

THE DOCTRINE OF CONSIDERATION: DEAD OR ALIVE IN ENGLISH EMPLOYMENT CONTRACTS?*

Abstract

The doctrine of consideration, with its emphasis upon exchange, and its general rejection of 'more for the same', seems inadequate for the modern environment in which flexible rewards may reflect the employer's concern that the importance of individual staff to an enterprise may not remain constant and may alter as the commercial context in which their work is performed fluctuates. Although versions of the classical doctrine have exercised an important influence in English employment law, there now appears to be a noticeable disinclination to use the doctrine as a problem-solving technique. This is especially so in relation to the variation cases as well as those concerned with the enforcement of apparently gratuitous benefits in formal policies, such as equal opportunities policies. It will be argued that the classical doctrine is either falling into desuetude or that it has been substantially revised.

1. Introduction

The fundamental proposition of English law that not every promise is legally enforceable requires the courts to establish problem-solving mechanisms to distinguish enforceable from non-enforceable obligations. This task is demanded of courts and tribunals in employment disputes as much as it is of courts in the commercial context. The classical common law has, of course, been dominated by the theory of bargain, which is the predominant explanation of contractual liability, albeit one that is supplemented by intention to create legal relations. Such is the command of the doctrine of consideration over legal thought that the courts have sometimes been prepared to fashion consideration where it is ostensibly absent rather than question its necessity.¹ Exchange thus comprises the *terra cognita* of contractual obligations. Donative promises are often relegated to the private sphere;² and, for their breach, only a moral

* Professor Barry Hough, Law School, Southampton Institute and Ann Spowart -Taylor, Principal Lecturer, University of Sunderland, UK.

¹ E.g., *Shadwell v Shadwell* (1860) 9 CB (NS) 159; *Ward v Byham* [1956] 1 WLR 496.

² E.g., *Combe v Combe* [1951] 2 KB 215. See also Professor H Collins, *The Law of Contract*, 3rd edition (Butterworths: 1997) ch.4.

sanction applies. However, in employment law, after the decision in *Taylor v Secretary of State for Scotland*,³ this classical distinction is coming under strain.⁴

It will be argued that English employment law has developed to a condition in which consideration is not consistently considered to be the dominant evidence of contractual intent. The purpose of the present article is to examine the state of English employment law jurisprudence to reveal the extent to which the courts are developing alternative explanations of the contract of employment. Of particular interest will be the question of enforcing post formation benefits, such as a pay rise where duties remain unaltered, where the issue of enforcement must confront the traditional prohibition on enforcing promises of more for the same.⁵ In many cases, as we shall see below, the absence of consideration appears to be either unnoticed or ignored.⁶ These latter decisions in particular raise the intriguing possibility that in employment law the classical doctrine of consideration is falling into desuetude and no longer convincingly explains the distinction between non-enforceable from enforceable obligations. Are the rules which now govern the legal consequences of these promises a further and fundamental erosion of the long established principle that a contract of employment "...is but an example of contracts in general"?⁷

2. The Meaning of Consideration in Employment Law

In English law there is no contract without reciprocity. The law could find the required reciprocity in an exchange of promises: a promise received in return for a promise given being understood as necessarily beneficial to the parties. However, the classical definition of consideration, which is furnished by

³ [1997] IRLR 608, Employment Appeal Tribunal (EAT); [1999] IRLR 363, Ct. of Sess.; [2000] IRLR 502, HL. See further below. The jurisdiction of the EAT is to hear appeals on points of law from Employment Tribunals on a range of employment rights, such as unfair dismissal, unlawful deductions from wages, discrimination etc. In this context common law principles are often of fundamental importance, in particular whether the employer's actions are in breach of contract.

⁴ The decisions of the EAT and the Ct of Session also suggest that the concept of bilateral formation may also no longer provide the exclusive means of creating an enforceable obligation.

⁵ E.g., *Stilk v Myrick* (1809) 2 Camp 317.

⁶ *Taylor v Secretary of State for Scotland* [1997] IRLR 608, EAT; [1999] IRLR 363, Ct. of Sess.; [2000] IRLR 502, HL.

⁷ *Laws v London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 WLR 689 *per* Lord Evershed MR at p. 700.

Currie v Misa,⁸ requires something more. Consideration "may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other."⁹ This bargain theory of contract, which sees the promise as being bought by the promisee, was approved by the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd*.¹⁰ "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

Collins has argued that the classical doctrine embraces two distinct versions. The dominant model of exchange assumes that anything requested by the promisor will be counted as a benefit. The emphasis here is upon the request.¹¹ The alternative version, which emphasises benefit and detriment rather than the request, insists that some substantive benefit should be conferred or a detriment suffered.¹² Of particular interest in this latter version is the observation that detriment to the promisee may be more important than benefit to the promisor.¹³ This is particularly important in employment law because the employer's offer of a benefit to the employee, such as a pay increase, is not usually dependent upon the employee suffering a detriment in order to "purchase" the additional reward.

An undertaking in an equal opportunities policy is a typical example of the kind of promise with which we are concerned. Where an employer promises not to discriminate on the grounds of religion, age or social class it is not normally the result of a bargained-for exchange according to which reciprocal additional performance is promised by the employee.¹⁴ Thus, it is not usual to raise the employees' performance targets, nor to extend their hours as a *quid pro quo* of the promise. Promises such as these are often merely "volunteered" outside a bilateral process. This example readily reveals that the classical model does not easily appear to fit within the employment context.

⁸(1875) LR 10 Ex 153.

⁹ *Ibid.*, at p 162.

¹⁰ [1915] AC 847 at 855.

¹¹ See also J C Smith, *The Law of Contract-Alive or Dead?* 13, *The Law Teacher* (1979) 73.

¹² Professor H Collins, *The Law of Contract*, *loc cit*.

¹³ Pollock, *History of English Law*, Vol. 8, p. 11; Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?* (1935-6) 49 *Harv L. Rev.* 1225.

¹⁴ It might, however, be possible to construct some fictional request that the employee's morale be raised by the promise, or that they might be more committed workers and continue in employment. The case-law does not, however, articulate such an approach. See below.

The courts have not, however, required that consideration should be the exclusive inducing cause of a promise. As Corbin has argued,¹⁵ consideration "need not be the object of the promisor's desire for which he offers his promise in exchange, but may instead be an action or forbearance by the promisee as a result or natural consequence of the promise. All that is required is that there should, between the promise and the consideration, be a causal connection." This is important because, as we shall see, this may be the version of consideration which explains contemporary employment law.

