THEORIES OF TERMINATION IN CONTRACTS OF EMPLOYMENT:

THE SCYLLA AND CHARYBDIS

Introduction

The common law rules governing the termination of a contract of employment are unsatisfactory and obscure. Hitherto, the courts have purported to develop rules according to alternative well-known rival theories. The first of these is a modified version of the so-called "elective theory" derived from the ordinary law of contract. This, of course, determines that a contract should only end upon the election of the innocent party. The alternative approach favoured the so-called "automatic" theory, which is applicable only in the employment context. According to this latter theory, a repudiatory breach of an employment contract *ipso facto* ends it. There is no need for any acknowledgment of this by the innocent party who is also denied the opportunity to keep the contract alive.

The problem of reconciling these theories has been described by some authors as intractable.[1] Another has observed that the problem requires "urgent attention". [2] However, in their seminal textbook, *Industrial Law*,[3] Smith & Wood assert that the debate as to which of these theories is dominant is, in practice largely irrelevant. This

[1] P Davies & M Freedland,"Labour Law" 2nd edition London, Weidenfeld & Nicholson, 1984 at p. 457.

[2] K D Ewing, "Remedies for the Breach of the Contract of Employment", (1993) 52 Cambridge L.J. 405 at p. 414.

[3] 7th edition (2000) Butterworths, London at 379-80. The authors do, however, concede that in cases where some collateral or incidental matter relies upon "the technical continued existence of the contract" practical consequences can follow. A similar perspective is offered by Bowers and Honeyball, "Textbook on Labour Law", 6th edition , London: Blackstone, 2000 at pp 65-69.

is so partly because the refined version of the elective theory delivers similar practical results to the automatic one.

This article will venture three principal contentions: first it will argue that there remain important practical differences between the two rival theories, and the courts should not regard the choice between them as merely academic. Second, and more fundamentally, it will be argued that each theory is an incomplete and unsatisfactory explanation of the rules the courts actually apply. Each is flawed by a common misunderstanding of the authorities governing the consideration for wages. Finally, it will be argued that, as neither theory is satisfactory, a more sophisticated and coherent approach should be constructed in their place.

Why the Elective/Automatic Distinction Matters

A contrary argument to that ventured by Smith & Wood asserts that there remain important practical differences between the opposing theories. Entitlements that can be identified according to one theory can be denied under the alternative theory. In *Turner v Australasian Coal and Shale Employees Federation*, for example, the Full Court of the Federal Court of Australia recognised how great an impact the choice the between the rival theories could be. It resolved that the elective rather than the automatic theory properly explained the Australian common law, and ventured the following observation about the enforcement of certain rights that was crucially dependent on that conclusion:

> " *From the employer's point of view, there may be a desire to restrain the employee from accepting employment which would be in breach of a restraint of trade clause, or from acting contrary to some term of the contract which restricts the employee in his or her activities after the end of the employment. From the employee's point of view, there may be entitlements to annual leave or long service leave or superannuation which depend upon the continuance of the employment.*"[4]

But these must be considered merely as examples, because it is possible to identify other claims that crucially depend upon which approach is chosen. For example, there is both English and Australian authority to establish that an eligibility to claim statutory rights can depend on the contract being in existence at the commencement of a new legal regime.[5] Moreover, in English law, a complaint alleging sexual harassment after the employment has ended cannot be presented, so the differences between the automatic and elective theories will have different consequences as to when the complaint can be made.[6] Similarly, the Race Relations Act 1976 has been held not to protect a former employee at an appeal hearing because the employment had terminated. If the elective theory were applied, the protection of the 1976 Act could last until after an appeal hearing provided the employee had not elected to terminate the contract before that date.[7] The implied contractual duty to provide a fair reference does not appear to apply to an ex-employee whose contract has been

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4 (1984) 6 FCR 177, 191-192; 55 ALR 63, 647-648. The court cited and followed a body of English authority to which reference is made below.

5 E.g., in Australia, *Ian Pinondang Siagian v Sanel Pty* (1994) 1 IRCR 1 and in England, *Hill v CA Parsons & Co* [1972] Ch. 305.

6 *Rhys-Harper v Relaxion Group Plc* [2001] EWCA 634; [2001] IRLR 460 CA.

terminated, and it would be important to know for that reason when the contract came to an end.[8]

The choice between the theories has also had an important impact in the context of statutory entitlements in English law. The definition of a "dismissal"[9] and the occasion of the "effective date of termination", "relevant date" and "act complained of"[10] affecting the time limits for making a claim for either unfair dismissal, redundancy or disability discrimination respectively depend on the theory favoured by the courts. For example, the definition of dismissal in the context of unfair dismissal has been strongly influenced by the elective approach.[11] In contrast, recognition has been given to the strong arguments for the automatic approach in identifying time limits.[12] This theory offers greater certainty than the elective one because an employee who claimed to have accepted the employers' repudiation would be able to argue that time ran from that later date.[13] Yet on this very issue, at least in the context of the anti-discrimination legislation, there has recently been a problematic divergence of judicial opinion.[14]

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[7] *Post Office v Adekeye* [1997] ICR 100.

[8] *TSB Bank v Harris* [2000] IRLR 157

[9] For the purposes of ss 95 and 136 of the Employment Relations Act 1996.

[10] Employment Rights Act 1996, ss.97 & 145 and the Disability Discrimination Act 1995, Sched 3 para 3 (1).

[11] E.g., the courts have rejected the argument that employees who repudiate their contracts dismiss themselves: *London Transport Executive v Clarke* [1981] ICR 355.

[12] See J. McMullen, "A Synthesis of the Mode of Termination of the Contract of Employment", (1982) 41 Cambridge LJ 110

[13] See *Robert Cort & Son Ltd v Charman* [1981] ICR 816, approved by the CA in *Stapp v Shaftesbury Society* [1982] IRLR 326. The real issue is that it is not well-settled what amounts to an election to end the contract and this partly explains why the automatic view has advantages in this context. See further n.60 below.

[14] In *Commissioner of Police of the Metropolis v Harley* [2001] ICR 927 whilst the EAT concluded that 'dismissal' for the purposes of s. 4 (2) (d) of the Disability Discrimination Act 1995 included only dismissal by the employer and not a constructive dismissal, it was alternatively prepared to hold that, if this primary conclusion were wrong, time would run from the alleged repudiatory act of the employer and not the employee's acceptance of it, thereby favouring the automatic view. In contrast, in *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 the EAT appeared to favour the view

In construing of reg 5 of the Transfer of Undertakings (Protection of Employment) Regulations 1981[15] Lord Oliver, the only judge who averted to common law theories of termination in *Litster v Forth Dry Dock & Engineering Co. Ltd*.[16] acknowledged that a contract survives a unilateral repudiation,[17] but he considered nevertheless that, for the purposes of the regulations, it was the transfer rather than the employee's acceptance of the breach that terminated the contract.[18]

It is against this background that we turn to consider the extent to which each of the theories adequately explains the rules actually applied by the courts.

