

SIMILARITIES AND DIFFERENCES BETWEEN LABOUR CONTRACTS AND CIVIL AND COMMERCIAL CONTRACTS

United Kingdom

Hugh Collins,

1. The Application of General Contract Law to Contracts of Employment.

In common law systems, in the absence of a distinct labour code or a commercial code, it is presumed that the ordinary private law of contract applies to commercial agreements and employment relations alike. The employment relation was analysed in law as a contract governed by private law by the middle of the nineteenth century, thus prising it apart from domestic relations of status, though the older language associated with a household status relation of 'master and servant' continued to be used by lawyers until the 1960s.¹ Unlike some commercial contracts, such as sale and bills of exchange, however, there has never been legislation designed to provide an authoritative and convenient summary of the principles of law applicable to contracts of employment.

Although the starting point of the common law is the application of common rules to all kinds of commercial contracts and the employment relation, both with respect to particular kinds of commercial relations and contracts of employment, the common law has the capacity to develop specific principles to govern a particular context. Most of these rules are not characterised as rules of law, but rather are described as 'implied terms' of the contract. This terminology denotes a fiction that these rules are part of the agreement between the parties, albeit part of an implicit rather than explicit agreement. Some implied terms may indeed represent the actual, though unexpressed, intention of the parties, and these are known as terms implied 'in fact'. But the more significant terms are implied without direct reference to the intentions of the parties. Instead, terms implied by law represent judicial conceptions of what obligations should be the normal incidents of standard types of contractual relation, such as the contract of employment. In practice, these rules are presumed to constitute part of the legal relation in the absence of express contrary agreement, so they function as supplementary or non-mandatory legal rules.

Implied terms can be introduced into contracts, if they are reasonably necessary to give the contract business efficacy.² The implied term must also represent an obligation that can be generalised across a type of contractual relation as a normal incident of that type of contract. But there is no fixed or conventional typology of contracts, so that a court may imply a rule into a contract of employment either as a normal incident of (a) contracts of employment, or (b) as a normal incident of a particular kind of employment relation, or (c) as a normal incident of a class of contracts into which the contract of employment falls. An example of (a) is the implied term of trust and confidence that applies to all contracts of employment, but not other contracts.³ An example of (b) is an implied duty to disclose information about changes in terms and conditions that provide valuable opportunities for employees when those changes have been collectively negotiated or introduced unilaterally by the employer as part of the rules of the organisation.⁴ Another example might be an implied duty imposed on the employer to supply work if the payment mechanism under the contract is determined by the completion of tasks such as piece work.⁵ Under the (c) category, it is possible for implied terms to be applied to a class of commercial contracts that includes some employment relations.

The application of standard commercial law default rules to the contract of employment led to the introduction of one of the most important implied terms. Under commercial contracts of indefinite duration, the courts usually imply a term that that the contract can be terminated by either party unilaterally on giving reasonable notice.⁶ This term permits either party to extricate themselves from a commercial relation by bringing the contract to an end, provided that they give fair warning. The period of required notice is that which a court regards as reasonable in all the circumstances. This rule was applied to the contract of employment in the UK (but not the USA) in the last quarter of the nineteenth century. Where a contract of

¹ O. Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1978) 93 *Law Quarterly Review* 508.

² *Liverpool City Council v Irwin* [1977] AC 239, HL.

³ *Malik v Bank of Credit and Commerce International* [1997] 3 All ER 545, [1997] IRLR 462, HL.

⁴ *Sally v Southern Health and Social Services Board* [1992] 1 AC 294, [1991] IRLR 522, HL.

⁵ *Devonald v Rosser Sons* [1906] 2 KB 728, CA.

⁶ *Staffordshire Area Health Authority v South Staffordshire Waterworks Co.* [1978] 3 All ER 769, [1978] 1 WLR 1387, CA.

employment was not for a fixed period, then the courts implied a term that either the employer or the employee could terminate it on giving reasonable notice. The period of notice required reflected social expectations of job security, so that the higher the status of the employee, the longer the period of required notice.⁷ For most workers, however, the period of notice was deemed to be the length of the periodical payments of wages. Thus workers who were paid weekly were entitled to a week's notice. This rule seems to have been to the mutual advantage of employers and employees. Employers had the power to terminate the contract on short notice vindicated by the law, but at the same time employees received a small degree of income security, and more importantly acquired the right to leave a job without risking criminal penalties.⁸ In the United States, however, the legal orthodoxy became one of termination 'at will', that is without a requirement to give reasonable notice, which represented a special rule for contracts of employment.⁹