In the following section we shall examine how the doctrine of consideration has ostensibly been received as a general principle of English employment law. We shall then consider the areas of particular difficulty, including cases of variation and, in particular, cases in which the employer offers an apparently unreciprocated benefit. Benefits formally promised in non-contractual documents such as codes of practice or policy statements provide an interesting modern example of the apparent collision between the doctrine of consideration and the flexible working environment. Possible alternative theoretical explanations of contractual liability will then be considered and a conclusion offered.

3. The Reception of the Theory of Bargain in English Employment Law.

(i) General Principles

The doctrine of consideration is infrequently put in argument in employment law, but its influence can be detected in a line of cases which are consistent with the classical doctrine. Accordingly, at the formation stage, no contract was created where a casual worker on a farm received, by way of 'payment', beer and the occasional supper since his work was found to be voluntary and the beer and food a mere expression of gratitude *after* the work was performed.¹⁶ The victuals were therefore not the cognisable inducement to provide the labour.

¹⁵ A L Corbin, *Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions*, 27 Yale L.J. 362, 366.

¹⁶ *Kemp v Lewis* [1914] 3 KB 543.

Similarly, in *Uttley v St John Ambulance*¹⁷ a volunteer who served with the St John Ambulance whose actual expenses were re-imbursed, but who was not paid a wage, was held by the Industrial Tribunal¹⁸ not to serve under a contract of employment because, *inter alia*, consideration, as an essential element of a contract, was not present. The opposite conclusion was reached in *Migrant Advisory Service v Chaudri*¹⁹ where the volunteer charity worker was paid a flat rate for expenses regardless of whether these expenses had actually been incurred. The conclusion that these payments were a disguised form of wages permitted the conclusion that the worker was an employee for unfair dismissal purposes,²⁰ and within the meaning of the Sex Discrimination Act 1975.

The supply of consideration was determinative in *Hanson v Royden*²¹ where the employer declined to honour the promise of a pay rise consequent upon a promotion. Here the court, influenced by bargain analysis, was forced to focus upon the "great differences"²² between the duties of an able-seaman and those of a second mate in order to convert the promissory words into a binding obligation.²³ In the absence of those differences it is possible to ask whether the promise to pay more to the promoted seaman would have been enforceable. In other words, *Hanson* would suggest that no promoted employee could sue for an enhanced wage unless the duties associated with the more senior post were demonstrably different (and arguably more burdensome). Such a conclusion would have far-reaching significance for modern pay structures, especially in the public service where pay increases within designated grades are often dependent merely on length of service. Yet *Hanson* is clearly consistent with the principle in *Stilk v. Myrick* (below) that a promise to pay more for the already contracted performance is *nudum pactum*.

Bargain analysis has been particularly influential in the law of wages where a readiness and willingness to work has traditionally been accepted as the

¹⁷ Employment Appeal Tribunal (EAT) 635/98, 18th September 1998.

¹⁸ The decision was upheld by the EAT on other grounds.

¹⁹ EAT/1400/97. See generally, D Morris, *Volunteers and Employment Status* (1999) 28 ILJ 249

²⁰ Employment Rights Act 1996, s.94.

²¹ (1867) LR 3 CP 47.

²² *per* Willes J at p. 50.

²³ Counsel for the owner argued that the seaman had not provided consideration for the additional wages because, as an able seaman, he had contracted to do obey all reasonable commands even if the duties were more onerous than usual. The court rejected this submission after confining the seaman's broad obligation to circumstances of emergency.

consideration for wages.²⁴ The courts have identified and deployed a mutual obligation to continue to supply consideration in order to deprive employees who take industrial action of their wages.²⁵ "In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages."²⁶ This insists on the model of exchange.

In the context of the "right" to work the courts have also sought to explain the rule and its exceptions according to the orthodox doctrine of consideration. The required consideration moving from the employer is normally limited to the payment of wages, but is not so confined in the well-known cases of actors, piece-rate workers and those on commission.²⁷

(ii) Collective Bargaining

Consideration may also be problematic in collective bargaining. The doctrine of privity, of course, prevents the agreement of the collective parties from benefiting the employees unless the individual contracts of employment permit incorporation.²⁸ Normally an express clause provides for this, although a similar result may derive from custom in the absence of such a clause.²⁹

Reciprocal promises made by the collective parties to achieve a bargain may satisfy the doctrine of consideration *inter se*,³⁰ but the employee beneficiary need not necessarily suffer any detriment. For example, if, in return for an across-the-board pay rise, the trade union gave up its right to send a representative to a particular committee the employee could not be said individually to have furnished consideration for the pay enhancement.

²⁴ *Hanley v Pease & Partners Ltd.* [1915] 1 KB 698; *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193.

²⁵ E.g., *Miles v Wakefield Metropolitan District Council*, *ibid.*

²⁶ *Ibid.* per Lord Templeman at p.198.

²⁷ *Bauman v Hulton Press Ltd.* [1952] 2 All ER 1121; *Devenold v Rosser* [1906] 2 KB 728; *Turner v Goldsmith* [1891] 1 QB 544. See generally, *Langston v AEUW No 2* [1974] ICR 519, 521-522, and most recently *William Hill Organisation Ltd. v Tucker* [1998] IRLR 313 at p. 317, where Morritt LJ, stated that the test to determine whether an employee could be sent on "garden leave", was to ask whether the consideration moving from the employer extends to an obligation to permit the employee to do work or is it confined to payment of agreed remuneration?

²⁸ The position appears to be similar in Australia: *Ryan v Textile Clothing & Footwear Union of Australia* [1996] 2 VR 235.

²⁹ *Henry v London General Transport Services* [2001] IRLR 132.

³⁰ Although, for other reasons, the agreement will not normally have contractual effect: Trade Union and Labour Relations Act 1992, s.179 (1).

(iii) The Problem of the Pre-Existing Contractual Duty

Before examining the variation cases, it is important to recall the classical strictures preventing the enforcement of a promise made in exchange for an act which the promisee is already contractually obliged to perform. These rules will be of particular relevance in relation to the promise of apparently gratuitous post-formation benefits.

The classical doctrine of consideration maintained that the performance of a pre-existing contractual duty owed by the promisee to the promisor was no consideration for a new promise to confer an additional benefit on the promisee. Policy considerations underpin this principle since promisors could otherwise find themselves at risk of blackmail or coercion from dishonest promisees.³¹ By this means the classical doctrine appears to place a significant barrier to the enforcement of post contractual gratuitous promises.

