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# CHAPTER 24

## DURATION, LAWFUL TERMINATION AND FRUSTRATION OF THE EMPLOYMENT CONTRACT

D. CABRELLI

### **Introduction: policy, context and doctrine**

In subjecting the common law regulation of the duration and termination of the contract of employment by lawful dismissal, employee resignation, retirement, the expiry/non-renewal of a fixed-term, and frustration to a measure of scrutiny, this chapter seeks to distil the rules and principles occupying a central role in the field. An additional objective is to offer a critical, yet progressive re-conceptualisation of this area of law, consistent with the notion that the law of the contract of employment is best viewed as an evolving legal institution.<sup>1</sup> The former endeavour involves a descriptive account of the operative legal rules applicable in this area, whilst the latter is engaged in the pursuit of a normative approach, with one eye firmly focussed on creative reorientation. This normative approach is aligned with the three normative principles which were articulated in [section 2 of chapter 2](#), engaging in particular with the reciprocity principle which was there proposed but also being concerned with the various senses in which specifications of the duration and terminability of contracts of employment contribute – or fail to contribute – to the realisation of ideas of fair exchange in the structure and structuration of contracts of employment. In pursuing this approach, and in its descriptive coverage, this chapter intersects at various points with the discussion of the structure of the contract of employment as an expression of continuing obligations which was undertaken in [chapter 17](#) of this work.

The nature, character and content of any proposed reform of the legal rules in this chapter will be shaped by three factors: policy considerations, context, and doctrine. First, the various policies suggested as useful catalysts for change in Part 1 of this book<sup>2</sup> will be employed as a means of suggesting law reform. Further, the pursuit of such a normative, policy-based recasting of the common law rules applicable to the duration, frustration and lawful termination of the contract of employment ought not to be conducted in some kind of contextual or doctrinal vacuum. As such, any proposed restructuring of the common law rules must be sensitive to the changing institutional and social setting. For example, Part 1 of this book explains the growth in importance of human resource management (HRM) as an organisational practice and why it ought to take centre stage as the predominant theory of work relations in the modern context.<sup>3</sup> Likewise, in putting forward proposed adjustments to the common law, recognition of the importance of doctrine on the internal structure of the contract of employment is paramount.<sup>4</sup> This doctrinal and structural approach to law reform is advanced in two distinctive ways in this chapter. First, it is preferable if the proposed reconfigurations of the law serve to strengthen

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<sup>1</sup> See [section 3 of Chapter 2](#) and [section 1 of Chapter 3](#).

<sup>2</sup> See [section 4 of Chapter 1](#).

<sup>3</sup> See [sections 2 and 3 of Chapter 1](#).

<sup>4</sup> See P Elias, 'The Structure of the Employment Contract' (1982) 35 CLP 95.

the degree of co-existence arising between the common law and statutory norms governing the duration and termination of the employment contract. Such a programme of reform which embraces an integrationist agenda,<sup>5</sup> conceives the common law and statutory rules on the duration and termination of the contract of employment as a single strand of regulation, thus amounting to a rejection of the hitherto prevailing ‘disintegrated’ relationship between these two sources of employment law.<sup>6</sup> Meanwhile, the second way in which the doctrinal and structural approach to legal reform is manifested in this chapter lies in a recognition that the legal framework of the employment contract is, and ought to be, perceived as a coherent whole, from inception to termination, duly comprised of rules and principles which complement, harness and logically reinforce one another. Seen from this perspective, this chapter will amount to an exercise in theorising about the impact that the norms governing the duration, classification, suspension, frustration and lawful termination of the contract of employment have on each other.<sup>7</sup> By the same token, any proposed reconfiguration of such norms must also be approached in a manner which preserves the structural integrity of the contract of employment: for example, an element of readjustment of the rules governing duration has inevitable knock-on consequences for the norms relating to the contract’s classification, suspension, and termination, and vice versa, some of which may render the latter incongruous and logically incoherent.

Section 1 is devoted to an exploration of the structural connections arising between the common law rules on the duration of the employment contract and its classification, suspension and termination. Meanwhile, section 2 addresses the consequences of reorienting the common law rules that govern the unilateral termination of the employment contract by the employer in light of particular policy preferences, and against the backdrop of the statutory regime specifically regulating unfair dismissals. In Section 3, the focus shifts to lawful resignations that unilaterally or bilaterally terminate the employment contract and the legal effect of a retirement on its duration. Section 4 turns to an assessment of the legal effects of the non-renewal of fixed-term employment arrangements and the degree to which there is scope for the governing common law rules to be adjusted within the context of the statutory regimes imposing carefully tailored controls on such contracts. Section 5 examines termination by operation of law by virtue of the doctrine of frustration and the final section concludes.

## **Section 1: Duration**

### **A. Basic sketch**

In the pre-industrial period, the common law developed an implied rule that where manual workers and employees entered into an employment contract, this would be treated as an annual hiring, i.e. a fixed-term, exclusive service contract for one year. Deakin and Wilkinson have argued persuasively that service on the basis of an annual hiring ‘was socially and legally the most significant form of wage labour for most of the eighteenth century’ and was derived from the pre-modern era of ‘master and servant’ law.<sup>8</sup> However, by the middle of the nineteenth century, ‘the presumption of annual hiring was on the way out... [and f]rom this point on, the presumption generally applied by the courts was one of an indeterminate hiring terminable by

<sup>5</sup> See M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2012) 222-245.

<sup>6</sup> See J Beatson, ‘Has the Common Law a Future’ (1997) 56(2) CLJ 291, 301 and A Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 LQR 232.

<sup>7</sup> See M Freedland, *The Personal Employment Contract* (OUP 2003) 197-198, 252, 261-268, 297 and 306-308 and Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 5) 168-176, 213-221 and 231-241.

<sup>8</sup> See S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 45 and [section 1 of Chapter 17](#).

notice according to the custom for the trade in question'.<sup>9</sup> The ultimate demise of the annual hiring default rule between the 1930s and 1960s in the decisions of the Court of Appeal in *De Stempel v Dunkels*,<sup>10</sup> *McClelland v Northern Ireland General Health Services Board*<sup>11</sup> and *Richardson v Koefod*,<sup>12</sup> coincided with the growing legal support for, and recognition of, the open-ended employment contract,<sup>13</sup> and the emergence of the welfare state. As such, rather than a fixed-term contract, the employment contract was conceived of as a contract of indeterminate duration by the beginning of the modern industrial period in the 1960s.

