomy, equality and other values.

In addition, threats to the enjoyment and exercise of human rights have long been recognised to emanate from a wider range of actors than simply those traditionally targeted by constitutions and human rights treaties. In order for human rights to be safeguarded fully, they must be protected in all contexts of daily importance to individuals, whether they are classified by legal study as 'public' or 'private'. Employers hold a significant influence over the course of the day-to-day lives of those whom they employ and the disciplinary sanctions applied by employers have been compared in their consequences to those applied by criminal

140. Collins, *Justice in Dismissal: The Law of Termination of Employment*, n. 64 above, 185.

141. See Myriam Hunter-Henin, 'France - Horizontal Application and the Triumph of the European Convention on Human Rights'; and Colm O'Cinneide, 'Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?' in *Human Rights and the Private Sphere*, n. 8 above.

142. International Labour Organisation, *Declaration of Philadelphia* (General Conference, 10 May 1944) I.

143. For a selection of endorsements of the position that human rights should be protected at work, see Collins, *Justice in Dismissal: The Law of Termination of Employment*, n. 64 above, 183; Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence & Wishart, 1995) 350; Keith Ewing, 'Rights at the Workplace: An Agenda for Labour Law' in Aileen McColgan (ed.), *The Future of Labour Law* (Cassell, 1996) 9-10, and Weiss, n. 126 above, 50.

law.¹⁴⁴ In a relationship of such importance for an individual's socio-economic wellbeing, for their fulfilment and self-esteem, and in the presence of such a severe power imbalance between the two parties, the protection of human rights in employment is especially necessary and urgent. Whilst some attempts have been made to reshape domestic labour law in line with human rights concerns, I have argued here that a bolder approach is necessary, a Bill of Rights for workers, and set out how it could best be formulated in the work sphere.

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144. Collins, *Justice in Dismissal: The Law of Termination of Employment*, n. 64 above, 2.