In many other respects, the common law implied terms into the contract of employment that carved out a distinctive model for the contract of employment, but which drew heavily upon analogies with default rules in other types of commercial contracts. For example, the courts implied into contracts of employment obligations imposed on the employee of loyalty and obedience. These obligations were regarded as essential to the employment relation, because it was believed that the relation could only operate effectively if the employee placed the interests of the employer before his own in the performance of the contract. In effect, this was an implied obligation of co-operation, which was not applied to most other commercial contracts. In standard commercial contracts the courts assumed that the parties were always entitled to act in their own best interests where the contract did not explicitly impose a contrary obligation, even if this caused inconvenience and loss to the other.

Yet in one kind of commercial agreement, the relation of principal and agent, such obligations of loyalty were implied, and these were extended by analogy to the contract of employment. There was clearly a resonance between the idea that the agent had to act in the best interests of the principal and the idea that an employee owed implied obligations of loyalty and obedience. For example, where employees worked in their spare time for a rival employer on highly skilled tasks, the court found them to be in breach of an implied obligation of fidelity, because their action of 'moonlighting' permitted a competitor to gain an advantage over their main employer.¹⁰

In these illustrations of terms implied by law into contracts of employment, we can discern how the supplementary regulation devised by the courts drew upon default rules created in commercial context and applied them to the contract of employment. Rules that regulated the problem of bringing to an end contracts of indefinite duration were applied to the contract of employment. Rules that regulated the conduct of agents vested with the power to act on behalf of the principal were applied by analogy to regulate the conduct of employees. Because there was no sharp separation in the common law between the contract of employment and other commercial contracts, the implied terms developed in commercial transactions could be adapted by analogy to deal with problems of incompleteness arising in contracts of employment.

2. Information Asymmetry and Standard Form Contracts.

In the common law governing commercial transactions, the parties are usually left free to determine most of their respective obligations. Although few commercial contracts need to be in writing in order to achieve legal validity or efficacy, it is a common business practice to use standard form contracts or to negotiate a written contract. In commercial relations, the problem sometimes arises that the standard form contract contains clauses that were not noticed or properly understood at the time of the formation of the contract. The problem is particularly acute in consumer contracts, where the consumer receives a ticket or signs a document without reading it. The question then arises whether the standard form contract in fact represents the agreement between the parties. In the common law of contract, the courts have developed rules that in effect impose a duty of disclosure of the terms on the party seeking to rely upon a standard form contract.

The common law's requirement of disclosure derives from a number of particular principles. First, for a standard form to be treated as the terms of the contract, the document must be communicated or presented before the contract has been concluded.¹¹ Secondly, confusing or obscure terms are interpreted by

⁷ M. Freedland, *Contract of Employment* (Oxford: Oxford University Press, 1976) 154.

⁸ S. Jacoby, 'The Duration of Indefinite Employment Contracts in the United States and England: A Historical Analysis' (1982) 5 *Comparative Labor Law* 85.

⁹ J. Feinman, 'The Development of the Employment at Will Rule' (1976) 20 *American Journal of Legal History* 118.

¹⁰ *Hivak Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, CA.

¹¹ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, CA.

reference to the reasonable promisee's understanding of the terms.¹² Thirdly, a failure to disclose the full import of the terms of a contract can be treated as a misrepresentation where statements about the content of the contract are made which omit some material element of the proposed contract.¹³ Fourthly: 'If one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party'.¹⁴ These common law principles apply to commercial agreements of all kinds, but they have been supplemented in relation to consumer contracts by various regulatory provisions that impose additional duties of disclosure in relation to particular types of transaction such as consumer credit.¹⁵

These common law and regulatory interventions are designed to reduce the market failure that may occur in the formation of contracts when one party does not properly appreciate the content or meaning of the terms for the transaction proposed in written documents. In commercial and consumer contexts, the common law has usually been vigilant in pursuing this objective of reducing market failure due to this particular source of informational asymmetry. The main exception has been the anomalous rule that a signature on a document signifies full consent and understanding of every term contained within it.¹⁶