The classical rule, which is considered to originate in the decision of Lord Ellenborough in *Stilk v Myrick*³², has been long been considered to reflect English employment law. It provides a fundamental objection to the enforcement of claims by employees to post formation benefits which are fundamentally gratuitous. In *Stilk v Myrick* the facts were that, following the desertion of two crew members, the captain of a vessel agreed with the remainder of the crew that if they worked the vessel back to London without replacements for the deserted seafarers, the wages which would otherwise have been paid to the latter would be divided amongst the remainder of the crew. After the ship's return to port the extra wages were refused, and the plaintiff's action to recover his share of the extra pay was dismissed. This was so because the seamen had, by their contracts, undertaken to do all they could under all the emergencies of the voyage. This included an obligation to sail the ship short-handed.

The insistence on the supply of consideration in *Stilk v Myrick* is particularly interesting in the present context because it is a decision which actually

³¹ This is a possible explanation of the policy underlying *Stilk v Myrick* (1809) 2 Camp 317. The recent development of the principle of economic duress is capable of addressing this concern: *Atlas Express Ltd. v Kafco Ltd.* [1989] QB 831. This safeguard may have allowed the courts to weaken the doctrine of consideration in *Williams v Roffey Bros. Ltd.* [1990] 2 WLR 1153 (see further below).

³² *Stilk v Myrick* has been accepted as a classical statement and remains good law: *Swain v West (Butchers) Ltd.* [1936] 3 All ER 261; *North Ocean Shipping Co. Ltd. v Hyundai Construction Co. Ltd.* [1979] QB 705; *Williams v Roffey Bros. Ltd.* [1990] 2 WLR 1153 although the latter decision is clearly intended to qualify, if not actually to overrule, *Stilk v Myrick*.

concerns a purported post formation modification to an existing contract. It exemplifies precisely the problem of enforcing a benefit promised after the formation of the contract and resolves this by making enforcement conditional upon the supply of fresh consideration to support the promise. This classical authority thus decides that a purported variation will be ineffective in the absence of the assumption of additional duties or greater productivity. As a consequence of this "strong" version of the doctrine of consideration, an employer is at liberty to resile from an unsupported promise formally and freely given and seriously intended. Any reliance placed upon that formal promise by the employee is irrelevant.

Stilk is particularly interesting because in more modern authorities the *weakest* application of the doctrine of consideration occurs in the variation cases. Interestingly, these cases appear to represent the low water mark to which the doctrine of consideration has retreated. An apparent absence of consideration is only rarely raised as an objection, which perhaps signals that the influence of *Stilk v Myrick* has been much diluted. As we shall see, however, other explanations are also possible.

The burden of *Stilk v Myrick* has also proved to be problematic in the general law of contract. The principle that a pre-existing contractual duty is no consideration for a new promise has been qualified in *Williams v Roffey Bros. Ltd.*³³ Whilst it is clear that *Williams* is not intended to overrule the requirement in *Stilk v Myrick* that there should be consideration³⁴ reconciliation of these cases is not straightforward.³⁵ A possible explanation lies in the commercial rationale for preserving relationships.³⁶ The point in *Williams* was that the cost of engaging a new contractor meant that the economically rational choice was to promise more to keep the existing contractor functioning.³⁷ As we shall see this logic may explain the revised conception of consideration in

³³ Above n.32.

³⁴ *Williams v Roffey Bros. Ltd.*, above n.32, *per* Glidewell LJ at p. 1165, Russell LJ at 1168 and Purchas LJ at 1170, although Russell LJ went further than his judicial brethren in doubting *Stilk v Myrick*.

³⁵ The captain in *Stilk* could, under the principle in *Williams v Roffey*, have derived a practical benefit (see below) from the safe return of the ship to the British port.

³⁶ See, e.g., J W Carter and M P Furmston, *Good Faith in the Negotiation of Contracts* (1994) 8 JCL 1 at 9.

³⁷ In *Reactions to Williams v Roffey* (1995) 8 JCL 248, at 271 J W Carter, A Phang and J Poole pertinently ask why we should be troubled if a promisor has bargained for something they are already entitled to receive. Paying more for the same might be a consequence of freedom of contract and *laissez-faire*.

modern employment law in which contracts are sometimes classified as relational or long term contracts - to which special principles apply - rather than exchange contracts which are subject to the orthodox rules.

(iv) Variation of Contract

According to the orthodox doctrine, as revealed in decisions such as *Stilk* and *Hanson*, the fundamental issue of principle is clear: consent and consideration must be established before any purported modification is effective.³⁸ Fresh consideration is the *sine qua non* of variation in contract and this principle has been accepted without question and applied in more modern times. In *Swain v West (Butchers) Ltd.*³⁹ a promise by the employer not to dismiss an employee who had carried out the unlawful orders of a superior was not binding since the contract expressly required the employee to "promote, extend and develop the interests of the company". At the time the employee agreed to provide evidence against his superior (in exchange for the undertaking about his continued employment) he was therefore already obliged to supply the information sought. The agreement not to dismiss him was *nudum pactum* enabling the court to dismiss his action for wrongful dismissal and breach of contract.⁴⁰

Thus the influence of bargain theory ostensibly pervades all aspects of the contract of employment: consideration is fundamental to its formation; the continued payment of wages is dependent upon continued performance of the contractual duties; benefits, such as a pay increase or the offer of any other benefit are not enforceable simply because they have been "accepted"; the employee must supply fresh consideration for the promised benefit. However, whilst the courts have never appeared to question the penetration of the classical doctrine in employment cases, it seems nevertheless to be vanishing from argument and judicial reasoning in modern purported variation cases. In practice, consideration is not often regarded as relevant in this type of case. This may permit the conclusion that classical bargain theory has been

³⁸ According to classical contract law, mutual consent is, by itself, insufficient to vary a contractual obligation: *Berry v Berry* [1929] 2 KB 316; *Vanbergen Properties v St Edmunds Properties* [1933] 2 KB 223; *Syros Shipping Co SA v Elaghill Trading Co. (The "Proodos C")* [1980] 2 Lloyd's Rep 390
³⁹ [1936] 3 All ER 261.

⁴⁰ See also *Sybron Corporation v Rochem* [1984] Ch 112, esp. 119. Note, however, the possibility, ventured by J W Carter in *The Re negotiation of Contracts* (1998) 13 JCL 185 that the problem of consideration could be avoided if the parties remember to discharge the "old" contract and mutually agree to substitute a "new" one including the new benefit. The author observes, however, that such a conclusion places an undesirable premium on form.

abandoned, or, at least, revised in modification cases. However, before this conclusion can be reached a *caveat* should be entered.