The Automatic v. the Elective Theory of Termination

(i) Automatic Theory

An automatic or unilateral theory of termination has been favoured by some members of the judiciary because of the presumption against specific performance of a contract

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that the Race Relations Act 1976 embraced a concept of constructive dismissal and that time ran from the employee's resignation (acceptance) rather than from the earlier date of the discriminatory act (although on the facts of the case this did not make a difference because the acts of discrimination continued up until the termination). These decisions are noted by Dr D Rowland, "Discrimination and Constructive Dismissal" (2001) 30 ILJ 381.

15 SI 1981 No 1794.

16 [1990] 1 AC 546. Lords Jauncey, Keith and Brandon concurred with Lord Oliver's speech.

17 *Ibid.* at p. 568

18 "..the effective cause of the dismissal is the transfer of the business, whether it be announced in advance or contemporaneously, or whether it be unannounced, and it would be no misuse of ordinary language in each case to speak of the termination of the contracts of the workforce as having been effected by the transfer." at p. 569.

of employment.[19] However, the objections to the automatic theory are numerous and fundamental.

First, at the doctrinal level, it has been recognised that the presumption against the specific performance of a contract of employment neither explains nor justifies a theory of automatic termination.[20] As Buckley LJ observed in *Gunton v Richmond-on-Thames LBC*,[21] there are many other contracts which cannot be specifically enforced that are not subject to a doctrine of automatic termination: the orthodox elective rule of contract is not displaced by the decision as to the appropriate remedy.[22]

At the level of policy, it can further be objected that the automatic theory releases a wrongdoer, who has committed a fundamental breach of contract from further performance. This in effect shifts the control over the ending of the contract from the innocent party - where it lies according to more orthodox elective contractual theory[23] to the guilty party, thereby appearing to reward iniquity.

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[19] The general rule against enforcement of a contract of employment means that the employee's remedy for a breach of contract by the employer normally sounds in damages. In *De Francesco v Barnum* (1890) 45 ChD 430, 438 Fry LJ stated that if performance of contracts were mandatory a contract of employment would become a contract of "slavery", hence the courts have been unwilling to hold that a contract survives a repudiation of the contract by either party to it. See e.g., *Sanders v Ernest A Neale Ltd* [1974] IRLR 236; *Denmark Productions v Boscobel Productions*; *and Chappell v Times Newspapers Ltd.* [1975] ICR 145 and the Trade Union and Labour Relations (Consolidation) Act 1992, s. 236.

[20] K D Ewing, in "Remedies for the Breach of the Contract of Employment", (1993) 52 Cambridge L.J. 405 at p. 410-411 rightly points out that the suggestion that an automatic theory is demanded by the rule against specific performance results in circularity.

[21] [1981] Ch 448, 468.

[22] Indeed, according to the English common law, the presumption against the specific performance of a contract for personal service is weakening: e.g., *Irani v Southampton and South West Hampshire HA* [1985] ICR 590; *Powell v Brent LBC* [1988] ICR 176.
etc.

[23] *White & Carter (Councils) Ltd. v McGregor* [1962] AC 413. Ewing's proposition (above n. 20 at p. 412) supports this but it will be argued below that the argument that the preservation of these obligation depends on the elective theory is flawed.

"(This automatic approach)…. produces a result which seems to me to be far from just. Why should a person who makes a contract of service have the right at any moment to put an end to his contractual obligations?"[24]

The injustice is compounded, as far as innocent employees are concerned, by the acknowledged rule that assesses their loss to minimise the burden of compensation imposed upon the wrongdoing employer. This is considered below.

Thirdly, the enforcement of express and implied contractual restraints on illegitimate competition by employees would be threatened by accepting the automatic theory as a general explanation of termination in employment law.[25] If the contract ended automatically upon the employee's repudiation, it was thought that the employee would be free of the restraining clause since that would have fallen with the other contractual terms.[26] If this were correct it was considered to have far-reaching economic consequences depriving the employer of control over the post-termination activities of employees who would find themselves at liberty to use a fundamental breach of contract to re-position themselves in the market place by securing more advantageous terms with a different employer.[27] However, it will be suggested below that this argument overlooks a number of classical precedents supporting a contrary view that permits the enforcement of express or implied restraining terms even after the contract has been terminated. We shall argue that the enforcement of restraint

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[24] *Thomas Marshall (Exports) Ltd. v Guinle, per* Sir Robert Megarry V-C [1979] Ch 227 at p.240

[25] *Id*, citing *inter alia, Lumley v Wagner* (1852) 1 De G.M. & G. 604; *William Robinson & Co Ltd. v Heuer* [1989] 2 Ch 451; *Warner Bros Pictures Inc v Nelson* [1937] 2 KB 209.

[26] *Thomas Marshall (Exports) Ltd. v Guinle,* above n.24.

[27] As we shall see below, the same difficulty can apply in cases of elective termination, so that the solution to post-termination enforcement arises independently of whichever theory is adopted and justifies neither.

clauses has been possible when employees have left after giving due notice and so cannot be dependent on the continued existence of the contract of employment.

Fourthly, as the automatic theorists acknowledge, the theory does not explain the conventional approach in purported unilateral variation cases where the employer repudiates the contract by action falling short of outright dismissal. In these cases, the employer's motivation is not to dismiss the worker outright, but to continue to employ them under new arrangements that alter the legal relationship under which work is provided. The weight of the authorities insists that employees normally entitled to rely on the *status quo ante* any purported unilateral modification of the contract.[28]

The variation cases are normally conceptualised within the elective model but, as we shall see below, the authorities lack consistency.[29] In comparison with the alternative theory, the elective approach does have a greater attraction. If it were otherwise, and an automatic theory applied in variation cases, it would be highly destructive of bargain security. Employers could unilaterally propose fundamentally altered terms that would thereupon terminate the existing contract of employment. A unilateral reduction in wages for example, would destroy the former contract notwithstanding the objections of the employee. If the employees presented themselves for work the following day they would be accepting a new contract incorporating the revised term.

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28 Shaw LJ, who advocated the automatic theory, admitted that a different approach would be required in variation cases, which he called cases of "oblique" repudiation in *Gunton v. Richmond-on-Thames LBC* , [1981[] Ch 448, at p. 459.

29 The bilateral approach can be identified in such decisions as *D A Coleman v S & W Baldwin* [1977] IRLR 342; *Industrial Rubber Products v Gillon* [1977] IRLR 389; *Tucker v British Leyland Motor Corpn.* [1978] IRLR 493; *Burdett-Coutts v Hertfordshire CC* [1984] IRLR 91; *Gibbons v Associated British Ports* [1985] IRLR 376; *Williams v Hereford and Worcester CC* [1985] IRLR 505 and *Rigby v Ferodo Ltd.* [1987] IRLR 516.