In the context of employment contracts, however, this policy of redressing asymmetrical information with respect to the terms of the contract has not been pursued so vigorously. Until the last quarter of the twentieth century, most contracts of employment were made informally or orally. Under these circumstances, the legal issue that might have arisen was whether the employer's 'work rules', that is a notice posted at the workplace, was incorporated into the oral contract of employment. But this issue does not appear to have occupied the courts very often. The explanation may be that the rules usually specified a set of disciplinary rules governing the workplace, and the employee rarely had any interest in enforcing those rules as terms of the contract. The employer might wish to rely upon the rules by way of a defence to disciplinary action. For example, if the employee claimed that the employer had made deductions from pay in breach of contract, the employer might seek to rely upon the works rules as terms incorporated into the contract in order to provide a defence to such a claim. But in this context, the employee enjoyed an alternative and superior course of action under the Truck Acts that punished employers for making 'unfair deductions', where the defence that the deduction was in accordance with the contract was not necessarily a sufficient defence to the charge of unfairness. Similarly, the issue might have arisen in an employee's claim for wrongful dismissal, that is termination of the contract without notice. But even if the disciplinary code of the factory had not been incorporated into the contract of employment, the employer enjoyed extensive powers of discipline under the standard implied terms of the contract, so that rarely would it be necessary to rely upon any express powers. The question of whether or not the notices posted in factories constituted a part of the terms of the contract was therefore not an important issue in the law, but it seems to have been assumed that the notices were incorporated as terms of the contract because they represented the custom of the workplace. On this reasoning, there was no need to bring the existence or the content of the notices to the attention of the employee prior to the formation of the contract, because the employee would be deemed to have consented to the customs of the trade or the workshop, whether or not the employee was actually aware of those terms.¹⁷ There seems to me to be a striking difference here between, on the one hand, the concern of the courts in commercial and consumer cases to ensure that parties to contracts had a reasonable opportunity to inspect the terms of standard form contract, and on the other hand, the assumption that employees agreed by implication to all the rules of the workshop, included the posted rules, merely by taking the job concerned.

The context of the employment relation has, however, changed significantly in the last twenty-five years. It has become standard practice for all but the smallest employers to issue a written contract of employment. The employer usually asks the employee to sign this document. The written contract often expressly incorporates as terms of the contract any relevant collective agreement and the provisions of the staff handbook or works rules. In this context, the question of whether the employee has been sufficiently notified of the detailed terms of the contract becomes an important legal issue. Despite the complexity of these documents and the difficulties for employees in acquiring information about them, the principles of commercial law requiring disclosure of information about the terms have not been applied in the context of employment. One reason may be the reliance upon the anomalous principle that a signature on a document represents full agreement to all its terms. But should this principle apply to a contract that incorporates

¹² *Scriven Bros v Hindley & Co* [1913] 3 KB 564, HC. For consumer contracts, there is special regulation: Unfair Terms in Consumer Contracts Regulations 1994, Reg. 6, implementing EC Directive 93/13.

¹³ *Cornish v Midland Bank plc* [1985] 3 All ER 513, CA.

¹⁴ Dillon LJ, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, CA.

¹⁵ EC Directive 87/102; Consumer Credit Act 1974; Consumer Credit (Agreements) Regulations 1983, SI 1983/1553.

¹⁶ *L'Estrange v F Graucoub Ltd* [1934] 2 KB 394, CA.

¹⁷ *Sagar v Ridehalgh & Sons* [1931] Ch 310, CA.

complex documents only by referring to them? Perhaps a deeper reason for the reluctance to challenge the staff handbook as a source of terms of the contract lies in a perception that the rules in a sense construct the organisation which the employee joins, and he or she must be deemed to accept those rules by agreeing to work there, just as the member of a club agrees to abide by the rules of the club for the time being. This attitude is exemplified by the practice of permitting the incorporation of staff hand-books by implication from custom and practice in the workplace, thus dispensing even with the need for notification of incorporation in the express terms of the contract.

Statutory regulation has addressed this problem in part by requiring an employer to provide employees with a statement of the terms and conditions of employment that must refer expressly to the relevant collective agreements and works rules, and these additional documents must be 'reasonably accessible' to the employee.¹⁸ This statement is not regarded by the courts as conclusive proof of the terms of the contract, merely the employer's view of what should constitute those terms.¹⁹ In practice, however, employers supply the statutory statement and ask employees to sign it as a record of the terms of the contract of employment. The legal effect seems to be that employees become legally bound to all the incorporated documents, whether or not they have been made available for inspection, and whether or not they contain onerous and unusual obligations. In this respect, therefore, the development of the law governing the disclosure or information about the terms of contracts in order to counter informational asymmetries has been stifled in the context of employment contracts compared to other kinds of commercial and consumer contracts.