It is an open question whether the default rule in favour of the employment contract of indeterminate duration emerged before, or as an inevitable by-product of, the recognition of the 'unrestricted reasonable notice rule' conferring the power on the employer to unilaterally terminate the employment contract on a lawful basis.<sup>14</sup> Whatever the position, it is clear that the two default rules, i.e. the indefinite employment contract and the unrestricted reasonable notice rule, are so indelibly linked as to be almost symbiotic in their relationship. Once it had been recognized that the employment contract was of indefinite duration and could be terminated by the employer on the provision of reasonable notice, English Law took the view that the structural integrity of that contract could only be maintained by effecting certain necessary revisions to the common law:

- [1] For example, just after the turn of the twentieth century,<sup>15</sup> the courts adopted the common law rule that an employer could not attempt to suspend its obligations under the employment contract and lay-off an employee without pay for economic or disciplinary reasons in the absence of an express term: if the employer intended to shift the risk of economic insecurity on to the employee, it could do so by taking advantage of the rule empowering it to lawfully terminate the contract on reasonable notice, rather than rely on a common law-sanctioned rule in favour of suspension.<sup>16</sup> As noted by Freedland and Kountouris, 'the wide powers of termination... confer[red] upon the employer... emerge as crucial conditioning features for the regulation of suspension...'.<sup>17</sup>
- [2] Secondly, at the turn of the twentieth century, the courts acknowledged that in the case of an indefinite employment contract, it would be unrealistic to legally hold an employer to an obligation to continuously supply work to the employee: the employer's requirements for labour will be subject to regular fluctuations in response to market pressures. As such, once the annual hiring default rule had been jettisoned, the judiciary felt it necessary to fashion a common law rule that

<sup>9</sup> Deakin and Wilkinson, *The Law of the Labour Market* (n 8) 79 and S M Jacobi, 'The Duration of Indefinite Employment Contracts in The United States and England: An Historical Analysis' (1982) 5 *Comp Lab L* 85, 97-103.

<sup>10</sup> *De Stempel v Dunkels* [1938] 1 All ER 238 (CA), 246G-H and 259 (Greer LJ and Scott LJ).

<sup>11</sup> *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594 (HL).

<sup>12</sup> *Richardson v Koefod* [1969] 1 WLR 1812 (CA), 1816C-F (Lord Denning MR).

<sup>13</sup> See the discussion in Freedland, *The Personal Employment Contract* (n 7) 306-307.

<sup>14</sup> Deakin and Wilkinson, *The Law of the Labour Market* (n 8) 65-73 and Jacobi, 'The Duration of Indefinite Employment Contracts in The United States and England: An Historical Analysis' (n 9) 100-101.

<sup>15</sup> *Devonald v Rosser & Sons* [1906] 2 KB 728 (CA) and *Hanley v Pease & Partners* [1915] 1 KB 698. See [Chapter 23 on variation and suspension](#).

<sup>16</sup> See O Kahn-Freund, 'Suspension of the Contract of Employment in English Law' *International and Comparative Labour Law Review*, 1970 10 (1) 4-5 and M Freedland, 'The Obligation to Work and to Pay for Work' (1977) *CLP* 175, 180.

<sup>17</sup> Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 5) 221.

an employer has no general implied duty to furnish an employee with work. In that way, the common law was adapted to shelter employers from breach of contract claims where their staff were left sitting idle, albeit being paid.<sup>18</sup>

- [3] Thirdly, by the early 1980s, the courts had established a rule that a contract could only be classified as an employment contract if reciprocity of obligation existed between the parties in their relationship.<sup>19</sup> The recognition of this ‘mutuality of obligation’ doctrine can be traced back to the implied rule that the employment contract is indeterminate/continuous in duration. In this way, mutuality/reciprocity, i.e. the normative reciprocity principle,<sup>20</sup> was equated with continuity/longevity. The contribution made by the implied indefinite duration rule to the emergence of the mutuality of obligation test is laid bare once the distinction between the exchange and reciprocity principles<sup>21</sup> is applied to the mutual obligations of the purported employee and employer which English Law treats as pre-requisites for the establishment of an employment contract. First, a basic work–wage bargain must be struck between the purported employer and the employee, in terms of which the purported employer actually provides a reasonable and minimum amount of work and pays for it, and the purported employee actually performs the reasonable and minimum amount of work offered by the purported employer (‘exchange component’). Secondly, there must be an exchange of mutual promises, whereby the purported employer makes an on-going commitment to provide a reasonable and minimum amount of work in the future and pay for it with a corresponding obligation imposed on the purported employee to perform that reasonable and minimum amount of work when offered in the future (‘reciprocity component’). It is the requirement for the parties to make mutual ongoing commitments to provide and perform work in the future at the inception of their relationship – i.e. the reciprocity component of the mutuality of obligation test demanding continuity of future performance – that reinforces the continuity of the employment contract. Seen from this perspective, a clear thread is visible, directly linking the rules governing the classification of a contract as a contract of employment to the implicit rules in play relating to the duration of that contract.

The end result of this analysis is that the implied continuity lying at the heart of the contract of employment permeates each of the default common law rules that the employment contract (1) is open-ended in duration,<sup>22</sup> (2) is comprised of two components – exchange-related and reciprocity-related - by virtue of the concept of ‘mutuality of obligation’, which is required for its formulation,<sup>23</sup> (3) cannot be suspended – in terms of the obligations that it imposes on the employee and the employer – in the absence of an express term empowering the employer to

<sup>18</sup> *Turner v Sawdon & Co.* [1901] 2 KB 653 (CA), 656-659 (A L Smith MR) and [section 1 of Chapter 17](#).

<sup>19</sup> *O’Kelly v Trusthouse Forte* [1984] QB 90 (CA) and *Carmichael v National Power plc* [1999] 1 WLR 2042 (HL). See also Deakin and Wilkinson, *The Law of the Labour Market* (n 8) 306-307.

<sup>20</sup> See [section 2 of chapter 2](#) and [section 3 of chapter 3](#).

<sup>21</sup> See [section 2 of chapter 2](#), [section 3 of chapter 3](#), Freedland, *The Personal Employment Contract* (n 7) 88–92, A Davies, ‘The Contract for Intermittent Employment’ (2007) 36 ILJ 102, 103 and H Collins, ‘The Contract of Employment in 3D’ in D Campbell, L Mulcahy and S Wheeler (eds) *Changing Concepts of Contract* (Palgrave MacMillan 2013) 65, 65-71.

<sup>22</sup> See *Richardson* (n 12) and *McClelland* (n 11).

<sup>23</sup> *Carmichael* (n 19)

do so,<sup>24</sup> (4) imposes no implied duty on the employer to supply the employee with work,<sup>25</sup> and (5) may be lawfully terminated by the employer on the provision of prior reasonable notice. This ensures the structural integrity of the contract of employment, prescribing a logically coherent body of legal rules operative from its inception and onward through to its termination.

## **B. Reform**

Having sketched out the common law norms regulating the duration of the employment contract and their structural significance, it is now an opportune time to reflect on the extent to which they ought to be reformed. The modern economic and industrial setting has implications for this discussion. This is tied to the notion that the standard indefinite/permanent employment contract emerged within the crucible of the ‘Fordist system’ of economic production. ‘Fordism’ entailed wholly integrated processes of production at the level of a single firm/employer directly employing a multitude of workers – also referred to as ‘vertical integration’ – discharging each level of the production process in-house and hiring labour on an indeterminate basis. The demise of the ‘Fordist system’ created the conditions for the emergence of labour markets that were more responsive to oscillations in managerial requirements for labour, i.e. ‘labour market flexibility’. In this way, the move from manufacturing to a ‘service world’, with a productive economy primarily grounded in services, has resulted in ingrained common law rules becoming frayed at the edges.<sup>26</sup> The collapse of Fordism, vertical disintegration,<sup>27</sup> and the rise in atypical working relationships associated with greater labour market flexibility could be used to justify the reform of the implied rule in favour of the indeterminate employment contract.