The problem is that many of the cases are not concerned with the enforcement of apparently gratuitous *benefits* but rather with the employee having resisted a proposed modification to the contract which (if successfully introduced) would have imposed a *burden*. It is trite law that the purported unilateral imposition of any new obligation contrary to the terms of an existing contract is normally a repudiation of that contract.⁴¹ In such a case the argument would be whether the employee had consented to the breach.⁴² The doctrine of consideration would not be apposite, and its absence from judicial reasoning can hardly be indicative of disillusionment with bargain theory. Thus conclusions about the relevance of bargain theory may depend upon practical choices as to how cases are argued as much as on theoretical perspectives. Furthermore, the courts themselves sometimes seem uncertain as to how to view these cases, with the result that there can be confusion as to the required problem solving techniques. The following analysis is offered subject to this *caveat*.

*WPM Retail Ltd v Lang*⁴³ exposes a possible failure to invoke the classical doctrine in circumstances in which it might have provided a very obvious problem solving device. In this case the court was, in effect, asked to declare the existence of a term in the employee's contract of employment entitling him to an annual bonus subject to achieving certain performance criteria. Given the court's finding that the employee's job "was quite unchanged"⁴⁴ the question ought to have been asked whether the performance criteria made demands on the employee which, prior to the promise of the bonus, he had not been required to meet. If the answer to that were in the negative the promise of the bonus would have been unenforceable (*Stilk; Hanson*). However, the court's attention was apparently not drawn to this possibility and so the question of

⁴¹ The principle applies to benefits too, only for obvious reasons employees are less likely to complain about the introduction of more advantageous terms!

⁴² *Marriott v Oxford & District Co-operative Society Ltd (No.2)* [1970] 1 QB 186 is the *locus classicus* on the consequences of a purported unilateral variation, but under this analysis the case ought properly to have been argued as one of a breach which had not been accepted by the employee. Consideration would not have been a relevant issue.

⁴³ [1978] ICR 787

⁴⁴ Above at 798. Counsel's argument was based on consent rather than bargain theory. The contrast with *Hanson v Royden*, above, is an interesting one.

consideration was passed over *sub silentio*. The bonus was held to be a contractual entitlement on consent-related grounds.⁴⁵

In Australia similar developments have taken place. In the recent decision in *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission*⁴⁶ the removal of tenure from a University lecturer (albeit an office-holder) by a collective agreement was upheld on the facts notwithstanding the absence of consideration moving from the University.

In England, in *Burdett-Coutts v Hertfordshire CC*,⁴⁷ the employer famously purported to amend unilaterally the contracts of employment of school dinner ladies in an attempt to reduce their pay. The court held that the dinner ladies, who had not consented to the change, were entitled to enforce the higher wage rates in their existing contracts of employment. The reasoning betrays some ambivalence as to whether the letter from their employer, which purported to reduce their wages, sought a unilateral variation of contract (in which case consideration moving from the employer should have been required), or whether the dinner ladies had simply refused to accept a repudiatory breach and insisted upon the original contract. As we have indicated, if the case was conceptualised in this manner, consideration could properly be regarded as irrelevant. The court finally appeared to favour the latter of these two possibilities in treating the employer's behaviour as a repudiatory breach. But in those parts of the reasoning in which the High Court considered the case as one of purported variation there was no allusion to the absence of consideration moving from the employer to support the proffered new term. This was perhaps surprising since it was open to counsel to argue that even if consent to the employer's purported wage reduction had been established it would still have been unenforceable.⁴⁸

⁴⁵ Although, since the adoption of an expanded version of consideration after *Williams v Roffey*, it is possible to argue that consideration existed in so far as the employer derived a practical benefit from the arrangement.

⁴⁶ [2001] FCA 303.

⁴⁷ [1984] IRLR 91.

⁴⁸ The court also used consent as the exclusive problem solving technique in *DA Coleman v S & W Baldwin* [1977] IRLR 342 where the absence of the employee's agreement meant that a fundamental change in duties was a repudiatory breach of contract. *Industrial Rubber Products v Gillon* [1977] IRLR 389 is also founded on consent theory since the EAT held that an unaccepted unilateral reduction in basic pay, even if of a modest amount, was a repudiation. The attention of the EAT was not apparently drawn to the further requirement under the classical doctrine for consideration for the pay reduction. The same approach can be found in *Williams v Hereford and Worcester CC* [1985] IRLR 505, *Gibbons v Associated British Ports* [1985] IRLR 376 and *Tucker v British Leyland Motor Corpn.* [1978] IRLR 493 where the courts reasoned that consent and not bargain explains the enforcement of changes to contracts.

(v) Post formation Promises in Policy Documents

Similar doubts concern the role of consideration in relation to the enforceability of promises contained in formal statements. Sometimes these promises appear in the 'staff handbook', 'works rules' or 'administrative notices'; other employers publish them as 'policy' statements. Equal opportunities statements are typical examples of the latter. The question in each case is whether these formal promises are enforceable.⁴⁹

Although the above-mentioned documents can be used as a vehicle for the purported unilateral imposition of less advantageous terms, for present purposes we are concerned with the principles in English law governing a formal promise to confer a *benefit*. The cases of interest here are those in which the employer attempts to enhance the attractions of the employment to the employee. As we shall see, these apparently gratuitous promises can possibly be explained for reasons other than altruism since the employer, by offering what appear to be enhanced terms, is aiming to achieve higher morale and lower staff turnover.

*Grant v SW Trains Ltd.*⁵⁰ provides a good example of the issues. This case concerned the unsuccessful attempt to enforce an equal opportunities policy containing an express commitment by the employer not to discriminate on the grounds *inter alia* of sexual orientation. The absence of fresh consideration moving from the employee to support the promise would have furnished the employer with a strong argument that the promise was not enforceable. This might, of itself, have been fatal to the plaintiff's claim that certain promises in the policy (issued after the formation of her contract) were contractual.⁵¹ However, this issue was neither raised in argument, nor by the court. Curtis J. identified the absence of promissory commitment or intention as the key factor in denying the liability of the employer.⁵² He decided *inter alia* that the intention of the promisor had to be identified by a polycentric examination of:

⁴⁹ In Australia it seems that orthodox contractual principles apply so that a policy cannot of itself become binding unless it is, for example, expressly incorporated within the contract of employment: *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889.

⁵⁰ [1998] IRLR 188.

⁵¹ Grant was employed between 4.6.93 and 31.3.95. The equal opportunities policy had been re-issued during the life of her employment contract in April 1994.