There have been signs in recent cases, however, that the courts are beginning to appreciate this problem of asymmetry of information in contracts of employment that have been formalised in a series of documents. In *Sally v Southern Health and Social Services Board*,²⁰ the employees were junior doctors who were members of the employer's occupational pension scheme. As a result of negotiations with the professional association, the terms of the superannuation scheme were altered in order to permit doctors to purchase additional years of service qualification on advantageous terms, which would have the effect of increasing their final pension. This opportunity was conferred as a contractual right for one year, and thereafter the employer had a discretion to grant permission to purchase additional years of service. The doctors were not informed of this entitlement by the employer, but heard about it later after the year's limitation period, but when they applied for the benefit, the employer refused to exercise its discretion in their favour. The employees brought an action for breach of contract. They had to establish that the employer had broken an implied term under which the employer would disclose this kind of valuable information to employees. This claim was ultimately successful in the highest appeal court. In describing the basis for the decision Lord Bridge made the following observations.

Here the express terms of the contract of employment confer a valuable right on the employee which is, however, contingent upon his taking certain action... Where that situation is known to the employer but not to the employee, will the law imply a contractual obligation on the employer to take reasonable steps to bring the existence of the contingent right to the notice of the employee? ...

The problem is a novel one which could not arise in the classical contractual situation in which all the contractual terms, having been agreed between the parties, must, *ex hypothesi*, have been known to both parties. But in the modern world it is increasingly common for individuals to enter into contracts, particularly contracts of employment, on complex terms which have been settled in the course of negotiations between representative bodies or organisations and many details of which the individual employee cannot be expected to know unless they are drawn to his attention...

Will the law then imply a term in the contract of employment imposing such an obligation [to take reasonable steps to bring the relevant provision to the notice of employees in time to avail themselves of the opportunity to buy added years if they so decided] on the employer? The implication cannot, of course, be justified as necessary to give business efficacy to the contract of employment as a whole. I think there is force in the submission that, since the employee's entitlement to enhance his pension rights by the purchase of added years is of no effect unless he is aware of it and since he cannot be expected to become aware of it unless it is drawn to his attention, it is necessary to imply an obligation on the employer to bring it to his attention to render efficacious the very benefit which the contractual right to purchase added years was intended to confer. But this may be stretching the doctrine of implication for the sake of business efficacy beyond its proper

¹⁸ Employment Rights Act 1996 s. 2.

¹⁹ *System Floors Ltd v Daniel* [1981] IRLR 475, EAT.

²⁰ [1991] IRLR 522, HL.

reach. A clear distinction is drawn in the speeches of Viscount Simonds in *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555 and Lord Wilberforce in *Liverpool City Council v. Irwin* [1977] A.C. 239 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. If any implication is appropriate here, it is, I think, of this latter type. Carswell J. [at first instance] accepted the submission that any formulation of an implied term of this kind which would be effective to sustain the plaintiffs' claims in this case must necessarily be too wide in its ambit to be acceptable as of general application. I believe however that this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision. I would define it as the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention. I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness. But I take the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit. Accordingly I would hold that there was an implied term in each of the plaintiffs' contracts of employment of which the boards were in each case in breach...

I have quoted this judgement at length because it illustrates several of my earlier observations. It shows how the courts are willing to insert implied terms into contracts of employment as a standard incident of the relation. It reveals how the courts can differentiate between different types of employment contract and imply terms that have been tailored to the particular relation. Finally, it reveals an awareness of the problem of informational asymmetry with respect to the terms of the contract of employment, and in order to combat this problem, imposes a duty upon the employer to communicate variations of terms contained in documents to the employee.

