



Contract in Employment: Weathering Storms in Mixed Jurisdictions? Some Comparative Thoughts¹

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1. Introduction

Two observations are important from the onset. Firstly, the British law of contract is the origin of modern contract law that is found in the United States of America and in the nations of the British Commonwealth where the common-law system was adopted.³ It is thus fair to state that British law has been particularly influential in jurisdictions with civil-law roots, often referred to as mixed jurisdictions, and which also includes South Africa.⁴

Secondly, the well-known British academic, Simon Deakin observed a few years ago that the contract of employment with its various contractual features and associated effects heads the list of those labour market institutions whose continued usefulness is questioned by the fundamental changes in the world of work.⁵ It was earlier suggested that the continued

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³ Clark explains that many groups of settlers from Europe arrived in the United States when Native Americans already inhabited the continent. Each group had its own culture, religion, language and institutions. In spite of the rich diversity, among those colonies that revolted from Great Britain, English became the dominant language. Along with the English came the common law tradition although Americans selected among English legal institutions and decided which to retain as suitable to their new political and social conditions. See DS Clark et al *Introduction to the Law of the United States of America* 2nd ed (2002) 6. When the English colonised North America, foremost among the many practices and institutions that they imported was the common law. The common law was used as an ideological weapon in the American struggle for independence but the severing of links with England brought little change in the basic structure of the legal system. The content and method of the common law were absorbed into American social culture and have never been displaced. See G Hughes 'Common Law Systems' in AB Morrison (ed) *Fundamentals of American Law* (1996) 9 at 12.

⁴ J Beatson in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 3.

⁵ S Deakin 'The Many Futures of the Contract of Employment' in J Conaghan & Fischl R & K Klare *Labour Law in an Era of Globalization Transformative Practices and Possibilities* (2002) 177 at 178. Deakin lists various factors which are evident in the 'new world of work,' and which undermine the contractual employment relationship simply because subordination is traded for security. These factors include: (i) the vertical disintegration of production, (ii) the decline of the male breadwinner-family, and (iii) the rise of global regulatory competition.

vitality of the employment contract depends on the rethinking of the concept 'employment contract' in order to find a balance between efficiency in the economic labour market and protection of the weaker parties participating in the market.⁶ Although the employment relationship has fundamentally a contractual character, it was stated that 'no branch of the law can be completely autonomous within a body of the judicial order as a whole'.⁷

The fact remains that the world is changing and so also the world of work. The world of work has correctly been described as 'exploding' and becoming much more 'volatile' due to globalisation,⁸ demographic trends and the introduction of new technologies.⁹ Globalisation, flexibilisation and deregulation have been keywords in the area of labour law and industrial relations since the 1990s, and it is thus not surprising that these three terms have become central concepts of those advocating new employment strategies specifically aimed at a more flexible and liberal labour market defined by minimum governmental interference.¹⁰

⁶ L Betten (ed) *The Employment Contract in Transforming Labour Relations* (1995) 8.

⁷ Vranken suggests a process of specialisation, which means that the emphasis should be on the positive freedom of labour law and on the role of the state, legislators, judiciary, scholarship and industrial parties to achieve an autonomous labour law. Since the need for specialisation only arises selectively, no need exists to upset the general rules of contract because they regulate specific aspects of the employment relationship, for instance the formation thereof, ie. employment offers and acceptance. See M Vranken 'Autonomy and Individual Labour Law: A Comparative Analysis' (1989) 5 *InternatJ of Comparative Labour Law & Industrial Relations* 100 at 119.