⁵² However, there would presumably be a contractual duty to apply a policy consistently; any failure in this regard might breach the implied duty to maintain trust and confidence: *Gardner v Beresford* [1978] IRLR 63.

(i) the process which gave rise to the document; (ii) the language used to express the possible obligations; and (iii) the formal status of the document.

His lordship was much influenced by the location of the promise in a *policy* document, which he regarded as, by itself, an indication that the employer was not making a commitment sufficient to indicate contractual intent.⁵³ This conclusion was re-inforced by the language of the promise itself which his lordship observed was a "concession" couched in "idealistic" terms. The employer's normal practice was to establish new contractual rights and obligations through the operation of joint negotiating machinery. The failure to invoke this procedure was found to be further evidence that the necessary commitment had not been made. Intention thus appeared to replace consideration in identifying the legal consequences of the promise made in the equal opportunities statement.

The implicit concern about the absence of consideration (the "concession") is surprising following the earlier decision of the English High Court in *Lee v GEC Plessey Telecommunications*.⁵⁴ Here an ostensibly gratuitous promise by the employer to extend enhanced severance payments to redundant workers, which was incorporated by reference into the contract of employment, was found to be supported by consideration in so far as the employer, in making the promise, avoided any argument that the payments should have been higher. It was also held that the employer gained the benefit of a more stable workforce. In applying *Roffey*, the Court clearly regarded these as "practical benefits" sufficient to satisfy the demands of the revised doctrine of consideration.

Intention rather than consideration was also a relevant criterion in *Wandsworth LBC v D'Silva*.⁵⁵ The court was asked to determine the contractual status of a policy concerning the length of permitted absence for sickness before a review

⁵³ A "policy" may be described as a flexible framework for operational guidance, rather than a contractual obligation. It is traditionally regarded as an expression of managerial prerogative and so, in a modern commercial environment, it is often thought to be adaptable and responsive to change. This potential for unilateral modification is unobjectionable where works rules and staff handbooks merely include a range of non-promissory information for the purposes of collective efficiency: opening and closing hours, meal times, the company's mission statement and procedural aspects of work are not 'apt' to be treated as enforceable rights. The difficulty is that these matters can each find their place alongside terms which substantively govern the legal relationship or which formally generate expectations. An equal opportunities policy is an example *par excellence* of this.

⁵⁴ [1993] IRLR 383.

⁵⁵ [1998] IRLR 193.

was commenced. It decided that, because the provisions in question provided no more than a framework for dialogue between employer and employee, and guidance for supervisors on an issue where flexibility and sensitivity were of paramount importance, good industrial practice negated contractual effects. The court accordingly concluded that, consistent with good industrial relations practice, these provisions were incompatible with the rigidity of legally enforceable obligations. As in *Grant*, the doctrine of consideration was not considered important in examining the possible contractual effects of the policy.

A similar emphasis upon intention, rather than the doctrine of consideration, can be seen in Australia. An example of this can be seen in *Byrne v. Australian Airlines Ltd*⁵⁶ in which a promise enshrined in a collective agreement that any dismissal would not be 'harsh, unjust or unreasonable' was held not to have contractual effect. The court was asked to imply this promise into the contract, but declined to do so by holding that there was no evidence that the agreement was intended to alter the legal relationship between the parties. It was held that the implied incorporation into the contract of the promise was not necessary to give the contract "business efficacy". The apparent absence of consideration for the promise was not considered.

(vi) Summary: Consideration as a Problem Solving Device in Employment Cases.

The case-law reveals that, whilst the classical doctrine of consideration operates in the employment context, the enforcement of promises in employment law is not always convincingly explained by the classical theory of bargain. It is true that consideration is required at the formation stage, and that it enables the court to analyse the scope and meaning of existing obligations, especially, the work/wage bargain. However, in variation cases, especially those concerned with the promise of a *benefit*, the classical doctrine of consideration may be falling into desuetude.⁵⁷

⁵⁶ (1995) 131 ALR 422 and discussed by G J Tolhurst and J W Carter in *The New Law on Implied Terms* (1996) 11 JCL 76.

⁵⁷ As we have seen, in some, but not all, cases concerned with the imposition of a detriment the issue is whether the employee has consented to the breach of contract rather than whether consideration has been supplied. *Henry v London General Transport Services* [2001] IRLR 132, above, is a recent decision which genuinely concerned a variation rather than possible acceptance of a breach.

There may be commercial reasons for this. Current British macro-economic policy, which is designed to encourage inward investment, emphasises the need for flexibility in working arrangements. With globalised, and technologically dependent, commercial environments, in which capital and investment can be shifted around the globe with relative ease, a flexible regulatory structure in employment law, which enables management to react rapidly to changing commercial conditions, is becoming more common.

*Henry v London General Transport Services*⁵⁸ illustrates how attempts to rigidify outmoded wage structures by dissenting employees can be swept aside within a well-established collective bargaining structure even where an express incorporation clause is absent.⁵⁹ Flexibility in rewards, perhaps offering strategic enhancements designed to retain key personnel, would have an important place within the new environment. The doctrine of consideration with its emphasis upon exchange, and its rejection of 'more for the same', seems inadequate for the modern environment in which flexible rewards may reflect the concern that the importance of individual staff to an enterprise may not remain constant as the economic context in which their work is performed fluctuates. A worker who possesses state-of-the-art skills today may shortly become redundant as technology advances; similarly, other skilled workers, who may be recruited without difficulty in the job market today may tomorrow become scarce if a skills shortage occurs. In each case the work performed by the employee may remain unaltered; but the value of the worker to the enterprise will not be constant and rewards may reflect this. Consequently it is possible to argue that the courts' modern approach is to develop within the individual employment a capability to respond to new conditions. Consideration, in its traditional forms, may be regarded as unduly legalistic, and quite contrary to the intentions of both management and employees, especially in its prohibition of enforcing 'more for the same'. This shift in the nature of the contemporary employment context supplies just one of many arguments why the classical doctrine could, in more modern times, be unhelpful. But it does pose a fundamental question about the theoretical basis for enforcement in

⁵⁸ Above n.57. Custom was held to be the means by which the collectively agreed wage cut became binding even on dissenting employees.

⁵⁹ This is entirely consistent with the British Government's view that trade unions and employees are now economic 'partners': see the Partnership at Work Fund <http://www.dti.gov.uk/partnershipfund/index.html> and the White Paper, *Fairness at Work* 1998, Cm 3968, especially para 1.8. The essential premise of the latter is that in return for a greater commitment to the firm, especially in return for accepting the burdens of "flexibility", employees are entitled to be treated "fairly". This new exchange is seen as enhancing competitiveness.

modern employment cases (particularly the variation cases). How is enforcement to be explained?