3. Opportunist Rent-Seeking.

In many commercial contracts and employment contracts the parties are presented by the danger of opportunist rent-seeking. This expression, drawn from economic analysis of contracts, describes the problem that the parties to a contract may become locked-in to the business relation due to the need to commit irreversible investments, that is expenditures during performance that cannot easily be used if the business relation is terminated. In a commercial contract, these expenditures might include the purchase of particular machinery, the development of designs and technical specifications, or the investment in plant. In the employment relation, these expenditures may involve the employer's investment in training, and the employee's investment in learning job-specific skills, which cannot be used if a job is taken with another employer. The effect of such irreversible investments is to bind the parties together in a type of bilateral monopoly, because both parties would be worse off if they terminated the relation and made an equivalent contract with another party. In order to protect such investments, the principal response is to seek to negotiate a long-term contract, so that neither party can withdraw without paying compensation to the other for wasted expenditure. Having become locked into this relation, both economically and legally, however, the parties create the opportunity for rent-seeking. The problem is that one party may seek to increase his benefits from the contract by demanding extra payments (or a reduction of prices), knowing that the other party will be compelled to consent to the variation by economic interest. In a commercial context, for instance, a franchisor may be able to extract a higher fee for the licence to use a business format from the franchisee, who cannot terminate the franchise owing to the risk of losing irreversible investments in plant and machinery. In the context of the employment relation, the employer may seek to reduce wages or fail to pay expected increases, knowing that the employee cannot afford to leave the employment relation for other jobs that pay less because his job-specific skills are unnecessary. I want to consider how the common law responds to this problem of opportunistic rent-seeking, and compare the response in commercial contracts with the response in employment contracts. Opportunism of this kind may present itself either in the form of coerced variations of the contract or termination of the business relation and the capture of an investment.

(a) Coerced variations. Private law is committed to preventing such opportunistic rent-seeking, though the task of drawing of the boundary between, on the one hand, opportunist rent-seeking, and on the other, necessary adjustments to changing market conditions in long-term economic relations, presents considerable difficulty in producing accurate regulation. The general rule for contracts is that a variation is ineffective without the consent of both parties and 'fresh consideration'. The requirement of 'fresh consideration' means that each party to the contract must receive something which they want in return for their consent to the variation. A simple price variation without some alteration in the corresponding obligation will not satisfy this requirement. In an employment law context, the coerced variation may arise when the employer seeks to impose a unilateral wage cut in breach of the existing terms of the contract of employment, or, similarly, the employees refuse to work according to the terms of the contract without a pay increase.

With respect to the requirement of consent to variations, the general commercial law rules have been applied without modification to the contract of employment. In the case of unilateral wage cuts, the employees may recover the balance of wages due under the contract, provided that they do not consent to the variation. Employees may continue to work under the contract, however, as long as they make it clear that they reject the proposed variation.²¹ Even if the employer agrees the wage cuts with a recognised trade union in a collective agreement, the employees may still decline to consent to the variation, because the union does not act as agent for the employees in UK law.²² Equally, if employees seek to vary the terms of the contract unilaterally, either by working reduced hours,²³ or reduced duties,²⁴ the employer may refuse to accept the variation and decline to pay any wages at all. In the contemporary context of employers seeking flexibility in work tasks and reductions in wage costs, this right of employees to withhold consent from contractual variations provides a significant bargaining counter. But the strength of the employees' position should not be exaggerated, because the employer may instead dismiss those who refuse to agree to new terms and conditions, and there is a good chance in such circumstances that a tribunal will decide that the employee has been fairly dismissed and is not entitled to any compensation.²⁵ In addition, the restriction on variations only applies to contractual terms, so that an employer can insist upon changes in working practices if the contract awards this power to the employer without express restriction.²⁶ The ability of employees to withhold their consent from variations to the contract of employment proposed under a collective agreement is also unsatisfactory, because this power in effect undermines the possibility for unions to engage seriously in 'concession bargaining' with respect to the terms of the contract. In this context, therefore the application of commercial law principles to the contract of employment appears dysfunctional, because it tends to undermine the possibility of creating collective solutions for labour force adjustments (other than dismissals) necessitated by changing business conditions.

The objective of the second requirement of 'fresh consideration' is to render coerced variations ineffective. The legal doctrine was in fact founded in employment cases. In *Stilk v Myrick*,²⁷ a claim by a sailor for extra wages on the faith of a promise by the ship's captain to pay an increase during a long voyage was defeated on the ground of the absence of 'fresh consideration', because it was found, rather unconvincingly, on the facts, that the sailor had not agreed in return to perform extra work. What is interesting here is that in commercial contexts this requirement of fresh consideration has proved unrealistic. The parties to a long-term contract may decide to make alterations in the terms of the transaction, and at times such alterations will constitute a detriment to one side without any corresponding benefit. Provided there has been consent to such a variation a court is unlikely to declare the modification invalid. This result can be achieved either through the equitable doctrine of promissory estoppel,²⁸ or by declaring that there were practical commercial advantages to be obtained by the agreed detrimental variation, which satisfy a rather looser conception of the doctrine of consideration.²⁹ The policing of opportunism or coerced variations is now achieved in a commercial context by the doctrine of economic duress.³⁰

²¹ *Rigby v Ferodo Ltd* [1988] ICR 29, HL.