⁸ Betten *supra* note 6 at 1. Globalisation or internationalisation of the economy is a process which refers to a tendency to return to the philosophy of *laissez-faire*, which apparently is necessary in order to compete with markets that are becoming increasingly more global with new countries acquiring competitive positions in the world market by combining low wages with high technology. See A Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2001) 193. Gladstone in turn views globalisation as the expansion of commerce beyond national borders in both tangible and intangible products and services. See A Gladstone 'Reflections on Globalization, Decentralization and Industrial Relations' in C Engels & M Weiss *Labour Law and Industrial Relations at the Turn of the Century Liber Amicorum in Honour of Roger Blanpain* (1998) 163. Three concepts can be distinguished in the process of globalisation, namely the economic war of 'all against all', mobility without cost, and the enlargement of the area of activity of each company to cover the entire world.

⁹ R Blanpain 'The Changing World of Work' in R Blanpain & C Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (1998) 23 at 30. P Ireland 'From Amelioration to Transformation: Capitalism, the Market and Corporate Reform' in Conaghan & Fischl & Klare *supra* note 5 at 198, refers to an opinion, stating that with the increasing mobility of capital and growing international competition one should question whether familiar labour law concepts, such as collective bargaining and strict contractual frameworks are capable of capturing the emerging paradigm of employment in a new economy characterised by globalisation and the reorganisation of production and work alike. Blanpain views the creation of employment as pivotal in this changing world, especially in Europe. See Blanpain *supra* note 9 at 34. Langille notes that in order to address the question on the impact of globalisation on labour law one should consider the meaning of 'domestic labour law' and its purposes. In his view one should consider the role of trade, investment, and directing resources to parts of the world which desperately need them when one considers the impact of globalization. See BA Langille 'Labour Law is not a Commodity' (1998) 19 *ILJ (SA)* 1002 at 1003. Betten states that it is far too optimistic and simplistic to suggest that flexibility in employment should be regarded as a *sine qua non* for reducing high unemployment in the future. See Betten *supra* note 6 at 4.

¹⁰ See generally Betten *supra* note 6 at 1; J Baskin 'South Africa's Quest for Jobs and Equity in a Global Context' (1998) 19 *ILJ (SA)* 986; T Treu 'Developments of Working-Time Patterns and Flexibility' in A Gladstone (ed) *Labour Relations in a Changing Environment* (1992) 33. Treu remarks that flexibility is especially a key concept in terms of working-time patterns. Fahlbeck refers to the many interests in the labour market regulation, and notes that some interests clash with flexibility. Other interests include the social responsibility of employers, equal opportunities and non-discrimination, transparency in matters regarding manpower, predictability or legal certainty and the legal protection of workers, particularly in respect of employment security. See R Fahlbeck *The Flexibilisation of Working Life: Potentials and Challenges for Labour Law An International Analysis* (1998) 12. Further, when one debates the impact and necessity of

In this article I shall endeavour to explore, perhaps a bit ardently, the continuing role of contractual principles in the contemporary commercial world of work. I shall consider the boundaries of common law contractual principles in the statutory framework of employment from a comparative perspective, bearing in mind the status of employment law as a mixed-jurisdiction. The article is divided into seven parts. In Part one I shall explore the various characteristics of the changing world of employment, whilst the trends effecting a so-called contractual re-surfacing in employment are considered in Part two. Next, I shall discuss a number of contemporary realities, influencing a reinterest in the employment contract as the regulator of modern employment relationships, in Part three. This is followed by Part four in which I consider aspects aiming to justify and discourage the return of contract in employment. Next, in Part 5 I shall reflect on the status of contractual freedom and the impact of legislation in this regard. The current position of contract in British employment relationships is considered in Part six. Lastly, I shall conclude this article with a brief summary.

2. The Changing Face of the World of Work

2.1 Role of Globalisation

Certain trends have in recent years been caused by the social-economic developments in international standards which in turn, influenced the role of the employment contract at all national levels. These trends include deregulation and flexibilisation of labour markets that are direct results of globalisation. Flexibility or the actual space thereof apparently depends on where the observers focus their attention, thus implying that it is closely linked to a variety of exogenetics.¹¹ The ways in which these different elements of various regulatory frameworks operate in relationships with each other, bearing the mind the distinct trends of the changing world of work, are important considerations.¹² Globalisation is currently used as an argument to deregulate employment both nationally and internationally. This process is particularly evident in the resistance of employers to the regulation of labour relations at any level.¹³

globalisation, the idea of global welfare should be kept in mind. See Langille supra note 9 at 1003.