4. An Alternative Theoretical Model in Employment Cases

Explanations of contractual liability can be found in five basic theories. If the courts no-longer require reciprocal exchange in relation to contractual modification in employment law, it poses questions about the theoretical explanation of contractual liability in English employment law. The solution will be located in one or other of these fundamental theories. If the courts, in examining modification cases, are consistent in their adoption of one of these alternatives to the classical doctrine of consideration, it may force us to ask how long other aspects of the contract of employment (such as formation) will continue to be dependent on the doctrine of consideration. It is not proposed to offer an exhaustive analysis of each of the theories, but simply to note their central tenets.⁶⁰

(i) Will Theory

According to this theory, a promise is enforceable because the promisor has freely undertaken to be bound by the commitment offered. Respect is accorded to the exercise of the promisor's choice. The theory emphasises the importance of the *subjective* intention, for it is only where the obligation is subjectively intended that the enforcement of the promise is morally justified. Accordingly, an employer's formal commitment to confer a benefit upon an employee could supply a sound moral argument for the enforcement of employment policies.

However, there is a practical impossibility in establishing the subjective intention of the promisor at the time of contract. The courts are required to pursue objective and not subjective techniques in the construction of contracts. This means that the law is only genuinely interested in the intention of the promisor where that corresponds with objectively manifested assent. Because will theory cannot satisfactorily resolve the pragmatic dilemma within this subjective-objective relationship it ultimately proves to be unsatisfactory. Unsurprisingly, will theory has played no part in the search for a doctrinal basis for the enforcement of employers' promises.

⁶⁰ These are considered in R E Barnett, *A Consent Theory of Contract*, (1986) 86 *Columb. L. Rev.* 269 to which the following is substantially indebted.

(ii) Consent Theory

Consent theory shares with the will theory the common feature that: "the deliberateness of the contractual intention is the sole test of the intention to be bound".⁶¹ It also accepts the fundamental premise that legal enforcement is morally justified because the promisor has voluntarily undertaken to create a legally binding obligation. Consent theory respects individual autonomy and "will", but courts look for a manifestation of an intention to be bound. The fundamental difference between will and consent theory is in the requirement of the latter for extrinsic evidence of an intention to be bound. This extrinsic evidence is a necessary precondition where society is concerned with the voluntary transfer of alienable rights.⁶²

An additional claim for the consent theory can be found in the idea of legal certainty according to which a promise objectively understood, freely given and seriously intended should be enforced. Consent theory also permits the protection of certain reliance because it entitles the promisee to act upon the manifested consent of the promisor. It thus provides a coherent account of the distinction between legally protected reliance and unprotected reliance by furnishing an explanation of enforcement independent of the mere fact of reliance.

The influence of consent theory arguably infuses the reasoning in *Grant*. As we have seen, Curtis J. was clearly concerned lest the employer be bound to a promise embodied in a document ostensibly concerned with "policy". However, the fundamental anxiety can be found in his objection that the ("idealistic") language in which the promise was made lacked the certainty required of a contractual obligation. In other words, the employer could not be objectively understood to have made a legally binding commitment to the employee.

⁶¹ Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?* (1935-6) 49 Harv L. Rev. 1225 at p. 1227. See also Holdsworth, *History of English Law*, vol. VIII at pp. 48-49 and the Law Revision Committee, 6th Interim Report Cmnd 5449. Such a view has also been judicially expressed: Wilmot J. in *Pillans v Van Mierop* (1765) 3 Burr. 1663, at p. 1670, who stated that consideration was merely a safeguard against impetuously made promises. An undertaking made after due deliberation and reflection would therefore be binding even if unsupported by consideration. This approach was probably never accepted as an accurate statement of the law, especially following *Rann v Hughes* (1778) 7 T R 350.

⁶² R E Barnett, *A Consent Theory of Contract*, (1986) 86 Colum. L. Rev. 269.

The courts do use the language of consent in other purported modification cases. As we have seen in *Burdett-Coutts v Hertfordshire CC*⁶³ the absence of consent to the pay reduction was also treated as, of itself, determinative. However, these cases are subject to the *caveat* that consent theory is concerned with the promisor's intention to make a binding commitment to the promisee; the absence of consent refers to the rejection by the promisee of proffered new terms; it is not concerned with the nature of any promise held out by the promisor.

(iii) Fairness

An appeal to diverse conceptions of substantive and procedural fairness has been made both in employment law and in the general law of contract. A theory of substantive fairness seeks to evaluate the substance of a transaction to see if it corresponds with a primary or "fair" standard.⁶⁴ The concern with undue influence and economic duress⁶⁵ is said to demonstrate the infiltration of this reasoning into the general law of contract,⁶⁶ although it is possible to argue that these latter principles are merely applications of the consent theory.

In employment law the idea of substantive fairness is also familiar, especially in the particular context of the fairness of a dismissal.⁶⁷ Appeals to a broad conception of industrial justice have also begun to influence the interpretation of contracts.⁶⁸

The reasoning in *Wandsworth LBC v D'Silva*⁶⁹ clearly reveals the influence of a version of substantive fairness theory and in this respect it indicates an interesting comparison with the decision in *Grant*. First, in *D'Silva*, the court was much less influenced than Curtis J had been in *Grant* by the source of the

⁶³ [1984] IRLR 91.

⁶⁴ See e.g., Eisenberg, *The Bargain Principle and its Limits*, 95 Harv L. Rev. 741, esp. 754.

⁶⁵ E.g., *National Westminster Bank plc v Morgan* [1985] AC 686; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 (undue influence); *Universe Tankships Inc. of Monrovia v ITWF* [1983] 1 AC 366; *Dimskal Shipping Co SA v ITWF* [1990] IRLR 102, and A Phang, *Consideration at the Crossroads* (1991) 107 LQR 21 (economic duress).

⁶⁶ R E Barnett, above, n.62.

⁶⁷ Employment Rights Act 1996, s.98 (4). This issue is treated as a question of fact for the Employment Tribunal to determine as the "industrial jury" using their understanding of good industrial practice: e.g., *Retarded Children's Aid Society v Day* [1978] IRLR 128.

⁶⁸ *Wandsworth LBC v D'Silva* [1998] IRLR 193, below. Appeals to standards are also evident in a possible duty to interpret a contract in good faith: *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522; *Kramer v South Bedfordshire Community Health Care Trust* [1995] ICR 1066.