This would create what some US jurists sometimes describe as an "administrative model" of the contract of employment. [30]

Finally, the automatic theory relies to a great extent upon the idea that the performance of work is the consideration for wages. This was given particular emphasis in *Gunton* where Shaw LJ re-iterated the rule that the employee, when confronted with a summary and wrongful dismissal, is unable to continue working, and for that reason they cannot recover damages in respect of work that has not been performed. This states an orthodox principle of both English and Australian law that if the employer, in breach of contract, refuses to permit the performance of work no claim for wages can be brought.[31] But it would, of course, be different if the consideration for wages is not the actual performance of work but, instead, a willingness to perform the work. Thus it becomes important to ask: what is the consideration for wages? We shall consider this point further below because it goes to the heart of the rules governing termination.

(ii) The Elective Theory

In rejecting the automatic theory as inconsistent with both principle and precedent Sir Robert Megarry V-C in *Thomas Marshall (Exports) Ltd. v Guinle*[32] held that a contract of employment is not an exception to the general rule governing commercial

[30] H. H. Perritt Jnr, *Employee Dismissal Law and Practice,* § 4.44 (3d ed. 1992) and see, for example, *Re Certified Question, Bankey v. Storer Broadcasting Co* 432 Mich 438; 443 N.W.2d 112. (Mich. 1989)

[31] E.g., *Denmark Productions v Boscobel Productions* [1969] 1 QB 699; *Ian Pinondang Siagian* v. *Sanel Pty* (1994) 1 IRCR 1.

[32] [1979] 1 Ch 227.

contracts. This influential decision has, of course, been followed and applied many times in both the English and Australian jurisdictions.[33] The termination of the contract following a repudiatory breach occurs only upon the election of the injured party; the contract does not end upon the occurrence of the fundamental breach nor by virtue of that breach.

According to the weight of modern authority, the innocent party is now considered to have control over whether and when the legal relationship should end. This is said to justify and explain the rules permitting the employer to control the activities of employees post-termination.[34] For example, an elective approach underpins those decisions in which an employer may obtain an interlocutory injunction restraining an employee, in breach of an exclusivity clause, from working for another during the contractual notice period. The contract continues, and the employer is bound to pay wages due until contractual notice expires, although the employee is no-longer bound to be ready and willing to work.[35] Where the contract contains an exclusivity clause and an express restraint clause, an employee may, in some cases, be prevented from

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[33] Examples include *Gunton v. Richmond-on-Thames LBC* above, n.21; *London Transport Executive v Clarke* [1981] IRLR 166; *Shook v. Ealing LBC* [1986] IRLR 46; *Dietman v Brent LBC* [1987] IRLR 259 upheld by CA [1988] IRLR 842. A recently reported English example is *White v Bristol Rugby Ltd.* [2002] IRLR 204, and see also further decisions discussed below. But note that in *Octavius Atkinson & Sons Ltd v Morris* [1989] ICR 431, 436, Sir N. Browne-Wilkinson V-C considered that the law had not yet made a clear choice between the two theories and that the controversy remained unresolved. The automatic theory was applied in that case although the court indicated a willingness to have considered the alternative had it been properly pleaded. In Australia the elective approach has been applied in such important decisions as *Re Turner and the Australian Coal and Shale Employees Federation etc* (1984) 55ALR 635 and *Ian Pinondang Siagian v Sanel Pty* (1994) 1 IRCR 1. The elective theory was well-precedented before *Guinle* was decided. See e.g. *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 39 Ch.D. 339 esp at p. 365 and *Lumley v. Wagner* (1852) 1 De G.M. & G. 604; *William Robinson & Co Ltd. v Heuer*[1898] 2 Ch 451; *Warner Bros Pictures Incorporated v Nelson* [1937] 1 KB 209.

[34] *Thomas Marshall (Exports) Ltd. v Guinle*, above n.24.

[35] *Evening Standard Co. Ltd v Henderson* [1987] IRLR 64. Where the repudiation takes the form of a failure by the employer to follow a contractual or statutory procedure prior to dismissal. The dismissal may be a nullity*: Irani v Southampton and South West Hampshire HA* [1985] ICR 590; *Shook v Ealing LBC* [1986] IRLR 46 at p.50.

leaving to work for a rival employer in breach of a contractual notice period, even if this means keeping him or her idle and on "garden leave" throughout the notice period.[36] These are illustrative of the principles thought to derive from an elective approach. However, not all problems are resolved by it. For example there is the rule that notice, once given, is irrevocable; it cannot be retracted even before it has been accepted.[37]

Notwithstanding that the elective theory has become the dominant one, it is no more a convincing explanation of the rules actually applied by the courts than was the automatic view. First, the judiciary are inconsistent in its application, leading to a profound lack of legal coherence in the authorities. As noted above, the variation cases are an important and disturbing example of this. The accepted view is that such cases are located within the elective model: in the absence of consent to a proposed change, an "offer" of new terms is ineffective to alter the contract and the *status quo ante* the "offer" is preserved.[38] The dominance of the elective approach in this context might suggest that automatic theory was only ever intended to apply to cases of outright dismissal. However, this possibility appears to be doubtful because there are important English authorities that suggest that a unilateral repudiation falling short

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[36] *Symbian v. Christensen* [2001] IRLR 77. Much depends on the interest the employer seeks to protect: e.g., *Provident Financial Group plc v Hayward* [1989] 3 All ER 298 and *William-Hill Organisation Ltd. v Tucker* [1998] IRLR 313.

[37] *Riordan v War Office* [1959] 3 All ER 552; aff'd [1960] 3 All ER 774. This was a point raised by J. McMullen in "A Synthesis of the Mode of Termination of the Contract of Employment" (above n.12) at p. 123 although he argued that the rule only applies because the notice is lawful under the terms of the contract. This is a point which, however, he concedes may not have been judicially accepted: *Murphy v Birrell & Sons* [1978] IRLR 458.

[38] *Marriott v Oxford & District Co-Operative Society Ltd (No.2)* [1970] 1 QB 186; *Rigby v Ferodo* [1987] IRLR 516; *Burdett-Coutts v Hertfordshire CC* [1984] IRLR 91.

of an outright dismissal[39] can be described as a "withdrawal" of the contract. This "withdrawal" is, of itself, effective to terminate the contract. This draws heavily on the unilateralist, automatic, approach that threatens to re-introduce that a model of employment that has been rejected in the majority of the state jurisdictions of the United States.[40]

The decisions in *Hogg v Dover College*,[41] *Jones v Governing Body of Burdett Coutts School*[42]and *Alcan Extrusions v Yates*[43] decide that compensation for unfair dismissal may be available where the employer purportedly varies the contract in the face of express objections by the employee who seeks to preserve the benefits of the existing contract.

In *Hogg*, the Head of History at a school was forcibly downgraded to act as an ordinary part-time teacher. This was conceptualised either as an express dismissal within s. 95 (1) (a) of the Employment Rights Act 1996 or as a constructive dismissal within s.95 (1) (c) which the employee accepted by serving the originating application.