¹¹ See Betten supra note 6 at 8. Blanpain explains that globalisation may limit the goal of achieving full employment world-wide because although the volume of international trade in goods and services is increasing, increased productivity means that more goods are available at less expensive prices resulting in production having to cope with less people. See R Blanpain 'Full Employment and Globalization' (2004) 20 *Journal of Comparative Labour Law & Industrial Relations* 297 at 301.

¹² Fahlbeck supra note 10 at 13.

¹³ Betten supra note 6 at 8. Rood suggests that international organisations, such as the ILO and the European Community, should address the current problems of labour law, for example social security law that is serving as a counterforce against labour law, individualism that is a threat to the balanced relationship between an employer and a worker, and the model type of worker who is disappearing through a process of internationalization. See MG Rood 'Internationalization: A New Incentive for Labour Laws and Social Security' in JR Bellace & MG Rood (eds) *Labour Law at the Crossroads: Changing Employment Relationships Studies in Honour of Benjamin Aaron* (1997) 140. Langille stresses that during the process of internationalisation the reality of deep economic integration is forcing one to reconsider the place of labour and labour law in a world where other factors of production have become more mobile. See Langille supra note 9 at 1004.

2.2 The Effects of Other Changes

The effects of changes bearing on the world of employment have been acknowledged by the judiciary. In one decision the changing world of employment was acknowledged by an observation that the court must be mindful of trends leading to ‘the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets’.¹⁴ Some role players have lobbied for a return to the free market system whilst others emphasised the importance of protecting the rights of workers and to create jobs as essential parts of long-term economic prosperity.¹⁵

Also, the extent to which judges are prepared to exercise their powers of regulation of the employment relationship may be of particular importance at a time of high unemployment in a deregulatory environment.¹⁶ But the danger of haphazard intervention by courts and lawyers was stressed when the following was observed in a South African decision:

[E]xcessive judicial zeal to rewrite the common law ... give rise to dangers for society ... autocratic and proactive courts which rush in where even the legislature has not seen fit to tread, are hardly consistent with the democratic ethos to which the South African nation aspires ... the common law was not shaped ... by ... intellectually retarded lawyers wholly insensitive to the needs of society.¹⁷

The new industrial relations system of South Africa additionally struggles with the relationship between contractual and statutory regulation in employment. One commentator referred to the various forms of legislation in South Africa, and concluded that although many role players favour contractual regulation and give it a wide scope, recent legislation provides many obstacles.¹⁸

Other commentators are of the opinion that the measures protecting the so-called ‘weaker party’ to an employment relationship (the worker) are standing in the way of full economic recovery, and European employers like to point to the American society of employment which has much lower unemployment levels and less protection through employment contracts.¹⁹ Apparently, a correlation exists between the level of unemployment in a country and the protection offered by public measures, for example legal regulation of the

¹⁴ Lord Steyn in *Johnson v Unisys Ltd* [2001] IRLR 279 (HL) 283 par 19. See also Jamodien C in *Bennett and Mondipak* (2004) 25 *ILJ (SA)* 583 (CCMA) 590J-591A who stated that the characteristics of modern work environments, eg increased competition in markets, new modes of working and elements of rapid change, impact on current employment relationships.

¹⁵ See Betten supra note 6 at 2. Baskin states that globalisation is placing severe limitations upon national governments. In order to combat these restrictions Baskin suggests that labour legislation, which is protecting workers on the one hand whilst burdening small and medium businesses excessively, should be reviewed. To this end the consequences of protective legislation for job growth must be seen as a priority for policy makers in the era of globalization. See Baskin supra note 10 at 986.

¹⁶ L Dolding & C Fawlk ‘Judicial Understanding of the Contract of Employment’ (1992) 55 *The Modern Law Review* 562.