⁶⁹ Above n.68.

disputed obligation (the internal 'code of practice'). Secondly, the court in *D Silva* showed a greater concern for the industrial context in which the policy would operate. The court clearly had in mind the standard of good industrial practice in determining whether that part of the code dealing with reviews in sickness cases should be binding. It resolved that it would be undesirable if this were so since flexibility is essential in dealing with the diverse range of circumstances surrounding illness absence for which the mandatory imposition of a penalty after a given period of absence was not desirable. The conclusion in this case seemed to be that a formal promise attains contractual status when it is good industrial practice that it should.

(iv) Reliance Theory

In contrast to will theory, in which the focus is upon the promisor, reliance theory explains contractual liability by reference to the promisee. Reliance theory can explain why the promisor is bound by the objective meaning of the promise regardless of his or her subjective intentions, since it understands that the purpose of enforcement is to protect the promisee in the reliance made upon the promise.

Reliance is more likely to be reasonable where the promise is formally promulgated in circumstances where the employee can reasonably understand that the employer is manifesting a commitment to act or refrain from acting in a specified way. There is authority in the state jurisdictions of the United States that it is the commitment to be bound (rather than bilateral negotiation supported by consideration) which is the *sine qua non* of a binding obligation.⁷⁰ In English law the position seems to be somewhat different. If *Grant* is an authority on this point, it suggests that the theory would appear to have little appeal for English judges. This is so because, had his lordship focused upon the clear commitment made by any employer who takes the formal step of declaring an equal opportunities policy, the decision might have been different. The circumstance of holding out the promise in a formal document objectively signalled seriousness and commitment, which was calculated to invite reliance by the workforce upon the policy.

⁷⁰ See for example, Michigan, *Rood v General Dynamics Corp.*, 444 Mich. 107 (Mich. 1993).

As a general explanation of contractual liability, reliance theory is, however, flawed because not all harm derived from detrimental reliance is actionable,⁷¹ which means that the theory is forced to draw upon evaluative standards (independent of the fact of reliance) in order to test whether the reliance was reasonable.

(v) Bargain Theory.

As we have seen, bargain theory provides the traditional explanation of the enforceability of promises. The apparent absence of consideration where benefits are gratuitously promised to employees suggests that the doctrine no longer provides the problem solving device used by the courts to identify binding promises in modification cases.

The problem with orthodox bargain theory is that it may cast down seriously meant promises which were intended to bind. This is a powerful indictment of the doctrine as classically construed and is a particularly apposite charge in the present context where the employer's promise manifests an intention to make a commitment to the employee.⁷² The cases where a bonus has been offered,⁷³ or a promotion awarded⁷⁴ illustrate how unattractive the application of the orthodox doctrine could be if over-rigidly applied in employment law. If, in response to this fallibility, the law adopts weaker interpretations of consideration, as it did in *Lee v GEC Plessey Telecommunications*⁷⁵ and *Williams v Roffey Bros. Ltd.*,⁷⁶ where contracted performance was recognised as supplying consideration for a fresh promise, it appears to sanction the possibility of successive re-negotiations as promisees strive to take advantage of any improved bargaining position.⁷⁷ Moreover, as Barnett observes, the weaker the doctrine is construed to be, the less it can perform its function of

⁷¹ The doctrine of promissory estoppel is less than full enforcement because it is a shield and not a sword: *Combe v Combe* [1951] 2 KB 215; *The Proodos C* [1981] 3 All ER 189.

⁷² See Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?* (1935-6) 49 Harv L. Rev. 1225. The doctrine also fails to predict unenforceability for reasons of illegality, mistake etc. These exceptions must be founded on principles quite outside bargain theory.

⁷³ *WPM Retail Ltd v Lang* [1978] ICR 787.

⁷⁴ *Hanson v Royden* (1867) LR 3 CP 47.

⁷⁵ Above n. 54.

⁷⁶ Above n.32.

⁷⁷ See Mindy Chen-Wishart, *Consideration: Practical Benefit and the Emperor's New Clothes* in J Beatson and D Friedman, eds., *Good Faith and Fault in Contract Law*, Clarendon (Oxford: 1995) Ch 5. There is also more widely based criticism from J O' Sullivan, *In Defence of Foakes v Beer* (1996) 55 CLJ 219.

distinguishing non-enforceable from enforceable obligations.⁷⁸ The doctrine also fails to explain unenforceability for reasons of illegality, mistake and undue influence. These exceptions must be founded on principles quite outside bargain theory.

Williams v Roffey Bros. Ltd., reveals that, even in relation to commercial contracts, the classical doctrine is under strain. As we have seen, the decision has already been followed and applied in English employment law in *Lee*. Moreover, the recent decision of the English Court of Appeal suggests that a revised version of consideration in employment law is gaining acceptance. *Edmonds v Lawson*⁷⁹ concerned the status of an unremunerated pupil barrister. The Court found economic value sufficient to constitute consideration in the somewhat indeterminate mutual benefits found in the professional relationship. Chambers gained an enhanced likelihood of recruiting a talented tenant, and the pupil acquired professional skills and the potential to be a future tenant.⁸⁰ It is yet another decision which offers a strikingly weakened view of consideration, but it is also an indication that the idea, if not the substance, of bargain appears to remain embedded in the common law. It suggests that, even where judges seek to evade the strictures of the classical doctrine, the chosen path is to invent consideration rather than to deny its necessity.⁸¹

This also seems to be the conclusion after *Taylor v Secretary of State for Scotland*.⁸² In this case the Industrial Tribunal and the Employment Appeal Tribunal were prepared to accept that an entitlement to enforce a promise in an equal opportunities could be created unilaterally.⁸³ This amounts to a rejection of the bilateral contract model, and, by implication, the need for bargained-for exchange. However, in the House of Lords, adherence to the orthodox contractual model was so strong that their lordships felt that, in accepting the contractual status of the equal opportunities policy, they were obliged to invent a finding of fact that the notification was subsequent to a negotiated variation.⁸⁴

⁷⁸ Above n. 62.

⁷⁹ [2000] IRLR 319 CA.

⁸⁰ It was not argued that the contract was a contract of employment but a contract of apprenticeship, which the Court of Appeal held that it was not.

⁸¹ *Shadwell v Shadwell* (1860) 9 CB (NS) 159; *Ward v Byham* [1956] 1 WLR 496; *Williams v Roffey Bros. Ltd.*, and, of course, *Lee v. GEC Plessey Telecommunications Ltd* above n.54, are other examples of the same technique.