In *Jones*, on similar legal facts, a purported unilateral variation affecting the contractual job function seems to have been treated as a constructive dismissal. The major point, unsuccessfully taken on appeal to the Employment Appeal Tribunal

[39] As we shall see, these even include cases where the job was unaltered.
[40] Discussed by B. Hough and A. Spowart-Taylor, "Employment Policies: a Lesson from America" (2001) 30 *Common Law World Review* 297-319.
[41] [1990] ICR 39.
[42] [1997] ICR 390.
[43] [1996] IRLR. 327.

(EAT) need not detain us. It was whether, having accepted alternative employment following a redundancy the employee's right to claim unfair dismissal was removed by statute rather than the variation.[44] Nevertheless, the decision would appear to fit within an automatic view because the employee did not accept the repudiatory breach committed by the employer when it indicated that he was going to be dismissed, yet the unilateral variation regarding his function was held to be effective to end the contract.[45]

In *Alcan*, the breach of contract was identified as a unilateral change in a shift pattern allied to consequential changes in shift premiums. The complexity in this case arose because the employees did not pursue a common law claim. They sought to continue the existing employment relationship without prejudice to their legal rights and yet pursue unfair dismissal claims. The difficulty was that a finding of constructive dismissal was not open to the Employment Appeal Tribunal because each employee had not sought to terminate the contract but rather to preserve its existence by objecting to the change.

The English tribunals departed from orthodoxy and treated the employer's behaviour as if its purpose was to end the employment relationship. In following and applying *Hogg* the EAT decided that unfair dismissal compensation can be available, depending on the facts, to protect the fundamental changes in contract even though the employment relationship continued. It identified the dismissal, upon which a claim is

44 See now Employment Rights Act 1996, s.138.

45 An objection to the EAT's reasoning in *Jones* concerned the Governors' warning that 12 weeks notice would be served if the employee declined the new job. This was presumably a notice of a future intention to end the contract according to its term. If so, it could be argued that there was no repudiatory breach.

necessarily contingent, as a dismissal within s. 95 (1) (a) of the 1996 Act, that is, a termination of the contract by the employer. It reasoned that a fundamental breach was capable of constituting on the facts a "withdrawal" of the contract of employment.[46] This "withdrawal" of course describes unilateral behaviour. In other words, the court treated a purported fundamental modification of the contract as, by itself, sufficient to end the contract. The implications of this reasoning are quite significant:

(i) Even if the employees had not objected to the new shift patterns, and had continued to work without objection, the employer would still, in law, have dismissed the employees because their contracts had been withdrawn, and it must have been liable in each case to pay at least a basic award. That is an unavoidable consequence of applying the automatic theory in such purported variation cases

(ii) The employees had probably been advised to object in writing to the proposed change and to work the new shifts under protest. This advice was clearly designed to avoid any suggestion of implied consent to the proposed change once the new shifts began. But this is only necessary where the courts are applying an elective approach. The reasoning that the contract was "withdrawn" means the employees were not

[46] The courts in Australia seem to recognise a similar distinction between a withdrawal of a contract and a mere purported unilateral variation of it. In *Quinn v Jack Chia* [1992] 1 VR 567, 577-578, His Honour Justice Ashley observed "... the change to the plaintiff's situation (after the purported variation) was exceptional, far reaching, not within the original contemplation of the parties and not comprehended by the contract initially made between them; and that it did give rise to the institution of a fresh contract of service between the plaintiff and the defendant rather than merely a variation of that earlier agreement". In *Bradshaw v Bob Garnett Real Estate Pty Ltd* (1995) Case 960275 Industrial Relations Court of Australia, this was interpreted to mean that a proposal that profoundly alters the employee's duties or responsibilities should more readily lead to a finding that a new contract is being offered. This decision strikes an interesting parallel with *Alcan*, revealing a similar approach in each jurisdiction.

required to withhold their consent because the contract ended automatically when "withdrawn". Their consent or lack of it is irrelevant; the contract had ended.

(iii) The court decided that whether a purported change amounts to a withdrawal of the contract and thus a dismissal is a question of fact. The danger with this reasoning is that, because of the facts in *Alcan*, *any* purported modification could place the employer in immediate peril of unfair dismissal claim. Otherwise stated, and notwithstanding the *caveat* that dismissal is a question of fact, the circumstances of *Alcan* seem to equate most, if not all, variation cases as cases of dismissal. This is clearly too broad a rule and inconsistent with the "elective" principles governing variation cases.

It might tentatively be argued that *Hogg* is more satisfactory than *Alcan* because the facts concerned altering the job function in a fundamental sense and so a dismissal could more readily be seen to have occurred.[47] In *Hogg* the contract of the Head of History was terminated and his function radically altered when he became a part-time teacher. In *Alcan* the issue is merely one of changing terms short of altering function, in other words it was a change in the manner in which work was done. Unfair dismissal compensation is not the appropriate remedy where the proposed change affects the manner in which the work is remunerated or otherwise organised.[48] The appropriate cause of action should have been a common law action for damages as in

[47] The problem is, of course that this argument acknowledges the unsatisfactory solution that distinctions can derived somewhat arbitrarily according to the issues of fact and degree.

[48] However, a proposed change affecting the place in which work is done could be a dismissal because a proposed re-location to a distant place could affect the employee's ability to perform his or her contractual function.

such well-known English authorities as *Rigby v Ferodo*[49] unless the employees accepted the repudiation *by resigning* and seeking compensation for unfair constructive dismissal.

The only permissible conclusion from these decisions is that elective principles are not fully rooted in employment law, so that even in the variation cases, which are normally resolved along bilateral lines, unilateral behaviour can be effective to terminate a contract

(iii) Further Problems with the Elective Approach.

But a lack of coherence in the extent of its reception in the English authorities is not the only problem affecting the elective theory. More fundamentally, it is internally incoherent. It will be recalled that the underlying purpose of the theory is to import into employment law the orthodox rules of contract law. However, the version of the elective theory actually introduced (when applied at all) is a highly modified one; indeed, the theory only partially succeeds in ousting the automatic approach. Bizarrely it seems to accept that some (but not all) obligations can end automatically. The following *dictum* makes this clear:

If a servant is dismissed and excluded from his employment, it is absurd to suppose that he still occupies the status of a servant. Quite plainly he does not. The

[49] [1987] IRLR 516.

relationship of master and servant has been broken, albeit wrongfully by one side alone.[50]

This signifies that an outright dismissal, of itself, ends the "status" of employee. But what does this mean?

"*As the relationship of master and servant is gone, the servant cannot claim the reward for services no longer rendered. But it does not follow that every right and obligation under the contract is extinguished. An obligation which is not of necessity dependent on the existence of the relationship of master and servant may well survive….*" [51]

The court here is advancing the orthodox rule that a wrongfully dismissed employee is unable to claim wages subsequent to the dismissal. Of course this collides with the logic of the elective approach that would otherwise suggest that all the rights and obligations are preserved until the innocent employee elects to terminate the contract.