However, it is suggested that the disposal, or modification, of the rule in favour of the open-ended employment contract would be a step too far. First, it is too closely connected to the unrestricted reasonable notice rule to be altered in isolation: adjustment or removal of the former would demand the reconstruction of the latter. Secondly, and more importantly, the indeterminacy of the employment contract is cemented into the statutory provisions regulating the employment contract. For example, section 86 of the Employment Rights Act 1996 (ERA) prescribes statutory minimum weekly notice periods,<sup>28</sup> and sections 210-219 of the ERA specifically provide for continuity of employment. Even more compelling are the terms of the statutory unfair dismissal regime in Parts X and XI of the ERA. These assume that the contract of employment is an open-ended rather than fixed-term contract, particularly sections 95(1)(a) and 136(1)(a).

## **Section 2: Termination by lawful dismissal**

### **A. Dismissal by reasonable notice or PILON**

It is an axiomatic principle of the common law that the contract of employment can be lawfully brought to an end by the employer providing a period of reasonable notice to the employee. This power of dismissal is unrestricted inasmuch as the law imposes no substantive or procedural controls on its operation. As noted by Lord Reid, it is lawful for an employer to

<sup>24</sup> See *Hanley* (n 15) and *Bird v British Celanese* [1945] KB 336 (CA). See also [Chapter 23](#).

<sup>25</sup> *Collier v. Sunday Referee Publishing Co. Ltd.* [1940] 2 KB 647, 650 (Asquith J).

<sup>26</sup> See E Albin, ‘Labour Law in a Service World’ (2010) 73 MLR 959.

<sup>27</sup> See H Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 OJLS 353.

<sup>28</sup> See *Richardson* (n 12), 1816F-G (Denning LJ) who treats the statutory predecessor of this provision as implying that the employment contract is of indefinite duration.

terminate with reasonable notice ‘for any reason or for none’<sup>29</sup> and the employer is under no legal duty to ‘hear his employee before he dismisses him.’<sup>30</sup> The common law unrestricted reasonable notice rule can be contracted out of by the employer and the employee in the contract of employment, e.g. the insertion of ‘just cause’ fetters on the employer’s power of dismissal.<sup>31</sup> However, in practice, such contractual provisions are generally rare owing to the fact that the contract of employment is a contract of adhesion, i.e. a ‘take-it-or-leave-it’ contract presented by the employer to the employee where the employee finds himself in an inferior bargaining position. As for the period of notice, section 86 of the ERA prescribes a minimum, namely one week’s notice where the employee has been continuously employed for a period between one month and two years, which increases by a week for each year of continuous employment beyond two years, subject to a maximum of 12 weeks’ notice. The common law-implied period of reasonable notice or the parties by agreement may derogate *in melius*, i.e. upwards from the statutory minimum. The calculation of the ‘reasonable’ period of notice under the common law is far from scientific<sup>32</sup> and is contingent on three factors, namely the custom of the employee’s trade, the standing of the individual’s job (i.e. professional or otherwise),<sup>33</sup> and the frequency of the payment of the wage or salary (e.g. one week’s notice where payment is weekly or one month’s notice in the case of a monthly salary).

If the employer fails to provide the requisite period of reasonable notice before terminating the employment contract, there are three possibilities. First, that the employer has wrongfully dismissed the employee. Secondly, that the employer has summarily dismissed the employee without notice on the ground that the latter is in repudiatory breach of contract. Finally, that the employer has instead terminated the contract by paying the employee a sum of money in lieu of notice. With regard to the latter, the PILON will be the gross pay of the employee for the period of notice in question. Where there is an express power of termination in the employment contract with PILON, then the law provides that this will constitute a power to bring the contract to an end with immediate effect on an entirely lawful basis: an employee has no legal right to ‘keep the contract alive against his employer’s will by refusing to accept wages in lieu of notice.’<sup>34</sup> This can be contrasted with the situation where there is no express PILON. Here, the effect of the common law is that there is little scope for an implied power to arise which enables the employer to terminate by PILON.<sup>35</sup> As such, the immediate termination of the contract by PILON will constitute a breach of contract in such circumstances.<sup>36</sup> In the case of such a breach, there are two possibilities: first, if the employer pays full wages and contractual benefits in respect of the notice period in the absence of an express PILON, what are the employee’s damages? Arguably the employee has suffered no loss, so no damages will be available, but will the employee have the benefit of a non-pecuniary remedy on the basis of the application of the elective theory of termination, e.g. an order for specific performance or injunctive relief? Indeed, subsequent to the decision of the Supreme Court in *Société Générale (London Branch) v Geys*,<sup>37</sup> whether injunctive relief or specific performance are remedies that are available in such circumstances remains unresolved.<sup>38</sup> Secondly, if the employer fails to

<sup>29</sup> *Ridge v Baldwin* [1964] AC 40 (HL), 65.

<sup>30</sup> *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 (HL), 1581F–G and *Reda v Flag Ltd.* [2002] UKPC 38, [2002] IRLR 747, [50] (Lord Millett).

<sup>31</sup> See *McClelland* (n 11).

<sup>32</sup> *Wilson v Anthony* 1958 SLT (Sh Ct) 13.

<sup>33</sup> *Hill v CA Parsons & Co. Ltd.* [1972] Ch 305 (CA), 313D and 316F (Lord Denning MR and Sachs LJ).

<sup>34</sup> B Hepple, ‘The Right to Work at One’s Job’ (1974) 37 MLR 681, 685.

<sup>35</sup> *Delaney v Staples* [1992] 1 AC 687 (HL), 692 (Lord Browne-Wilkinson) and *Morrish v NTL Group Ltd.* [2007] CSIH 56, 2007 SC 805, [13] (Lord Nimmo-Smith).

<sup>36</sup> See *Rabess v London Fire and Emergency Planning Authority* [2014] All ER (D) 188 (EAT) (Sep).

<sup>37</sup> *Société Générale (London Branch) v Geys* [2012] UKSC 63, [2013] 1 AC 523.

<sup>38</sup> See *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] IRLR 57 [55] (Longmore LJ).

pay wages and other contractual benefits in respect of the entirety of the notice period, then this will amount to a wrongful dismissal<sup>39</sup> giving rise to damages,<sup>40</sup> unless the employer was justified in summarily dismissing without notice<sup>41</sup> or paying the employee a sum less than the full economic value of the notice period.