¹⁷ *Martin v Murray* (1995) 16 *ILJ (SA)* 589 (C) 602 D-F.

¹⁸ Fahlbeck supra note 10 at 28, with reference to the provisions of the Basic Conditions of Employment Act 75 of 1997; hereinafter referred to as the Basic Conditions of Employment Act, and the Labour Relations Act 66 of 1995, hereinafter referred to as the Labour Relations Act.

¹⁹ Betten supra note 6 at 2. Blanpain views the creation of employment as pivotal during this changing world of work. Some of the measures which are debated as influencing employment include social clauses pertaining to fundamental human rights, flexibility and deregulation in markets, vocational training and the reduction of labour costs. See Blanpain supra note 9 at 37.

terms of employment contracts. Of course one may argue that the protection offered to employees by legislation together with the costs of the unemployed are a financial burden on the society as a whole.²⁰ But at the same time, to subject employment entirely to market forces without any government interference may cause effects less desirable.²¹

Another important consequence of deep global integration which is also a characteristic of contemporary legal work is its tendency to induce a lack of clarity in norm-hierarchy worldwide.²²

2.3 Contract as the Foundation of Employment

The primary legal basis of an employment relationship is a contract of employment despite the fact that the rules regulating the employment relationship are derived from mainly three sources, namely the common law, labour legislation and collective bargaining.²³ The general role of contract law as a whole has been depicted as:

[I]n an atmosphere in which the prospects of legislation appear less likely it is possible that the consensus favouring judicial restraint will break down and there will be greater judicial activism.²⁴

Although the contractual foundation of an employment relationship has never been denied, a leading South African labour law academic announced during the drafting of the South African Labour Relations Act that the latter meant the demise of the contract of employment.²⁵ Yet, since the middle 1990s a new interest in the role and purpose of contractual principles was evident in a number of South African court decisions which were either decided on purely contractual principles, or where contractual principles were given recognition. During the last couple of years a renaissance, a re-emergence, or possibly a resurfacing of the role and application of contractual principles in individual employment relationships in South Africa have clearly been evident. A number of recent cases were decided on typical contractual principles regardless of the availability of legislative measures. Moreover, these decisions acknowledged and applied common law contractual principles, thus alluding to the possibly new importance of the common law of contract in individual employment relationships.²⁶

²⁰ Betten supra note 6 at 3.

²¹ Betten *ibid.*

²² K Klare 'The Horizons of Transformative Labour and Employment Law' in Conaghan et al supra note 5 3 at 28-29. Klare explains that ambiguity about the applicable legal regime apparently delayed the unionisation-drive for years in the United States. In order for labour law to be transformative it must *inter alia* take on a global perspective, be immersed in transnational dialogue, de-center paid employment and switch the focus to work and social contribution, escape the grasp of the distinction between public and private law, and establish work relationships that combine flexibility with security. Klare is certain that labour law must pursue many different approaches in the twenty-first century instead of following a single over-arched paradigm.

²³ JF Coaker & DT Zeffertt (eds) *Wille & Millin's Mercantile Law of South Africa* 18th ed (1984) 340.

²⁴ *Bliss v SF Thames RHA* [1987] ICR 700 (CA) at 714 with reference to the mutual contractual duty of trust between and employer and an employee.

²⁵ This statement is based on the notion that the new framework with its statutory rules would ultimately have lead to the end of contractual principles in the employment relationship. See C Mischke 'Return of the Employment Contract' (2002) *Jan Contemporary Labour Law* 58.