In order to strain the elective theory to accommodate a rule which is in fact inimical to it, the electivists purport to contrast the operation of the employment *relationship* with the *contract* of employment.[52] They are forced to concede to the automatic theorists

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[50] *per* Brightman LJ in *Gunton v. Richmond-on-Thames LBC* , above n.21 at p. 474. Contrast *Hogg v Dover College* [1990] ICR 39, 42 "The trite law is that of course employment results from a contract. It is the contract at which one has to look and not the relationship of the employer and employee."

[51] *Id* at p. 475.

[52] There is Australian authority doubting the distinction between relationship and employment: *APESMA v Skilled Engineering Pty Ltd* (1994) 1 IRCR 106 per Gray J at pp. 113-115 but English and Australian common law rules now seem to be consistent: *Automatic Fire Sprinklers Pty. Ltd. v Watson* (1946) 72 CLR 435, followed in *Byrne v Australian Airlines Ltd*. (1995) 185 CLR 410; 131 ALR 422

that the *relationship* of employment is subject to unilateral or automatic termination, whilst the contract of employment survives the repudiation until an election is made.

It has not, however, been clearly explained what is meant by the "status" or "relationship" of employment as opposed to the various rights and obligations of the contract of employment. It is a deeply problematic distinction because it is the contract that constitutes and defines the employment relationship; arguably there can be no employment relationship independent of a contract: they stand or fall together.[53] On the assumption that a free-standing and non-contractual concept of *relationship* can be erected, it is difficult to identify what its content might be. What rights and duties are enshrined within it and what is their jurisprudential basis?[54]

In the terms in which the electivists make the argument, the employment *relationship* seems at least to refer to the obligation to work and the duty to pay wages for that work. This is arguably so because it is these co-relative obligations that the electivists accept end upon the repudiatory breach, although it is probable that other legal obligations might also be included within this framework of automatic termination.[55] But the essential point is this: even within the elective theory some (but not all)

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[53] Contrast *Motorola Ltd v. Davidson* [2001] IRLR 4 where the court held that where a worker has a contract of services with an employment agency but is directed to work for a particular employer, and to obey reasonable instructions from that employer, an employment relationship may exist between the employer and the worker notwithstanding the absence of a contractual relationship between them, provided the receiving employer has a sufficient *de facto* control over the worker. However, in this case the court was perhaps concerned, as a matter of public policy, not to permit the interposition of third parties to evade statutory rights.

[54] As Gray J. observed in the APESMA decision in Australia, (above n. 52) the "relationship" of vendor and purchaser is unknown to the law and why should employment be different?

[55] E.g. the duty to provide a safe system of working, at least in the case of an outright dismissal. A repudiation that constitutes merely an offer of a new fundamental term, would , of course, be treated otherwise where work continues to be provided.

contractual obligations end automatically. The elective theory is thus an incomplete explanation of the common law rules.

(iv) The Elective Theory and the Assessment of Loss

We have already shown how the elective theory permits an employee who has not consented to a breach of contract by the employer to recover damages for breach of contract representing the value of the lost entitlements.[56] In the present context, we are primarily concerned with entitlements following an outright dismissal because it is here also that the elective theory has failed to oust the automatic view. The latter's survival is evident in relation to the assessment of the innocent employee's loss. Before examining this issue, however, it is necessary to make some preliminary remarks on recent developments in English law.

After *Malik v BCCI*[57] an employee may recover damages for breach of the implied duty to maintain trust and confidence where the employer's conduct, such as the fraudulent operation of the business, has caused damage to reputation compromising the employee's future employment prospects. However, after the decision of the House of Lords in *Johnson v Unisys Ltd*[58] it is clear that an employee cannot rely on breach of the same implied duty to claim special damages for financial losses, such as lost earnings, following the termination. Their Lordships held that to have allowed such a claim to arise upon dismissal would have circumvented the statutory law of unfair dismissal, in particular by evading the time limits and limits on the maximum amount of compensation recoverable.

56 E.g *Rigby v Ferodo Ltd.* [1987] IRLR 516.
57 [1997] IRLR 462.
58 [2001] 2 All ER 801, noted H Collins (2001) 30 ILJ 305.

The important feature of *Johnson* was that it was not argued on the grounds that there was an unaccepted repudiatiory breach which was incapable, by itself, of destroying the contract. This is important because it will be argued below that the employee may sustain a claim in respect of wages which (had the "relationship" continued) should have been earned after the repudiation and, further, that this right survives until the election to terminate the contract is made. Their Lordships' decision does not consider the consequences of applying an elective theory of termination to the entitlement to receive unpaid wages accruing until the date of the acceptance of the breach. It is to this issue that we now turn.

(v) The Elective Theory and Entitlement to Wages.

When the elective theory is applied in commercial contracts the innocent party is entitled to "expectation damages" placing them in the position they might have been in had the contract been performed. Applied to a case of outright dismissal, this would obviously entitle the dismissed employee to recover the value of wages not earned from the dismissal/repudiation until the time of the acceptance of alternative work.[59] This is so because it is only upon that event, the acceptance of the breach, that the employee could be said to have ended the contract.[60]

However, the rules actually developed sit uneasily with an orthodox version of the elective theory. It is important at this stage to recall that one of the purposes of

[59] From this payment will be deducted any amount which he earned in alternative employment (or through his or her fault failed to earn) during the period of notice.

[60] This is so because by accepting alternative work the employee is making it impossible to fulfil the obligation to provide work under the original contract. However, there are other possibilities. An election to treat the contract as at an end could be made, for example, by issuing proceedings to seek compensation or damages in respect of the dismissal. Alternatively a court may find, as it did in *Gunton*, (above n.21) that the election is made at the trial.

introducing this theory into employment law was to attribute the ending of the contract to the actions of the innocent party. In other words, one of its key purposes was to avoid rewarding the guilty party who might otherwise be freed from a burdensome contract merely by breaching it.

Problematically, the orthodox rules in employment law are fundamentally opposed to this *beau ideal*. This is because the innocent party's losses are assessed in a limited way that deprives them of the real benefit that the elective theory would seem logically to provide.[61] The employee's losses are calculated on the assumption that employers would have exercised any power they may have had to bring the contract to an end in the way most beneficial to themselves, albeit that, by breaching the contract, they have not done so.[62] This means that damages are not assessed on the basis of what the ill-advised employer actually did, but on what the employee might have received if the employer had respected its duties under the contract (which *ex hypothesi* it did not). The courts have thus overlooked the tenets of the *caveat emptor* principle by forging a rule that permits damages to be assessed according to the length of the contractual notice period (subject to an even earlier cut-off for a failure to mitigate). It follows that this is a period that may often expire before any election the innocent party makes or is deemed to have made.[63]

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[61] English and Australian common law is consistent on this point see *Gunton v Richmond-upon-Thames LBC* , above n.21 and in *Automatic Fire Sprinklers Pty. Ltd. v Watson* (1946) 72 CLR 435.

[62] *Gunton* above n.21, *per* Buckley LJ at 469 and see, for example, *Boyo v Lambeth LBC* [1995] IRLR 50.