## B. Reform

Turning to the possible orientation of any proposed reformulation of such common law principles, it is suggested that an integrationist agenda which has hitherto been missing in the law governing unilateral dismissals by the employer ought to be pursued at all possible opportunities. This is the policy which this chapter will adopt, thus heralding a challenge to the traditional ‘oil and water’ relationship between the common law and statute, i.e. the disaggregated approach which conceptualizes the common law of termination as an independent layer of regulation that is completely separate from the statutory controls on termination which are superimposed on top of it.<sup>42</sup> As for the ‘small print’ of the proposed reconfiguration, it is argued that there is a compelling case for a modest degree of reform of the unrestricted reasonable notice rule. The proposed modification would be in terms of a narrowing of the scope of the applicability of that rule, as opposed to its wholesale abandonment, and one which is nonetheless consistent with the decisions of the House of Lords and the Supreme Court in *Johnson v Unisys Ltd*,<sup>43</sup> *Eastwood v Magnox Electric plc*<sup>44</sup> and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*.<sup>45</sup> These cases preclude an express or implied term from controlling the employer’s power of dismissal at common law on the basis that the existence of the statutory unfair dismissal regime presents a road-block. Faced by these authorities endorsing the continued operability of the unrestricted reasonable notice rule in the teeth of the unfair dismissal regime, the proposal is that some limited reconfiguration of this central rule - within the crevices or interstices of the operation of the statutory unfair dismissal regime - ought to be pursued. The suggested reforms might be found attractive to the judiciary insofar as they do not undermine the statutory scheme, amounting to a proper exercise of constitutional power by the judicial branch of government, and lying at the interface between the common law and statute.<sup>46</sup> They are also pro-employee in their orientation, and are of a *procedural* and *substantive* nature, coming into effect where there are gaps in the application of the unfair dismissal legislation. For instance, the two-year qualifying threshold for unfair dismissal protection excludes many employees from its coverage,<sup>47</sup> as do the eligibility criteria for access to such statutory rights.<sup>48</sup> The same point applies where the definition of ‘dismissal’ in section 95(1) of the ERA is not met by an employee. Seen from this perspective, where an employee falls outside the legislative scheme in this way, the common law would expand to offer substantive and procedural protections. The merit in such an approach is that the common law is only permitted to evolve where there are gaps in coverage of the statutory unfair dismissal regime, i.e. a much more modest and sober package of reform, reflective of Davies’

<sup>39</sup> *Pepper v Webb* [1969] 1 WLR 514 (CA).

<sup>40</sup> See chapters 8, 25 and 28 for the law on wrongful dismissal and remedies.

<sup>41</sup> For example, *Pepper* (n 39)

<sup>42</sup> Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 5) 222-245.

<sup>43</sup> *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, [43] (Lord Hoffmann).

<sup>44</sup> *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503.

<sup>45</sup> *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22.

<sup>46</sup> For an evaluation of the constitutional argument for the decision in *Johnson* (n 43), see section 4 of chapter 25.

<sup>47</sup> Section 108(1) of the ERA.

<sup>48</sup> See section 10 of the Employment Tribunals Act 1996 and sections 199 and 200 of the ERA re share fishermen and the police.



theme in Chapter 4 of the tendency of the common law to expand only where statutory principles are left unhindered.<sup>49</sup>

Assuming that the common law is indeed permitted to flourish outside the boundaries of the statutory unfair dismissal legislation, it is suggested that the law emerging under the rubric of the implied term of mutual trust and confidence, or the embryonic implied contractual right to fair treatment, might offer useful pointers as to the form that the modest *procedural* constraints on the unrestricted reasonable notice rule could take. Building on the arguments advanced by Brodie advocating the role of the implied term of mutual trust and confidence in securing procedural justice,<sup>50</sup> and the emerging jurisprudence in *West London Mental Health NHS Trust v Chhabra*<sup>51</sup> and *Yapp v FCO*<sup>52</sup> recognising an implied right to a fair disciplinary process, one could foresee the adaptation of the content of these implied terms as the juridical techniques employed to develop a broader principle empowering the employer to lawfully dismiss if it conforms to fair and proper processes prior to dismissal. As such, where the employer adheres to fair and proper pre-dismissal procedures, the reformed law would assume that the employer had complied with the implied term of mutual trust and confidence or the newly established implied contract right to fair pre-dismissal treatment. Conversely, where the employer dismisses without adhering to such procedures, this would sound an action in damages, which may or may not be capped at the same level as the maximum compensation allowed for unfair dismissal.<sup>53</sup> As for the exact content of such fair and proper procedures, one would expect the terms of the ACAS Code<sup>54</sup> to be adopted at the very least. To fill in the detail, one need look no further than what is considered to be ‘best practice’ due process in the HRM industry, which promotes transparency and consistency in decision-making.

As for the nature of the substantive controls on lawful dismissal by the employer, it is argued that ‘just cause’ requirements<sup>55</sup> prior to dismissal ought to be imposed at common law by analogy with the statutory presumptively valid reasons found in section 98(1), (2), and (3) of the ERA. In this way, the common law would adopt or adapt the statutorily prescribed concepts such as redundancy, misconduct, and incapacity/capability found in the unfair dismissal legislation to its own ends.<sup>56</sup> This would also have the benefit of heralding an integrated approach to the law governing the unilateral termination of the employment contract. It would do so by establishing a composite body of rules that offer a moderate degree of deviation from the hitherto prevalent ‘loose’ or disaggregated approach.<sup>57</sup>

On the justifications for adjusting the unrestricted reasonable notice rule to import procedural and just cause protections, it is contended that these changes are consistent with the modern

<sup>49</sup> See section 2B of Chapter 4.

<sup>50</sup> D Brodie, ‘Mutual Trust and Confidence: Catalysts, Constraints and Commonality’ (2008) 37 ILJ 329, 341-343.

<sup>51</sup> *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] ICR 194.

<sup>52</sup> *Yapp v FCO* [2014] EWCA Civ 1512, [2015] IRLR 112.

<sup>53</sup> Whether damages at common law for breach should be limited in this way would be a policy choice for Parliament to make, on which, see Freedland, *The Personal Employment Contract* (n 7) 396.

<sup>54</sup>

See [http://www.acas.org.uk/media/pdf/k/b/Acas\\_Code\\_of\\_Practice\\_1\\_on\\_disciplinary\\_and\\_grievance\\_procedures-accessible-version-Jul-2012.pdf](http://www.acas.org.uk/media/pdf/k/b/Acas_Code_of_Practice_1_on_disciplinary_and_grievance_procedures-accessible-version-Jul-2012.pdf) accessed 13 July 2015.

<sup>55</sup> See G Davidov, ‘In Defence of (Efficiently Administered) ‘Just Cause’ Requirements’ (2007) 23 IJCLLR 117.

<sup>56</sup> For an account of the various substantive restrictions imposed on the employer’s power to dismiss in comparative labour law, see Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 5) 234.