⁸² Above n 3.

⁸³ The EAT quoting from the decision of the industrial tribunal: [1997] IRLR 608 at 609.

⁸⁴ [2000] IRLR 503 at 504. There seems to have been no evidence that negotiation actually took place.

This insists on the bilateral tradition and hints at a *quid pro quo* in the supposed exchange of promises. None of their lordships, however, expressly raised the issue of consideration.

5. Conclusion

The first, possible conclusion, is that the doctrine of consideration is not consistently invoked as the dominant problem solving device in distinguishing enforceable from non-enforceable promises and that the courts are (perhaps somewhat hesitatingly) engaged in a project to identify an alternative theoretical foundation for the employment contract. The evidence for this can be seen in its absence from so many of the decisions considered above in which the doctrine might have been expected to have exercised a decisive influence.

If this development is now taking place it would appear to be at an embryonic stage, for there is not, as yet, consensus about what makes a promise binding in the employment context. Consent theory appears to dominate in cases of purported unilateral variation where the employer seeks to impose a *burden*. But even this conclusion cannot be ventured with complete confidence because the line of cases concerning the imposition of a burden is more properly concerned with the consent of the employee to a breach of contract as opposed to the question whether the employer has made a commitment to be bound.

Not all burden cases are, however, argued on the basis of consent. An example of this is *D'Silva* which suggests a preference for a version of fairness according to which a purported variation (imposing a burden) will be binding when, according to the relevant industrial context, it is fair and just that enforcement takes place. In relation to *benefits* the decision in *Grant* seems to signal a preference for consent theory since his lordship was clearly troubled that the idealistic language of the promise, when objectively interpreted, did not reveal an intention to make a binding commitment to the employee.

Reliance theory appears to have made little progress in the reasoning in English employment law jurisprudence. Had Curtis J been concerned to protect the employee in the reliance made upon the formal promise rather than examining the intention of the promisor the decision in *Grant* might have been

otherwise.⁸⁵ However, reliance offers one possible explanation of the modern decisions on bonuses and pay increases, of which *WPM Retail Ltd v Lang* is an example to which reference has been made.⁸⁶

An alternative conclusion may be possible. It may be that the doctrine of consideration in employment law continues to be applied but that it has simply been modified after *Lee v GEC Plessey Telecommunications* and *Edmonds v Lawson*. This modern approach to the doctrine of consideration may actually have been predicted by Corbin who, as has been mentioned above, suggested that consideration "need not be the object of the promisor's desire for which he offers his promise in exchange, but may instead be an action or forbearance by the promisee as a result or natural consequence of the promise'. All that is required is that there should, between the promise and the consideration, be a causal connection. According to this view, an employee who receives an unreciprocated benefit is less likely to resign and seek work elsewhere. Indeed, the act or forbearance (the employee's continued employment) need not be of significant value because the employee could immediately enforce the promise of higher pay and resign shortly afterwards. The consideration supplied to the employer is perhaps merely the more realistic hope that a better rewarded employee will not resign.

Thus it can be seen that the employer's interest in securing a better motivated and stable workforce is the advantage derived from the promised benefit and is causally related to it in the manner Corbin suggested was necessary. Alternatively, it could be argued that enhanced motivation and stability in the workforce is the outcome which the employer impliedly requests when offering the apparently donative promise, thereby making it enforceable.⁸⁷

The problem with these possibilities is that the doctrine of consideration is too often absent both from counsel's argument and from judicial reasoning. This makes it too early to argue that there has been a consensus about a revised version of the doctrine and a consistent application of it.

⁸⁵ Although it is possible that an objection might still have been raised concerning the language in which the promise was made *a fortiori* if reliance has to be reasonable.

⁸⁶ An alternative might be the consent of the employer to be bound.

⁸⁷ *Shadwell v Shadwell* (1860) 9 CB (NS) 159, and note also Collins, *loc. cit.* at 61-62.

Nevertheless, the arguments for the continued application of the traditional versions of the doctrine are unconvincing. A contract of employment creates a relationship beyond the underlying exchange and this furnishes an argument for the development of special legal principles which assist that relationship to flourish. The courts have expressly acknowledged the importance of engaging in this project and explain developments in the implied duty to maintain trust and confidence in these terms.⁸⁸

"Flexible" working arrangements also emphasise the importance of a co-operative model based on partnership to capitalise upon all possible sources of knowledge in order to enhance competitiveness.⁸⁹ If 'flexibility' dictates both job and function insecurity, employers must find other means of motivating their workforce than the implicit offer of job security. Formal and ostensibly donative promises are a response to this need. Promises of enhanced terms and conditions are the employer's retort to any possible threat that valuable, highly skilled staff may be lost to a competitor. If the new "flexible" working does destroy job security, co-operation will suffer in an environment viewed as one-sided or unfair.⁹⁰ This suggests that employees will expect some reciprocation for the new instability of the "flexible" environment. This may explain the modern trend to make promises of enhanced employment standards or enhanced rewards. The role of the classical doctrine of consideration risks striking down these seriously intended promises designed to provide motivation in an increasingly risk-laden commercial environment. The explanation of contract as exchange seems ill-suited in employment law to meet this contemporary need. It is surely naive to assume that donative promises lack a rational commercial purpose; the law should, and often does, give effect to this purpose without an *ex facie* regard to the strictures of the classical rules. Accordingly, the task for the courts should be to recognise that the traditional doctrine no-longer satisfactorily explains the enforcement of promises in

⁸⁸ The duty to maintain trust and confidence reflects a unitary view of the employment relationship that regards the employer and employee as sharing the same objectives and purposes in the relationship. This received much emphasis in *Malik v BCCI* [1997] IRLR 462 in which Lord Nicholls stated: "...the purpose of the trust and confidence implied term is to facilitate the proper functioning of the contract" (at 464) "... the purpose of the trust and confidence term is to preserve the employment relationship and to enable that relationship to prosper and continue..." (at 465). See also, for example, *Scally v Southern Health and Social Services Board* [1991] IRLR 478 and *Goold (Pearmark) Ltd v McConnell* [1995] IRLR 516.

⁸⁹ Department of Trade and Industry, White Paper, *Our Competitive Future: Building the Knowledge Driven Economy* (London: 1998) para 3.2.

⁹⁰ Prof H Collins, *Regulating the Employment Relation for Competitiveness* (2001) 30 ILJ 17

employment law and, as a consequence of this, a coherent alternative explanation should be evolved.