[63] The election may occur either when the employee puts it beyond his or her power to offer further performance by accepting alternative employment or, for example, by bringing proceedings for unfair dismissal In *Gunton* , the election was found to have been made at the trial. In *Shook v Ealing LBC* [1986] IRLR 46, 51 the EAT unsurprisingly thought that it might, depending on the facts, occur earlier, but it "could hardly…come any later." It seems the orthodox rule that the election must be

The stated purpose of the elective theory is to protect the innocent party, and yet the rules on *quantum* reward the iniquitous employer, depriving the employee of almost all the economic value the elective theory might have afforded.[64] When an employer has acted in breach of contract by not giving notice it might be asked why should he or she be protected by being deemed to have done so?

But this does not conclude the matter, for it can be argued that the restrictions on damages for wrongfully dismissed employees are inconsistent with principle. As we have seen, the explanation for the restriction on damages lies in the supposed rule that wages and work go together. A wrongfully dismissed employee does not work, and is thought not to be entitled to pay. In sum, the employee is thought to be unable to recover wages because work has not actually been performed. Thus it is common ground between elective and automatic theories that there is a necessary link between the actual performance of work and an entitlement to wages. The theories converge at this point. This is why, in *Gunton*, Buckley LJ, although espousing an elective view, observed that in practice the employee would have no option but to make the election and treat the contract as at an end: it would be futile to continue the contract in many cases.[65]

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communicated applies, although communication can be by words or conduct: *Octavius Atkinson & Sons Ltd v Morris* [1989] ICR 431, 436.

[64] A cynical view might argue that the real purpose of the elective theory is that it is a perceived justification for employers to control the activities of employees who compete after leaving employment. Thus the elective theory can produce different results according to the nature of the interest that it is sought to protect. The law thus gives greatest weight to the proprietary interests of employers, rather than to the livelihood of individual employees. However, it will be argued below that the elective theory is a somewhat unconvincing explanation even for the rules on post-termination competition by employees.

[65] *Per* Buckley LJ in *Gunton* above n. 21 at p. 469.

However, these arguments fail if the consideration for wages is not the actual performance of work but merely being ready and willing to work. If that is so two important consequences follow:

- the wrongfully dismissed employee would be entitled to recover in debt a sum representing the value of the wages that ought to have been paid after the repudiation until the election is made to end the contract. Because this is an action in debt no duty to mitigate arises;
- employers who wish to avoid these consequences must end the contract by giving due notice under it. This would reduce the damages payable provided that this implied or express contractual notice expires before the employee makes the election. This meets the objection that might have arisen after *Johnson* that an employee might, by choosing not to end the contract, seek to enforce a substantial claim that would have exceeded what was available under the law of unfair dismissal. The employer can prevent this simply by giving due notice thereby bringing the contract to an end before a claim for wages for a substantial period could accrue, although that would depend, of course, upon the duration of the contractual notice period and the employer's decision to rely on it.

The Consideration for Wages

Surprisingly, for the point is a fundamental one, the courts have not been consistent in resolving what the consideration for wages is. One view is that work must actually be

performed before a claim to wages can be sustained.[66] Alternatively, it has been seen to be more consistent with *laissez-faire* principles that the parties should determine for themselves that which must be furnished in exchange for wages. Limited Australian and English authority holds that the question of consideration is resolved simply as a matter of construing the contract.[67]

However, because it will be difficult in many cases to identify the intention of the parties, the English courts appear to have consistently adopted a broad default position that treats willingness to work, rather than the actual performance of work, as entitling the employee to wages.[68] There is some Australian authority to a similar effect although, as in England, the issue has not been without difficulty.[69]

Support for the general principle that work and wages are not inexorably bound together can be found in diverse authorities. For example, there is the rule that, in the absence of an express term, there is no common law right for the employer to suspend

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[66] See e.g., *per* Greer J. *in Browning v Crumlin Valley Collieries* [1926] 1 KB 522 at p. 528: "The consideration for work is wages, and the consideration for wages is work."

[67] E.g., Atkinson J. in *Petrie v Macfisheries* [1940] 1 KB 258 at 269, followed by the New South Wales Industrial Relations Commission in *Swift Placements Pty Ltd.v Workcover Authority of New South Wales (Louisa May)* [2000] NSWIRComm 9 citing, *inter alia*, Latham CJ in *Automatic Fire Sprinklers Pty. Ltd. v Watson* (1946) 72 CLR 435, 452-453.

[68] It perhaps not settled whether the authorities that favour this approach treat it as a rule or as liable to be overridden by a contrary intention. Arguably, the latter is more consistent with principle.

[69] See generally, *Automatic Fire Sprinklers Pty. Ltd. v Watson* (1946) 72 CLR 435. "It is only in an exceptional case where the payment of money to the servant does not depend upon his doing work, that the servant can recover remuneration without daily work. He cannot remain idle, even though he truly alleges readiness and willingness to do the work and claim wages or salary as if he had done the work." *per* Latham C.J. at p 452; "The common understanding of a contract of employment at wages or salary periodically is that it is the service that earns the remuneration…" *per* Dixon J., at pp 465-466, although he admitted that, as one of several exceptions, an entitlement to wages can be enforced for a period spent on annual leave: at p. 446. However, as in England, an employee who refuses to work according to the contract cannot claim wages: *Australian National Airlines Commission v Robinson* [1977] VR 87 esp. 91.

without pay.[70] The entitlement to be paid arises in such cases because the employee is willing to work, but was prevented by the employer from performing that work.

The courts also seem to have been aware that if entitlement to wages only arises on the performance of work it would work injustice since employees normally have no right to be given work. According to the famous *dictum* of Asquith J:

"*Provided I pay my cook her wages she cannot complain if I choose to take any or all of my meals out."*[71]

If consideration for wages were the actual performance of work, the cook would not, of course, be entitled to be paid even if she had been willing, although unable, to cook the meal.

These same principles endure in more recent English case-law. In *Beveridge v KLM (UK) Ltd*.[72] it was held that if the employer closes the business over Christmas, the employees are entitled, unless the contract stated otherwise, to be paid despite having done no work.

Of course, the entitlement to wages does not arise in every case that work is not performed. The English common law clearly recognises a distinction between an involuntary failure to perform the work, which does not disentitle the employee to wages, and a voluntary failure which does. For example, the taking of industrial

[70] *Hanley v Pease & Partners Ltd.* [1915] 1 KB 698.
[71] *Collier v. Sunday Referee Publishing Co.* [1940] 2 KB 647 at 650

action, constituting a refusal to work in breach of contract, bars an employee from claiming wages.[73] But in the case of sickness (at least prior to the modern English law as it was established in *Mears v. Safecar*[74]) a contractual entitlement to sick pay during a temporary illness was not thought to be depend upon the express or implied obligations of the contract of employment: the early common law rule was that by being willing, albeit unable to work, an employee was entitled to receive wages during temporary sickness because he or she had supplied the necessary consideration.[75]

There is, however, one ill-defined exception where a mere willingness to work is insufficient to found a claim to wages. This arises where the employer is not at fault for its failure to allow the employee to work. This can be seen in *Browning v. Crumlin Valley Collieries Ltd*[76] In this case it will be recalled that the employer prevented miners working in unsafe conditions by laying-off without pay until the mine was repaired. The refusal to pay wages was, on these facts, held to be justified by the existence of an implied term.[77]

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[72] [2000] IRLR 765.