²⁶ See briefly the following examples: *Sun Packagings (Pty) Ltd & Another v Vreulink* (1996) 17 ILJ (SA) 633 (A) in respect of the interpretation of a contractual clause; *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ (SA) 784 (LAC) where good faith is viewed as an implied contractual term of an employment contract; *Coetzee v Comititis* (2001) 22 ILJ (SA) 331 (C) with regard to express terms in an employment contract; *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) where the court held that the respondent has not been deprived of a

But South Africa is not the only country where a renewed interest in the contractual features of the employment relationship is evident despite the availability of various forms of protective- and regulatory legislation. In other heavily statutory-regulated common law countries, for instance the United Kingdom, Canada and the United States of America, and some of the countries on the European continent, various role players have been commenting for the last ten odd years on noticeable trends relating to the role of contractual principles in individual employment relationships worldwide. These trends are discussed next.

3. Trends Effecting Contractual Re-surfacing

3.1 Need for More Flexibility

During the sixteenth to the twentieth century the idea encompassing the ‘flexibility of contract’ as found in contractual promises was viewed as an ‘interchangeable.’ Accordingly, expectations of future values became present values for the purpose of trade and for the ultimate purpose of corresponding to the flexibility achieved in the free market and the economy.²⁷

Globally speaking, an era of diversity has been entered into which in turn implies that the development of collective economic frameworks instead of strict regulation should be considered.²⁸

However, some academics interpret ‘flexibility’ in employment as implying that the appointment and dismissal of employees are determined by the conditions created by the economic markets instead of the fixed regulation usually offered by legislation.²⁹ Moreover, most commentators seem to advocate a process of flexibilisation of working life for the purpose of liberating people from the ‘stifling bonds’ of rigid labour regimes imposed by *inter alia* political activists, over-zealous legislators, and nonresilient production methods of the factory type work.³⁰

common-law remedy for contractual damages based on the breach of a fixed-term contract simply because other remedies under the principles of unfair dismissal in terms of the Labour Relations Act are also available; *Chevron Engineering (Pty) Ltd v Nkambule & Others* (2003) 7 BLLR 631 (SCA) where a claim based on the breach of an employment contract was held possible by the High Court regardless of an unfair dismissal in terms of s 188 of the LRA of 1995; *Swissport SA (Pty) Ltd v Smith NO & Others* (2003) 24 ILJ (SA) 618 (LC) in respect of the parole evidence rule; *Carter v Value Truck Rental (Pty) Ltd* (2005) 26 ILJ (SA) 711 (SE) regarding breach of an employment contract and repudiation.

²⁷ JR Harker ‘The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary western Society’ (1984) 101 *South African LJ* 121 at 122. Treu notes that two factors are important when considering flexibility in employment. Firstly, the increased economic pressures at both national and international level which require changes in the organisation of work as influenced by technological innovations. Secondly, changes in the structure of the labour force as required by, for instance, feminisation, tertiarisation and social changes. See Treu supra note 10 at 34.

²⁸ Suptot supra note 8 at 191. Surveys in Europe indicated that workers prefer flexibility in their employment environments because it increases professional quality and autonomy in work which in turn leads to workers experiencing feelings of being in control of their respective jobs.

²⁹ Betten supra note 6 at 4. Flexibility is admittedly an extraordinarily wide concept implying that any adopted framework should include and deal with a number of aspects of employment. See HN Wheeler ‘Labour Market Flexibility and New Employment Patterns: Introduction’ in Gladstone supra note 10 17 at 19. Treu states that the trend towards flexibilisation implies a modification of some of the fundamental dogmas in traditional labour law. One of the most discussed dogmas is the principle of favour for economic public order. Based on this principle statutory law can be derogated from to the advantage of employees. See Treu supra note 10 at 37.

³⁰ Fahlbeck supra note 10 at 9.