<sup>57</sup> See chapter 25.

institutional HRM context, which actively promotes due process in employment relations.<sup>58</sup> They also reflect the increasing recognition of the influence of procedural justice via the statutory unfair dismissal regime and its feedback effect on workplace procedures. The suggested reforms also chime with the theory of relational contracting<sup>59</sup> in private law and the strand of democratic theory encountered in public law known as participative communitarianism. For example, in terms of relational contracting theory, ‘greater emphasis is placed on preservation of relations given the added significance of the relationship to the parties compared to a more transactional exchange... [and] one would expect the law to function in a manner that was supportive of the relationship continuing and serve as a restraint on ease of exit.’<sup>60</sup> Relational contracting would also point in the direction of just cause constraints and procedural protections such as the right to a hearing and reasons for dismissal at common law.<sup>61</sup> As for the notion of participative communitarianism, this ensures that ‘individuals – and groups – affected by public decisions ought to have the opportunity to participate in those decisions, for instance, by being given a hearing before the decision is made, having opportunities to put their own case and arguments, or being given reasons for the eventual decision and having the right to apply for [appeal]... if decision makers have not complied with these requirements.’<sup>62</sup>

One might object that such reform is unwarranted for a number of reasons, e.g. Brodie has concerns that ‘[d]eference towards the legislature [as exemplified in *Johnson, Reda, Eastwood* and *Edwards*] may mean that courts will refuse to extend the protection of the common law even where it is not claimed that to do so would undermine the will of Parliament.’<sup>63</sup> In light of such sentiments, an attempt will be made here to anticipate and address these concerns. First, the most obvious charge is that the deferential attitude of the judiciary to the unfair dismissal regime renders it impossible for the common law to act as the engine of the proposed reform. It is submitted that this objection is misplaced, since it fails to ‘hit the target’: the whole point of the suggested scheme is that it constitutes a carefully limited exception to the unrestricted reasonable notice rule that will only be pressed into service when an employee is excluded from the coverage of the legislation. Indeed, it is the very fact that the unfair dismissal regime is inoperative that acts as the justification for the expansion of the common law, sounding a remedy in damages in the event of breach of the substantive and procedural restrictions imposed on dismissal. Of course, the proposed reforms would also have to confront the decision of the House of Lords in *Addis v The Gramophone Company*,<sup>64</sup> but it is contended here that the arguments presented in chapter 25 are sufficiently persuasive to warrant the abandonment of *Addis*.<sup>65</sup>

A second objection to the proposed introduction of selective common law constraints on the unrestricted reasonable notice rule is the argument that they would inevitably damage the structural integrity of the employment contract, leading to the rejection of the default rules prescribing that the contract of employment (1) is of indefinite duration, and (2) cannot be suspended without pay for economic or disciplinary reasons in the absence of an express term

<sup>58</sup> D Brodie, ‘Mutual Trust and Confidence: Catalysts, Constraints and Commonality’ (2008) 37 ILJ 329, 336-339.

<sup>59</sup> I Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (YUP 1980).

<sup>60</sup> See section 5E of Chapter 7.

<sup>61</sup> See section 5E of Chapter 7.

<sup>62</sup> D Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999) 5-6. See also M Freedland and N Kountouris, ‘Common Law and Voice’ in A Bogg and T Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 358-359.

<sup>63</sup> D Brodie, ‘Voice and the Employment Contract’ in A Bogg and T Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 337, 344.

<sup>64</sup> *Addis v The Gramophone Company* [1909] AC 488 (HL).

<sup>65</sup> See chapter 25.

to that effect. Whilst superficially powerful, it is suggested that these concerns are misguided for the reason that what is not being proposed is the renunciation of the unrestricted reasonable notice rule. Instead, the modifications are limited to circumstances where the statutory unfair dismissal scheme is inoperative.

Thirdly, of a more formidable nature is the accusation that the proposed reforms fail to cohere with the laws regulating unilateral termination. The line of argument here is that it would be a recipe for chaos to draw up a regulatory regime that encompasses a newly nascent common law of wrongful dismissal offering more robust procedural and substantive controls alongside the self-contained strand of statutory regulation that finds its expression in the unfair dismissal regime. One might quibble that this would lead to a more disintegrated system of legal regulation of termination of the employment contract than that which already pertains under the current law. For instance, where the employer fails to adhere to the newly crafted substantive or procedural restrictions on the employer's power to dismiss on reasonable notice, and thus breaches the implied term of mutual trust and confidence or the emerging implied contractual right to fair treatment, the danger would be that employees falling outside the statutory regime would enjoy a heightened level of protection in comparison with those employees who continue to be subject to the legislation. Employees not covered by the statutory scheme, but protected by the common law, would be entitled to claim breach of contract in court and recover damages in respect of their dismissal. Meanwhile, employees subject to the legislation would be denied such a substantive right and remedy, since *Johnson*, *Reda*, *Eastwood* and *Edwards* would channel their claim down the route of the employment tribunal system.<sup>66</sup> Ultimately, this fragmented approach can be criticized on the basis that it is incoherent and irrational, carving out a two-tier labour force. However, it is argued that this particular indictment is nothing more than a chimera. At the very least, such a development of the common law would take matters some way down the direction of enhanced protection for employees not covered by the unfair dismissal legislation. There is every possibility that this journey could lead to the content of the reformed law thriving, duly leap-frogging over to employees generally, i.e. to include those falling within the scope of the legislation. Secondly, as things stand, the current approach is equally as, or arguably even more, illogical than that expressed by the proposed reforms, since one group of employees clearly boasts a greater degree of protection than another. In the teeth of a restrictive common law attitude to employees generally as regards rights and remedies on wrongful dismissal, and a permissive approach to qualifying employees covered by the unfair dismissal regime, this whole narrative simply highlights the difficulties one encounters in crafting a unified approach to the regulation of unilateral terminations by dismissal.

### **C. Summary dismissal**

The law of justified summary dismissal lays down the conditions for a lawful unilateral termination by the employer without notice or PILON, owing to the fact that the employee has committed a repudiatory breach. A distinction in the case law has been drawn between (1) improper/dishonest and (2) insubordinate/un-cooperative employee conduct. Unlike the former, the latter entails the application of a searching evaluation of the employer's conduct, which may require an examination of the motives of the employer and whether it was in bad faith in dismissing the employee.<sup>67</sup> Of course, both (1) and (2) demand a repudiatory breach by the employee to determine whether the employee's behaviour constitutes gross misconduct,

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<sup>66</sup> At best, post-*Edwards*, such employees might be entitled to an injunction from the courts in respect of a threatened dismissal.

<sup>67</sup> *Macari v Celtic Football and Athletic Club Co. Ltd.* [1999] IRLR 787 (CS).

rather than the lesser form of ‘serious’ misconduct.<sup>68</sup> Suffice to say that the employee’s actions must be such that they ‘make... the continuance of the contract of service impossible’.<sup>69</sup> It has been decided that a summary dismissal will be lawful, but will not readily be sustained, in the case of misconduct which only incidentally impacts upon the performance of the core duties of the employee under the relevant employment contract.<sup>70</sup> Whether there has been a repudiatory breach is a classic ‘jury question’ for the trial judge to determine and an appellate court will be slow to interfere.<sup>71</sup>

Of central importance in recent times has been the emergence of the implied terms of the contract of employment<sup>72</sup> as a normative toolkit for the development of the law of summary dismissal. For example, it has been held that an employer will be entitled to summarily dismiss an employee lawfully where the employee’s conduct so undermines the trust and confidence which is inherent in the employment relationship that the employer should no longer be required to retain the employee in its employment.<sup>73</sup> The importation of the implied terms into this corner of the regulation of termination of the employment contract is seductive and has had consequences for the default rules on duration: the policy notions of mutuality and reciprocity that are so central to the implied terms,<sup>74</sup> serve to buttress the continuity inherent within the default rule controlling the duration of the employment contract. By transposing the conceptual framework of the implied terms into the common law governing summary dismissal, the common law has once again accentuated the structural connections which arise between the law governing the content and performance of the contract of employment on the one hand (i.e. the implied terms) and the law applicable to its termination and duration on the other hand. Nonetheless, certain risks are associated with this approach. The danger is that doctrinal conflicts could arise if the law governing the content and performance of the contract of employment is allowed to penetrate too far into the common law of summary termination, potentially leading to a conceptual cul-de-sac. Two points can be made at this juncture.