[73] E.g., *Sim v Rotherham MBC* [1986] Ch 216; *Miles v Wakefield MDC* [1987] AC 539. It seems that in Australia employers have a statutory duty to withhold pay during industrial action: s.187AA of the Workplace Relations Act 1996.

[74] [1983] ICR 626. It was decided here that sick pay was to be regulated by an express or implied agreement; thus by implication a willingness to work is not seen as consideration for wages at least where there is evidence that of a contrary intention. However, in deciding that where there was no clear evidence of the intention of the parties and the matter should be resolved in favour of sick pay entitlement perhaps suggests a residual reliance on the default position governing the doctrine of consideration in employment cases.

[75] *Cuckson v Stones* (1858) 1 El. & El. 248, followed in *Warren v Whitingham* (1902) 18 Times LR 508; and see also *Storey v. Fulham Steel Works Co*. (1907) 24 Times LR 89 and *Niblett v Midland Ry. Co*. 96 LT 462.

[76] [1926] 1 KB 522.

[77] There is a lack of definition in this rule because *Devonald v. Rosser & Sons* [1906] 2 KB 728 decides that an employer cannot lay-off without pay due to a decline in trade, even if the lack of profitability is not due to its fault. This suggests that the rules are founded independently of fault.

In conclusion, an employee who is willing to work, but who is prevented by the employer from doing so without just cause, is entitled to receive his or her wages. The rule that a wrongfully dismissed employee's compensable loss is only the loss of wages during the notice period is thus exposed as lacking a sound basis in principle.

The consequence of this is that it profoundly alters the version of the elective theory applied in employment law. In particular, it casts doubt on the rule governing the measure of damages that a wrongfully dismissed employee should not be able to receive the value of their wages from the date of the repudiation. On the contrary, it provides strong and consistent authority for the view that such an employee should be entitled to recover in debt the value of wages from the wrongful dismissal or repudiatory breach of contract until the date at which the employee puts further performance of the contract out of their hands.[78]

This conclusion is not affected by *Johnson v Unisys Ltd*[79] because it does not require any reliance upon an implied obligation to sustain the claim; indeed, unlike *Johnson*, it requires no extension of *liability*: it is an issue that straightforwardly engages the question of the entitlement to wages. It can additionally be argued that *Johnson* should not be read as limiting common law rules governing the law of wrongful dismissal since this form of action, unlike that raised in *Johnson*, is not concerned with the *manner* of dismissal, and thus survived parliament's intervention. It is

[78] This, of course, advances the law beyond the point reached in *Rigby v Ferodo* [1987] IRLR 516 because there is a continuing right to receive wages notwithstanding that the duty to serve has been ended automatically.

[79]

simply argued here that the restrictions on recovery of wages at common law for wrongful are inconsistent with principle.[80]

A Disaggregated Contract

We have seen how, in many employment contexts, the courts have decided to adopt as orthodoxy a bilateral, elective, approach ostensibly derived from the ordinary law of contract, albeit that it has been highly revised when compared to the orthodox principles governing the termination of commercial contracts. We have already stated, but it is important to re-iterate here, that one of the reasons for doing so was to prevent the party repudiating the contract from acquiring an illegitimate advantage by being able to escape their obligations merely by committing a fundamental breach. This was particularly problematic in the case of restraint clauses that, it was felt, would not be enforceable if an automatic theory represented the law. Sir Robert Megarry V-C made this point explicitly in *Guinl*e:

"*... if the doctrine of automatic determination is good law, all that Johanna Wagner, Heuer and Bette Davis had to do was to say that their contracts were at an end, and so they were free from the contractual restrictions that applied while their employment continued.*"[81]

[80] This is a more modest contention than arguing that the measure of damages should reflect the employee's disappointment in having the contract of employment terminated prematurely and for that reason assessing damages according to period for which it was likely that the contract would otherwise have continued, for normally, although perhaps not universally, the award will be significantly less.

[81] [1979] Ch 227 at p 241. His lordship was referring to *Lumley v. Wagner* (1852) 1 De G.M. & G. 604; *William Robinson & Co Ltd. v Heuer* [1898] 2 Ch 451; *Warner Bros Pictures Incorporated v*

This reasoning suggests that restraint and exclusivity clauses can only be enforced during the continuation of the contract, and that once the contract is ended their enforcement becomes impossible. In other words, an employer wishing to rely on such clauses should not accept the breach by the employee and so treat the contract as at an end, for these clauses will necessarily stand or fall with the remainder of the contract. Thus, according to the orthodox view, only the elective theory is capable of furnishing protection for employers in relation to the post-termination activities of the employee and only then if the innocent employer elects to preserve the contract.

However, this reasoning is open to objection because it is manifestly inconsistent with many well-established authorities. The enforcement of restraint clauses has never been made contingent upon the continued existence of the contract of employment. If it were otherwise the employer would be vulnerable whenever the contract were terminated lawfully, for example by the giving of due notice. Only the few employees who declined to give due notice would be caught: others would not be subject to these clauses because *ex hypothesi* their contracts would have ended by the giving of notice leaving no foundation to justify the employer's enforcement proceedings. By the same reasoning, if the employee were to "walk off the job" without notice, even under the terms of the elective theory, the employer could lose the protection of a restraint clause if a replacement worker were engaged.[82]

Nelson [1937] 1 KB 209 in which employers had been able to prevent employees from working for rival employers in breach of ' negative' stipulations in their contracts of employment.

82 For engaging a replacement could be seen as an acceptance of the employee's breach because the employer would thereby be putting it out of its power to re-instate the employee. Thus the contract would have ended by the time the employer sought to enforce the restraint clause.

It is trite law that the courts have not so restricted the enforcement of such clauses. There are numerous decisions in which the employee has ended the employment contract and yet the employer has subsequently successfully invoked a restraining clause.[83] Indeed, in *Herbert Morris Ltd v Saxelby*[84] there had been an intervening employment prior to the successful action by the employer. In each of these cases it was clearly unnecessary to keep the contract alive to preserve the restraint or exclusivity clause, which means that the enforcement of these clauses arises independently of a continuing contract. One of the fundamental purposes of the elective theory is accordingly undermined to that extent.

Once it is realised that such fundamental obligations exist independently of the continued existence of the contract there are important consequences for our understanding of the theories governing the termination of contracts. Arguably, neither the automatic nor the elective view of contract can be satisfactory since neither accommodates the rules on restraint of trade. Whether the termination be held to have occurred under the automatic or an elective view makes no difference in this context: obligations can be enforced independently of either theory after the contract has ceased. It is must therefore be appropriate to search for a more convincing explanation of the rules.