Flexibility may further be equivalent to the number of options available to the ‘buyers’ and ‘sellers’ of labour when dealing with one another on both the individual and collective level. This broad definition of flexibility implies that it encompasses deregulation, decentralisation and privatisation because all these terms increase the potential for arriving at solutions tailored to the need to increase flexibility.³¹ Regardless, most employers are aware of the advantages of the values of social protection and understand that complete dictation of labour conditions by the economic market is not desirable.³²

All the same, the need for flexibility in employment relationships has caught the attention of the judiciary. The need for a flexible employment relationship was aptly described in a decision of the South African Labour Appeal Court. In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*³³ Froneman J remarked:

Neither employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment ... What the employee exacts in return is not only a wage, but a continuing obligation of fairness on the part of the employer.³⁴

Another point should be mentioned in this context. In the neo-classical economic model, protective labour legislation is viewed with suspicion because it is perceived as creating rigidities in the labour market, causing the role players in the market to develop new forms of ‘flexible’ contracts beyond the purview of legislation.³⁵ In some countries flexibilisation would mean that an employment contract should be abolished instead of supported.³⁶

3.2 Influence of Deregulation

Flexibilisation usually implies a certain level of deregulation. This trend is particularly evident in some European countries, for instance in Germany where the loosening of rigid provisions on fixed-term and part-time work have been experienced pertaining to certain

³¹ Fahlbeck supra note 10 at 10. Wheeler observes that flexibility in job content induces stress in management. Flexibility has also a negative influence on unions and should not be encouraged too much if one is concerned about the quality of long term employment relationships. See Wheeler supra note 29 at 17.

³² Betten supra note 6 at 4. See also DM Davis ‘Death of a Labour Lawyer?’ in Conaghan supra note 5 159 at 173, who observes that neither the idea of a nation-state nor the global free-market imperatives are so free of fundamental contradictions that an exercise of the ‘exit option’ can be regarded as self-evident. An ‘exit option’ means that in a global economy a national court may interpret the provisions of a labour code more progressively while capital may simply exercise an exit option by moving to a jurisdiction where a more conservative interpretation is guaranteed. Davis is of opinion that the contradictions of international business open up different possibilities for legal development. As international systems respond to the effects of globalisation the earlier contradictions will become less unclear.

³³ (1997) 18 *ILJ (SA)* 361 (LAC).

³⁴ At 365I-366A. The respondent employee alleged that he was unfairly constructively dismissed after his employer changed his conditions of employment and he (the employee) had no other option but to resign because he found the new remuneration system unacceptable.

³⁵ B Hepple ‘Labour Law and the New Labour Force’ in Gladstone supra note 10 at 287-288. Hepple refers to three challenges for labour law, namely (i) an increase in atypical employment relationships, (ii) the changing gender and age composition of the workforce, and (iii) the shift from production industries to the services sector, especially where new technology is utilised.

³⁶ Betten supra note 6 at 4. Olivier remarked that in the South African context flexibility in employment should include more special protective measures, for instance voice regulation, should be taken to safeguard atypical employees against abuses. This notion is strongly advocated by the ILO. See M Oliver ‘Extending Labour Law and Social Protection: The Predicament of the Atypical Employed’ (1998) 19 *ILJ (SA)* 669 at 684.

groups in employment.³⁷ But deregulation is causing certain aspects of industrial relation policies, previously governed by statutory rules, to enter the domain of firm practices either negotiated or unilaterally imposed.³⁸ A particular danger that is evident in countries where deregulation of the labour market has been prevalent is the trend of placing older workers and younger workers in direct job-competition, thereby shortening the working life of both parties.³⁹

4. Contemporary Realities in Employment

4.1 Role of Common Law of Contract in Employment

The development of a contract-culture across the global economy together with the dominance of contract as a way to analyse relationships in society made some commentators notice another phenomenon, namely existing hybrid forms of contractual relationships are forming as the result of utilisation of the common law of contract to govern modern relationships which were previously mostly subjected to public ordering rather than private ordering.⁴⁰ Perhaps it is appropriate at this stage to explain what is meant by the term 'common law'. The common law is defined as that part of law which is within the province of the courts themselves to establish. It is thus a system built on precedent with recognition of the importance of the decisions of judges, especially those decisions of appellate judges.⁴¹ It was observed that the common law has presented itself as a fragmented system with different and independent sources of law, judge-made principles which are divided into common law and equity principles, and statutory rules.⁴²