First, orthodox principles of contract law do not cling to the notion that a repudiatory breach of an implied term is required to enable an innocent contracting party to terminate a contract. A repudiatory breach of an implied term is sufficient, but not necessary, since it is equally possible for an innocent party to elect to terminate on the occurrence of a repudiatory breach of an express term, or the occurrence of any conduct on the part of a contracting party evincing an intention to no longer be bound. There is an argument that the onward march of the implied term of mutual trust and confidence from its traditional ground governing the content and performance of the employment contract onto the territory regulating its termination is difficult to resist,<sup>75</sup> but it is not inevitable and may represent an unwarranted intrusion. Secondly, consider the position where the employee has reasonable and proper cause for his repudiatory conduct, and the employer is invoking the latter as the ground to summarily dismiss. The question that arises is whether it is possible for the jurisprudence pertaining to the implied term of mutual trust and confidence, which incorporates a ‘reasonable and proper cause’ defence, to fit in here where the employer summarily dismisses? The employee’s defence may herald the

<sup>68</sup> For the distinction between gross and serious misconduct, see *West London Mental Health NHS Trust* (n 51).

<sup>69</sup> *Wilson v Racher* [1974] ICR 428 (CA), 432 (Edmund Davies LJ).

<sup>70</sup> *McCormack v Hamilton Academical Football Club Ltd.* [2011] CSIH 68; 2011 GWD 39–801.

<sup>71</sup> *Clouston & Co. Ltd. v Corry* [1906] AC 122 (Privy Council, NZ).

<sup>72</sup> See chapter 22.

<sup>73</sup> *Jervis v Skinner* [2011] UKPC 2 (Privy Council, Bahamas). Such conduct may amount to gross misconduct.

<sup>74</sup> Freedland, *The Personal Employment Contract* (n 7) 127–128.

<sup>75</sup> On the basis that breach of an implied term automatically constitutes a repudiatory breach of the employment contract (*Morrow v Safeway Stores plc* [2002] IRLR 9 (EAT)) and that the common law regulating unilateral summary terminations of the employment contract by the employer and constructive dismissals are simply the opposite sides of the same coin.

emergence of an intensive evaluation of the employer's conduct in order to determine whether the employee had sufficient reason to destroy or severely damage the trust and confidence in their relationship. This would be consistent with the current law applicable where the employee's conduct is of an insubordinate/un-cooperative nature, i.e. (2) above in the preceding paragraph, but would not sit well with the approach adopted at the present time in relation to improper/dishonest behaviour of the employee which is being used as reason for summary dismissal, i.e. (1) above in the preceding paragraph. One way of perhaps reconciling the employee's reasonable and proper cause defence with the law of summary unilateral termination in this case would be to develop measures which curtail the ability of the employer to immediately terminate without notice. For example, the reasonable and proper cause defence inherent within the rubric of the implied term of mutual trust and confidence could be used as the catalyst to fashion managerial requirements for adherence to due process, e.g. public law-oriented rights in favour of the employee to a hearing, a right of appeal, etc. before summary termination for repudiatory breach. In this way, the failure of the employer to follow such procedures would generate a finding that the employee had reasonable and proper cause for his repudiatory conduct. Such a development would be consistent with the characterisation of summary dismissal in the case law as an exceptional remedy,<sup>76</sup> as well as paragraph 22 of the ACAS Code which recommends conformance with a fair disciplinary process in all cases where the employer dismisses without notice.<sup>77</sup> It would also be comparable with the proposed reforms in respect of the unrestricted reasonable notice rule generally, which were mooted earlier in this section. Ultimately, the point being made here is that it is essential that some element of synthesis of these two strands of the common law of the employment contract is fashioned so that they are integrated more fully into a coherent body of norms.

### **Section 3: Termination by resignation or retirement**

Both resignation and retirement of the employee function as limits upon the duration of the contract of employment. They are both regulated in a similar manner inasmuch as they can be conceptualized as particular modes for its termination. However, the pressures exerted on retirement by the legislative regulation of age discrimination operate to distinguish between the two.

#### **A. Resignation**

It is intuitive to conceive an employee resignation as a unilateral termination of the employment contract on the provision of the requisite period of notice. But such a rationalisation of the position would be simplistic and under-inclusive. For instance, a resignation may in fact amount to a bilateral termination of the employment contract by mutual consent.<sup>78</sup> In shorthand, this is often referred to as an 'agreed resignation' or 'voluntary redundancy/retirement',<sup>79</sup> and has been held not to amount to a dismissal, i.e. a unilateral termination by the employer under the statutory unfair dismissal regime. However, 'automatic termination/resignation' clauses inserted into a contract of employment whereby the employer and employee purport to agree to the latter's resignation on the occurrence of some event, will be treated as void under the restrictions on contracting out of the unfair dismissal legislation by virtue of section 203(1) of

<sup>76</sup> *McCormack* (n 70).

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See [http://www.acas.org.uk/media/pdf/k/b/Acas\\_Code\\_of\\_Practice\\_1\\_on\\_disciplinary\\_and\\_grievance\\_procedures-accessible-version-Jul-2012.pdf](http://www.acas.org.uk/media/pdf/k/b/Acas_Code_of_Practice_1_on_disciplinary_and_grievance_procedures-accessible-version-Jul-2012.pdf) accessed 13 July 2015.

<sup>78</sup> See *Logan Salton v Durham County Council* [1989] IRLR 99 (EAT).

<sup>79</sup> For example, *Birch v Liverpool University* [1985] ICR 470 (CA).

the ERA: as such, the termination will amount to a unilateral dismissal.<sup>80</sup> A similar outcome will be reached under the unfair dismissal legislation where the departure of the employee is more accurately cast as a ‘forced’ resignation rather than a unilateral resignation/termination by the employee, e.g. where there is a clear causal link between the employee’s resignation and an employer’s threat of dismissal. In such a case, the termination of the employment contract will count as a ‘dismissal’ thus engaging the statutory unfair dismissal protections.<sup>81</sup>

Is there a compelling argument to re-orient the common law rules on lawful resignation in the case of a unilateral, ‘agreed’ or ‘forced’ resignation? It is suggested that some convergence between the rules governing a ‘forced resignation’ under the unfair dismissal regime and the common law would be welcome. This would translate into the ‘forced resignation’ – which resembles a unilateral termination by the employee – instead being treated at common law as a unilateral termination by the employer, i.e. as a dismissal. In such a case, the ‘dismissed’ employee would be entitled to notice pay and other contractual benefits during his/her notice period, which he/she would have been denied on the ground that he/she had resigned. However, beyond that, there are unlikely to be any additional implications for the common law if it is assimilated with the statutory legal position adopted in the case of a forced resignation. If anything, such convergence would also have the attraction of engendering an integrated approach towards the common law and statutory regulation of the termination of the employment contract.