A New Approach

[83] *Roger Bullivant Ltd v Ellis* [1987] IRLR 464; *Fitch v Dewes* [1921] 2 AC 158; *Leng v Andrews* [1909] 1 Ch 763; *Robb v Green* [1895] 2 QB 315.
[84] [1916] 1 AC 688

Whilst we have accepted that the elective theory is the dominant explanation of the rules governing the termination of a contract of employment we have argued that the version of the theory applied by the courts has been based upon a misconception of the consideration for wages. The first element of this new approach is therefore that whilst for most purposes contracts end bilaterally, it has been inconsistent with principle to deny employees the right to recover the value of their wages from the date of the outright wrongful dismissal until the election is made to end the contract. To that extent we have offered an approach that differs significantly from the orthodox principles by suggesting that an action lies in debt to recover the value of these wages.

We have also argued that the majority of the variation cases should be conceptualised and resolved according to elective principles. To this extent, it can be argued that *Alcan* was wrongly decided. The appropriate cause of action in that case was not one for unfair dismissal compensation but a common law claim for damages, as in *Rigby v Ferodo Ltd.* [85]

We have accepted, however, that there are limited obligations within the contract that end automatically upon an outright dismissal and we thus accept that automatic termination should co-exist with an elective approach in so far as the former governs the termination of a very limited number of obligations at common law. These are the obligations that are associated with the "relationship" of employer and employee

[85] [1987] IRLR 516.

such as the duty to serve according to the contract[86] and the duty to provide a safe workplace. Moreover we have not sought to contest the argument that the automatic theory would also seem to have significant benefits in relation to time limits for making statutory claims.

But this does not conclude the matter because we have also suggested that there is a third principle governing the termination of contracts. This is used by the courts to justify, for example, the enforcement of restraint of trade clauses. We have seen that these obligations remain enforceable after the contract has ended and thus operate outside either theory. As we have seen, the enforcement of restraint of trade clauses has never depended upon a continuing contract and so the courts have erred in believing that the elective theory is necessary to justify their enforcement. A more convincing explanation for the protection of proprietary or legitimate interests would appear to be the doctrine of public policy rather than the continued existence of the contract. This recognises and is entirely consistent with the long established principle that although restraint clauses may be created by agreement, their operation depends on considerations beyond the contractual intention of the parties. It is true that public policy is normally understood as a means of preventing the operation of unacceptably wide restraints and that the suggestion here is the different one that it may be used to continue existence of otherwise valid restraints after termination. Nevertheless, we have argued that the case law justifies such a conclusion; indeed, this is not perhaps as controversial a might otherwise appear when it is recalled that the courts have

[86] It is the duty to serve as stipulated in the contract that ends upon an outright dismissal by the employer. Any alteration in the content of that obligation, for example, an altered job description would be subject to bilateral principles.

already used public policy to *create* obligations as implied terms, for example, in the rules of monopolistic bodies.[87]

Once a role for public policy is understood and more openly acknowledged it may lead to a number of developments within the context of the emerging "partnership" model of industrial relations. In Britain there has been an increasing emphasis upon re-aligning the employment relationship in order to meet the challenges of globalised competition. The precise nature of "partnership" remains somewhat elusive although, at its broadest level, it would seem to require a cultural change that encourages greater mutuality and respect for employees. This is offered in exchange for enhanced motivation, "flexibility" and innovation on their part.[88] A key element in gaining from employees a greater commitment is a willingness to reward innovation. Where employers respond to this by negotiating terms that permit employees a greater share of the benefit of their inventions than the law would otherwise permit,[89] it would be necessary to protect that interest by permitting the employee to enforce that term after the employment has ceased. Neither the elective nor the automatic theories would seem capable of explaining or justifying this. Accordingly, where there are terms intended by the parties to protect their respective proprietary interests a new theory of termination is necessary.

But public policy is not merely confined to the continuation of terms concerned with the proprietary interests of the parties. Apart from restraint of trade clauses, other

87 E.g., *Russell v Duke of Norfolk*[1949] 1 All ER 109.

88 See B. Hough and A. Spowart-Taylor, "Realising Partnership in Employment Relations: Some Legal Obstacles" forthcoming, King's College Law Journal, Winter 2002/03.

89 See Patents Act 1977, ss39-41 and Copyright, Design and Patents Act 1988, s.11 (2).

terms subject to this principle might include, for example, a contractual responsibility to ensure that any reference provided is fair. This obligation should also be enforceable after the employee's contract has been terminated.[90]

Conclusion

The law governing the termination of the contract of employment is in an inadequate state. First the courts have assumed, wrongly as we have argued, that the proper explanation of the common law rules lies in one or other of the two rival theories of termination, the elective and the automatic theories. It is evident, however, that even if this were true, the courts have failed to make a consistent choice between them. This fundamental level of indeterminacy of principle had led the judiciary to arrive at decisions which are highly unsatisfactory. The threat posed by *Alcan* to bargain security is not the least of these problematic decisions.

But this does not conclude the issue because, on the assumption that wages are only earned by work having been done, each theory succeeds in denying employees a measure of damages that would more accurately reflect their losses following from an employer's wrongful dismissal.

[90] In *TSB Bank v Harris* [2000] IRLR 157 the EAT speculated, in an *obiter dictum* that the obligations owed to a former employee may be different from those owed to a current employee enjoying the protection of contractual terms such as the employer's duty to maintain trust and confidence. This is the implied term that may be breached by the provision of an unfair reference whilst the employee is still in employment. The EAT's reasoning that the obligation owed to the ex-employee are different simply because a reference provided by a former employer might be less persuasive than a current one does not seem to be convincing. Its alternative view that the contract has ended might also be vulnerable if our argument below that some terms, including this one, may continue to be enforced post termination as a question of public policy is accepted.

The courts have achieved this injustice in effect, by absolving employers from their breach of contract by holding that damages are assessed as if the contract had been ended lawfully, when *ex hypothesi*, this was not the case. This misconception has destroyed for employees one of the principal benefits that was claimed for the elective theory as one of its primary advantages over the automatic theory, namely the policy of denying a reward to iniquitous parties to a contract. This exposes a lack of balance in the law because, in many leading cases in which courts have favoured the elective view, it has been to extend employer's controls over the post-termination activities of the employee. It would, however, be going too far to suggest that the adoption of the elective theory has few advantages for employees because, as we have seen, there are clearly instances where the survival of the contract until the date of an election has been advantageous. But, in relation to breaches by the employer, the misconception of the doctrine of consideration does undermine an entitlement that the law should not frustrate.

Similarly we have seen that the courts have strained orthodox contractual principles to justify the enforcement of restraint clauses to control the activities of employees after termination. The true basis for these decisions lies outside the ordinary law of contract and in the arena of public policy and we have argued that the recognition of this could provide a more satisfactory balance between employer and employee within the emerging partnership agenda.