²² *Robertson v British Gas* [1983] ICR 351, CA.

²³ *Miles v Wakefield Metropolitan District Council* [1987] ICR 368, HL.

²⁴ *Wiluszynski v Tower Hamlets London Borough Council* [1989] IRLR 259, CA.

²⁵ *Hollister v National Farmers' Union* [1979] ICR 542, CA.

²⁶ *Cresswell v Board of Inland Revenue* [1984] ICR 308, Ch.D.

²⁷ (1809) 2 Camp 317.

²⁸ *Central London Property Trust Ltd v High Tress House Ltd* [1947] KB 130, KB (a reduction of rent in a lease).

²⁹ *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1, CA; (a price increase to benefit a sub-contractor on a construction project in order to encourage the sub-contractor to complete the work according to the original schedule).

³⁰ *Pao On v Lau Yiu Long* [1980] AC 614, PC.

This dilution of the requirement of fresh consideration has not yet appeared in an employment context. The practical effect of the requirement is that in order to render wage increases effective in law in the absence of the alteration of the duties of employees, legal reasoning has to adopt some fictions. The legal analysis is that the modification occurs through an agreed termination of the original contract of employment and its replacement with a new contract at the higher wage. In order to prevent this new contractual relationship from breaking the continuity of service that is necessary in order to acquire many statutory employment rights, the statute needs to deem the events as not terminating the relation.³¹ Here the application of commercial law principles to the contract of employment by the common law has to be combated by specific statutory regulation.

(b) Termination and capture of investments. Another dimension of opportunism in long-term business relations occurs in cases of termination of the contract at a moment when the other party has not yet had the opportunity to reap the advantages from his investments. This problem occurs, for example, in franchises and some instances of employment. In the case of employment, the opportunism may occur in internal labour markets, where the employee has made firm-specific investments in training, but is prevented from reaping the reward in terms of higher wages due to seniority and promotion by premature termination.

English commercial law has, however, not recognised this problem. In commercial contracts such as franchises the parties are bound by the terms of their agreement, and if those terms permit abrupt termination, then a court will not interfere. There is no requirement of performance or termination in good faith.³² At the most, the courts require that the power to terminate the contract should be conferred expressly rather than through technical legal jargon.³³ This strict stance of commercial law has also been applied to the employment relation, so that the employee is restricted in claims for damages to strict contractual entitlements without compensation for any reasonable expectations. In a claim for wrongful dismissal at common law, for instance, the employee can claim compensation for loss of wages during the contractual notice period, but cannot claim more speculative losses such as the loss of a career in the organisation or the loss of discretionary bonus payments. Nor will compensation for these losses be obtained through a statutory claim for unfair dismissal, which differs principally from the common law on in respect of compensation for the likely duration of unemployment.³⁴

The sole way in which an employee might seek to protect job-specific investments is by seeking an injunction to prevent the dismissal from occurring. As a general rule, the courts are unwilling to specifically enforce contracts of employment on the grounds that compensatory damages are usually an adequate remedy and that the relation has become unworkable due to a loss of mutual trust and confidence. But the courts have developed in recent years a qualification to that rule in respect of disciplinary procedures. Where the employee benefits from a formal disciplinary procedure under the contract of employment, a court will usually issue an injunction to prevent the employer from dismissing the employee without complying with the agreed procedure. One of the reasons for this qualification is, I suggest, that the courts recognise that damages are inadequate compensation for the loss of career prospects based upon job specific skills. For example, a court issued an injunction against dismissal of a hospital doctor in breach of procedure on the ground that any damages would be inadequate to compensate the doctor for possible loss of the opportunity to pursue a career in the National Health Service, a near monopoly employer of doctors in the United Kingdom.³⁵ This use of injunctions to enforce expressly agreed disciplinary procedures is a distinctive feature of employment contracts, for in commercial contexts the courts will almost certainly insist that any termination of a contract should be remedied by an order for compensatory damages.