The role of the common law in a South Africa of the twenty-first century has been contemplated recently. It was explained rather convincingly that the ongoing value of the common law in South Africa is reflected by its inclusion in the South African Constitution⁴³ implying that the common law is a living and developing body of law and not a closed entity of the past.⁴⁴ But in a South African decision the High Court has made reference to the characteristics of the common law in employment,

³⁷ Treu in Gladstone supra note 10 at 36. Baskin observes that globalisation and its effects placed two agendas before the South African public, who is struggling with massive patterns of inequality, combating unemployment and upward pressures on wages. Firstly, to resist greater demands for more labour flexibility. Secondly, to embrace the global world, deregulate labour markets, and to hope for the best in the new world economic order. See Baskin supra note 10 at 990-991.

³⁸ Gladstone in Engels & Weiss supra note 8 at 176.

³⁹ This phenomenon occurs when older workers with more experience but who are overworked with outdated skills are replaced by younger workers who are less experienced but more open to innovation and who are more responsive to incentives to work harder. This process leads to a shortened working life where employees enter higher positions earlier but also leave earlier because of both professional and output burn-out. Generational replacement is thus always possible. See M D'Antona 'Labour Law at the Century's End: An Identity Crisis?' in Conaghan supra note 5 31 at 48.

⁴⁰ A Supiot 'The Dogmatic Foundations of the Market: Comments Illustrated by Some Examples from Labour Law and Social Security Law' (2000) Dec *ILJ (UK)* 320 at 321.

⁴¹ J Beatson 'Has the Common Law a Future?' (1997) July *Cambridge LJ* 291 at 295.

⁴² J Beatson 'The Role of Statute in the Development of the Common Law Doctrine' (2001) *Law Quarterly Review* 247. In the United Kingdom the contract of employment is governed by the same common-law principles that regulate the conclusion and validity of other forms of civil contracts. See P Burgess (ed) *Contracts and Terms and Conditions of Employment Income Data Services* (1995) 380; 383.

⁴³ Of 1996; hereinafter referred to as 'the South African Constitution'.

⁴⁴ PH Thomas 'The South African Common Law into the Twenty-First Century' (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 292 at 296 with reference to the provisions of section 39(2) of the South African Constitution.

and stated:

Truisms about the innate dynamic capacity of the common law to accommodate changing societal mores and policy in an evolutionary manner, provide no justification for the propounding of an aggressively intrusive philosophy of judicial interventionism in the common law relating to employment.⁴⁵

Marais J observes that although the common law may in some instances be rather rigid it may also be flexible when it is required to be:

The common law does not swing about like a weathervane in whatever direction any passing gust of wind might blow. It is not designed to be ... inherently incapable of being responsive to volatile social and economic circumstances.⁴⁶

Oliver in turn refers to the position of employment in common law by explaining that an employment relationship was a status relationship rather than a contractual relationship. The reason for this is that the status of an employee determines his obligations and his remuneration.⁴⁷ Another academic stresses that the law in common-law jurisdictions has greater integrity simply because statutes also operate in particular cases where the operation of the common law is questioned.⁴⁸ It has been observed in a decision by the House of Lords that the contribution of the common law in the employment revolution has been especially evident in the context of the evolution of implied terms in a contract of employment.⁴⁹

But Marais J observed that the common law can not be expected to change with a changing society when the latter is characterised by

the ebb and flow of demand and supply in the field of the waxing and waning of respective bargaining strengths ... impact which transient extraneous circumstances such as political instability, increased emigration or immigration ... have on the respective positions of employer and employee ... are all factors ... the common law cannot reasonably be expected to respond as they occur ... would require so frequently and kaleidoscopic a shifting of obligations that there would be ... no stability in the common law.⁵⁰

⁴⁵ Marais J in *Martin v Murray* supra note 17 600H-I.

⁴⁶ *Martin v Murray* supra note 17 600J.