## **B. Retirement**

The common law of retirement shares some affinities with the position on resignation in the sense that retirement may also constitute a bilateral termination by mutual consent,<sup>82</sup> or a unilateral termination by the employer or employee at a prescribed age on the provision of reasonable notice. In contrast with a unilateral termination by the employer, if the employee’s retirement amounts to a bilateral termination, the statutory unfair dismissal scheme will not apply. The legal position is complicated by section 13(2) of the Equality Act 2010 (EqA) in the case of a unilateral termination by the employer. Whilst the dismissal of an employee at a particular age will be lawful at common law if the employer provides reasonable notice, if the employer’s unilateral termination constitutes less favourable treatment of the employee in comparison with an actual or hypothetical comparator employee because of the employee’s age, the employer will be liable for unlawful direct age discrimination under section 13(1) of the EqA.<sup>83</sup> Liability can only be sidestepped if the employer is able to show that the unilateral termination at the retirement age was a proportionate means of achieving a legitimate aim in terms of section 13(2) of the EqA. The employer will be able to satisfy the proportionality test if it can convince a court that it is appropriate and necessary to dismiss the employee for the reason of retirement in order to achieve one of a strictly controlled class of legitimate aims, namely inter-generational fairness and preserving the dignity of older workers.<sup>84</sup>

The distinction drawn here between the common law and statutory regulation of unilateral termination by the employer for the reason of retirement raises the question as to whether an element of integration between the two sources of law ought to be pursued. It is difficult to respond to that question, since the statutory controls on retirement in the guise of the age

<sup>80</sup> *Igbo v Johnson Matthey Chemicals Ltd.* [1986] IRLR 215 (CA). Cf. *Brown v Knowsley Borough Council* [1986] IRLR 102 (EAT).

<sup>81</sup> *Sandhu v Jan de Rijk Transport Ltd.* [2007] EWCA Civ 430, [2007] ICR 1137, [35] (Wall LJ).

<sup>82</sup> See *Birch* (n 79).

<sup>83</sup> See Freedland, *The Personal Employment Contract* (n 7) 309. It is not clear whether retirement by bilateral termination would constitute ‘treatment’ of the employee in terms of section 13(1) of the EqA.

<sup>84</sup> See *Seldon v Clarkson, Wright & Jakes* [2012] UKSC 16, [2012] ICR 716, [54] (Baroness Hale).

discrimination legislation are not specifically designed to address the regulation of the *termination* of the employment relationship. Accordingly, it is arguably inappropriate to promote the assimilation of the two strands, particularly since such a reformulation may give rise to calls for convergence of the common law and the norms applicable in the context of dismissals which are discriminatory on the basis of other protected characteristics in the EqA. Further, it is not at all clear how the rules applicable under the statutory unfair dismissal and equality regimes can be reconciled with the common law, or together for that matter. For instance, it is yet to be fully understood how the proportionality standard of review evaluating the employer's behaviour in terms of section 13(2) of the EqA can be equated with the range of reasonable responses standard of review which scrutinizes the substantive fairness of the employer's decision to dismiss for the reason of retirement under the unfair dismissal legislation.<sup>85</sup>

#### **Section 4: Termination by expiry and non-renewal of a fixed-term employment contract**

The common law and the statutory unfair dismissal regime supply no definition of a 'fixed-term' contract of employment. The only guidance that is available is found in sections 95(1)(b) and 235(2A) of the ERA, which refer to the concept of a 'limited-term' contract. This is defined as a contract of employment under which employment is not intended to be permanent and where the contract provides for it to be terminated by virtue of the occurrence of a 'limiting' event. Section 235(2B) of the ERA goes on to define a 'limiting' event as the expiry of a term where the contract is for a fixed-term, the performance of a specific task, where the contract contemplates such performance, or the occurrence of a particular event, where the contract stipulates that it will terminate on the occurrence of the same.<sup>86</sup> At common law, the 'commonly held view or intuition'<sup>87</sup> is that where a provision of a contract of employment directs that it is to endure for a specific period of time, or that it is to terminate on the performance of a task or the occurrence of an event, and the contract terminates but is not renewed, then this will constitute a bilateral termination in terms of a pre-termination agreement. The fact that the fixed-term/limited-term contract prescribes that it is terminable by notice prior to the fixed term or the performance of the task or occurrence of the event, is of no consequence. The position at common law can be contrasted with the legal position adopted under the statutory unfair dismissal scheme. In *Dixon v BBC*,<sup>88</sup> the Court of Appeal held that the expiry and non-renewal of a 'fixed-term' contract constitutes a unilateral termination by the employer, i.e. a dismissal, notwithstanding that the contract is terminable on reasonable notice prior to the expiry of that term.<sup>89</sup> One would expect the same reasoning to apply to the analogous statutory concept of the 'limited-term' contract in the ERA.

Yet, whilst statute will categorize the expiry and non-renewal of a fixed-term contract as a dismissal, the dismissal itself will not be treated as conduct discriminatory to fixed-term employees. For instance, the FTER seek to prevent fixed-term employees from experiencing less favourable treatment than their counterparts that are permanently employed by their employer. In *Department for Work and Pensions v Webley*,<sup>90</sup> the question that came before the court was whether the termination of a fixed-term contract by the effluxion of time, i.e.

<sup>85</sup> See *Turner v East Midland Trains Ltd.* [2012] EWCA Civ 1470, [2013] ICR 525, [50]-[53], H Collins and V Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) MLR 909, 920-921 and D Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 ILJ 146, 163 and 170.

<sup>86</sup> In regulation 1(2) of the Fixed-Term Employees Regulations (SI 2002/2034) ('FTER'), the expression is 'fixed-term contract' rather than 'limited-term' contract.

<sup>87</sup> Freedland, *The Personal Employment Contract* (n 7) 434.

<sup>88</sup> *Dixon v BBC* [1979] ICR 281 (CA).

<sup>89</sup> Likewise, see *University of Stirling v UCU* [2015] UKSC 26, [2015] ICR 567.

<sup>90</sup> *Department for Work and Pensions v Webley* [2004] EWCA Civ 1745, [2005] ICR 577.

expiry and non-renewal, could amount to less favourable treatment by comparison with a permanent employee under regulation 3(1) of the FTER. The Court of Appeal reached the conclusion that the non-renewal of the contract constituted a dismissal, but that this could not be counted as a form of less favourable treatment.