4. Conclusion.

The above remarks obviously only touch upon a few aspects of comparison between labour contracts and commercial contracts. We have explored some of the implications of the strong presumption in English law that the general rules of contract law apply equally to commercial contracts and employment contracts. Indeed, the courts invariably deny that any special rules apply to the contract of employment. For example, in relation to summary dismissal, the courts insist upon applying the commercial law doctrines regarding repudiatory breach. In commercial contracts, if one party repudiates a contract, the other party is given the choice of either accepting the repudiation and bringing the contract to an end, or to refuse to accept the repudiation and keep the contract alive. Applying the same doctrine to a summary dismissal, the courts

³¹ Employment Rights Act 1996, Part XIV, Chapter 1.

³² Compare: *Fortune v National Cash Register Co.*, 373 Mass. 96, 364 N.E. 2d 1251 (1977).

³³ *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, HL.

³⁴ *Norton Tool Co. Ltd. v. Tewson* [1972] ICR 501, NIRC.

³⁵ *Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590, Ch.D.

suggest that the employee has the option whether or not to accept this repudiatory breach.³⁶ The legal consequence of an employee refusing to accept a summary dismissal is that in theory the contractual relationship remains in existence, although of course the employer has excluded the employee from the workplace and no work is performed. Some courts have been reluctant to agree with this orthodox application of commercial contract law to the contract of employment, because it is plainly unrealistic to suppose that the contract of employment continues after a summary dismissal.³⁷ Nevertheless, there is little doubt that ordinary contractual principles apply here as elsewhere to the contract of employment.

What has seemed to me to be interesting is whether in fact we can detect signs of deviation from ordinary contractual principles in the employment context, even if these departures from principle remain unacknowledged. With respect to implied terms as a solution to incompleteness in contracts, the courts apply normal contractual principles for the construction of default rules. But they have created a special set of rules for the employment relation that emphasises, unlike commercial contracts, the importance of the continuation of a personal relation of mutual trust and confidence. The significance of this special set of rules is largely to buttress the employer's disciplinary powers, but it can also be used sometimes by employees (as part of a statutory claim for unfair dismissal) in order to claim compensation for harsh and unreasonable treatment.³⁸ We also explored what seems to be to be a deviation from the principles of commercial law (especially consumer contracts) with respect to informational asymmetries in respect of the content of standard form contracts. Employees seem to be bound rather more easily to complex and remote documents than would be permitted in consumer and commercial contracts.

In another line of enquiry, I have explored the question whether the special problems of opportunism that can arise in long-term contracts, have been addressed in similar ways in commercial contexts and in employment relations. Although superficially the principles appear to be uniform across all kinds of long-term transactions, I did detect some subtle differences of approach to variation that enabled commercial parties greater flexibility than parties to an employment relation. The rigidity with respect to variations in an employment context is not explicable by reference to a concern to protect employees due to their weaker bargaining power, for the rules were originally designed to protect employers against collective pressure on the part of the workers. This rigidity does create some considerable practical problems in the conduct of labour relations by undermining the possibility of concession bargaining. This difficulty may explain in part why labour force adjustments in the United Kingdom are commonly achieved through dismissals rather than wage reductions. On the general theme of opportunism in long-term relations, however, we did detect a small sign of willingness to protect job-specific investments through injunctions, whereas there is no comparable practice in commercial transactions.³⁹

Although this report may have detected some small deviations from ordinary contract law in respect of the contract of employment, the general picture must remain one of a refusal to acknowledge the need for special principles to respond to the many features of the employment relation that may be described compendiously as inequality of bargaining power. It is for this reason, amongst others, that labour lawyers in Britain have from time to time become interested in trying to insist upon autonomy for labour law,⁴⁰ that is the development of particular regulation that is separate from the ordinary law of contract. These appeals have, however, fallen upon deaf ears in the courts and the legislature.

³⁶ *Gunton v Richmond-upon-Thames Borough Council* [1980] ICR 755, CA.

³⁷ *Boyo v London Borough of Lambeth* [1995] IRLR 50, CA.

³⁸ *The Post Office v Roberts* [1980] IRLR 347, EAT.

³⁹ A rare exception to that proposition may be *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, Ch.D (an interlocutory injunction issued to prevent an oil company from cutting off supplies to a tied retailer during the period of oil shortages).

⁴⁰ Lord Wedderburn, 'Labour Law: From Here to Autonomy?' (1987) 16 *Industrial Law Journal* 1-29.