A measure of reflection on the ‘black-letter law’ discussed in the previous paragraphs betrays a degree of disjunction between the regulation of fixed-term contracts at common law and statute. One might ask why the expiry of a fixed term contract should not be treated as a unilateral termination/dismissal at common law in much the same way as it is under statute. In practice, the conflation of the common law and statutory treatment of the non-renewal of a fixed-term contract might not make much difference. Yet, the recalibration of the common law in this way would be symbolic, serving to integrate the two disjointed streams of the law which function to regulate lawful termination of fixed-term contracts of employment. Whilst such a proposed adjustment would represent a patent deviation from general contract law doctrine – in the sense that a bilateral termination is being recast as a unilateral termination/dismissal – it is suggested that the institutional context and in particular, the role of HRM in modern employment relations, serves to furnish a justification. In Chapter 1, Freedland referred to the ‘heightened consciousness’ of management to set up and administer the use of contracts in the mode of precariousness.<sup>91</sup> Calculated behaviour of this kind gives rise to the conviction that there ought to be a more central role for the common law in subjecting the use and termination of fixed-term contracts of employment to a greater degree of legal control. For instance, Freedland also addressed the scope for the forging of a parallel line of protection by adapting reasoning analogous to that employed in *Autoclenz Ltd. v Belcher*.<sup>92</sup> The line of thought here is that the modified sham doctrine formulated in *Autoclenz* ought to be applied to furnish precarious fixed-term contract workers with some legal safeguards, e.g. by overlooking the ‘contractual rationality’ where this is not reflective of the true agreement of the parties in favour of the ‘relational rationality’ as expounded by Collins.<sup>93</sup> This could involve the common law providing that an employer is required to have a legally prescribed qualifying reason or reasons in order to employ an individual on a fixed-term contract of employment, as is the case in certain continental jurisdictions. But more crucially, the common law should be reconfigured to offer up the potential to reclothe such contracts as permanent and as such, play a part in acting as a counterweight to the increasingly specialized and professionalized HRM practices and the intensification of the contractualisation of employment relations. Indeed, such an approach would be consistent with the provisions in regulation 8 of the FTER on the conversion of fixed-term contracts into permanent contracts, where the former have been used successively by the employer for four years or more.

### **Section 5: Non-lateral termination: frustration**

When the employment contract is terminated by frustration, the termination is not attributable to the fault or conduct of either of the contracting parties, but to a supervening event.<sup>94</sup> To that extent, termination by frustration can be distinguished from unilateral or bilateral termination, which involves the participation of one or both of the parties in some form of terminatory action. The general trend in the case law has been to restrict the circumstances in which the employment contract will be treated as having been automatically terminated by the doctrine

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<sup>91</sup> See section 3 of Chapter 1.

<sup>92</sup> *Autoclenz Ltd. v Belcher* [2011] UKSC 41, [2011] ICR 1157.

<sup>93</sup> Collins, ‘The Contract of Employment in 3D’ (n 21) 71-76.

<sup>94</sup> *Davis Contractors Ltd. v Fareham UDC* [1956] AC 696 (HL).



of frustration.<sup>95</sup> If a tribunal or court accepts that the employee's employment contract has been frustrated, he/she will be precluded from accessing statutory unfair dismissal protection, since he/she will be unable to establish a 'dismissal' in terms of section 95(1) of the ERA: this statutory provision envisages an actual or constructive terminatory action of some sort on the part of the employer or employee. As such, the limited recognition of the operation of frustration in the case law can be explained by the severe circumstances for an employee where he/she is denied entry through the gateway to the statutory unfair dismissal regime, namely the concept of 'dismissal'. The failure to acknowledge a role for the frustration doctrine is particularly evident in the case of an interruption of the employee's employment by incapacity/illness or a custodial sentence.

In light of the foregoing evaluation, it is argued that the underlying common law of frustration of the contract of employment has been irrevocably influenced and adjusted by the case law developed through the unfair dismissal legislation. To that extent, the two statutory-based and common-law based strands of regulation of the employment contract are aligned, thus underlining the existence of an integrated approach. Seen from this perspective, the operation of the doctrine of frustration is conducted within carefully controlled limited bounds so as to not deprive the employee of the common law right to claim wrongful dismissal or the statutory right to claim unfair dismissal.

### Conclusion

The proposed reforms advanced in this chapter can be summarized briefly and grouped into two camps, according to whether they promote the goals of substantive or procedural fairness. First, permitting the common law to expand to confer substantive pre-dismissal protection on those employees falling outside the ambit of the statutory unfair dismissal scheme to enable them to recover damages at large for losses suffered is one means of achieving substantive fairness. As for the proposed reconceptualization of the 'forced resignation' at common law as a unilateral termination of the employment contract by the employer, i.e. a dismissal, this also amounts to an adjustment of the law which will enhance substantive fairness. The same can be said for the suggested reforms whereby the non-renewal of a fixed-term contract is treated at common law as a dismissal and the frustration doctrine is constrained at common law. In advancing such legal reforms of a substantive hue, it is argued that they are consistent with the traditional emphasis on the deployment of the law of the contract of employment as a means of mutualising the economic risks of the employing enterprise, entailing the diffusion/shifting or allocation/co-ordination of such risks.<sup>96</sup> Meanwhile, the goal of procedural fairness is also furthered by the conferral of pre-dismissal protections on employees who are disintitiled from pursuing a statutory unfair dismissal claim. Likewise, in the case of the proposed modifications to the law of summary termination by the employer, which introduce pre-dismissal due process requirements.

At a more conceptual level, it is argued that the recent introduction of employment tribunal fees acts as a powerful driver for the procedural reforms. The point here is that the fees function indirectly to limit the application of the procedural protections furnished to employees by labour law. The denial of access to justice associated with the employment tribunal fees is a 'game-changer' which one would argue demands a re-balancing of the interests of capital and labour. Of course, this could be spurred by the traditionally conservative judiciary, but the signs

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<sup>95</sup> *Williams v Watsons Luxury Coaches Ltd.* [1990] ICR 536 (EAT) and *Burns v Santander UK plc* [2011] IRLR 639 (EAT).

<sup>96</sup> N Countouris and M Freedland, 'The Myths and Realities of 'Social Europe'' in N Countouris and M Freedland (eds) *Resocialising Europe in a Time of Crisis* (CUP 2014) 7-8.

of any movement in this direction to date are scant.<sup>97</sup> As for the substantive reforms, whilst of undoubted practical effect, they are also symbolic in character inasmuch as they would represent judicial and Parliamentary recognition of the employment contract as a social phenomenon rather than one that is purely economic in nature.<sup>98</sup> They also amount to an adjustment of the bargain between management and workers by equitably reallocating the economic risks involved in the employer's enterprise, i.e. mutualising the economic risks and edging the common law away from its traditional insistence on the protection of the private property rights of the employer.<sup>99</sup>

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<sup>97</sup> See *R (on the application of Unison) v Lord Chancellor* [2015] EWCA Civ 935 and *R (on the application of Unison (No. 2)) v Lord Chancellor* [2014] EWHC 4198 (Admin).

<sup>98</sup> Elias, 'The Structure of the Employment Contract' (n 4) 99.

<sup>99</sup> *RMT v Serco* [2011] EWCA Civ 226, [2011] IRLR 399, [8] (Elias LJ).