⁴⁷ D Oliver *Common Values and the Public Private Divide* (1999) 128. See, however, the contrasting view in *Martin v Murray* supra note 17 at 603H-I where it is stated that since the emancipation of slaves in 1834 the common law has never regarded ordinary contracts of employment in the private sector as giving rise to a status in the technical sense in which the word is used in the law. Marais J was not persuaded that it was necessary to commence doing so during 1995.

⁴⁸ Beatson supra note 42 at 247; 271. This view was motivated by the fact that in some court decisions the courts were prepared to modify rules of the common law in circumstances where the results were clearly undesirable in the absence of legislative intervention. Brodie agreed with this observation by noting that statutory employment protection laws might have helped to simulate a number of changes in the common law. See D Brodie 'Mutual Trust and the Values of the Employment Contract' (2001) March *ILJ (UK)* 84 at 100.

⁴⁹ See *Johnson v Unisys Ltd* supra note 14 283 par 18 where Lord Steyn referred to the evolution of the implied obligation of an employer to act with mutual trust and confidence towards his employee during the employment relationship.

⁵⁰ *Martin v Murray* supra note 17 601C-E.

Although it was stated that the common law should not be regarded as ‘an ossified code of immutable principles which can only be changed by legislation’, Marais J also added that ‘there is virtue in stability and predictability in the law ... it is a virtue which should not be undervalued’.⁵¹ So in this context the value of the common law of contract has been recognised by its ability to import stability and certainty into the law even when the latter is confronted with change.

4.2 Statutory Regulation

Employment relationships are seemingly in general regulated too extensively both during existence and upon termination. Although much of these regulative measures are imposed by legislation, the common law and the principles of equity have also contributed to this phenomenon.⁵² Freedland recently argued that employment legislation is continuing to interact with the law of contract in two ways. Firstly, legislation has invoked the body of common law. Secondly, legislation is having a major substantive impact on the principles of the common law.⁵³ So the basic principle is that legislation usually prevails instead of principles of the common law. So a central question is then how far the application of statutory rules can be defeated by the contrary contractual intent of the parties.⁵⁴ The attributes of legislation as a regulator of employment is explained in a South African decision where the court stated:

The legislature is the only institution which can respond quickly and effectively to frequently fluctuating circumstances of a social-economic nature ... the courts have no such inherent power ... no such power exists in the common law.⁵⁵

In addition, the role and interaction between the common law and legislation has been recognised by section 39(2) of the South African Constitution which provides:

When interpreting any legislation, and when developing the common law ... every court ... must promote the spirit, purport and objects of the Bill of Rights.

Recently the South African Constitutional Court per O’Regan J noted that by developing the common law as provided for by the Constitution, it must be kept in mind that the common law develops progressively through the rules of precedent.⁵⁶ O’Regan further stressed that a

⁵¹ *Martin v Murray* supra note 17 601J-602A. Later the advantage of the stability of common law principles in employment was emphasised in a similar vein by R Rideout, ‘The Lack of Principles in Labour Law’ in W Freeman *Current Legal Problems* (2000) 409, who observes that the common law has found its feet in the new labour law and appears to be able to establish principles that will maintain an acceptable balance between employer and employees.

⁵² Oliver supra note 47 at 24.

⁵³ M Freedland *The Personal Employment Contract* (2003) 3-4. Freedland further observes that the interaction between the common law of the contract of employment and legislation has progressed to a point that a significant fusion between the two systems has been created. In his view academics should be referring to the common-law based law of employment contracts instead of the common law of employment contracts.

⁵⁴ S Deakin & G Morris *Labour Law Third Edition* (2001) 132. The authors refer to the British principle of ‘contracting out’ of statutory rights when the clear wording of a statute allows it.

⁵⁵ Marais J in *Martin v Murray* supra note 17 601E-H.

⁵⁶ O’Regan J in *K v Minister of Safety and Security* (2005) 8 *BLLR* 749 (CC) 756E-F. O’Regan J explained that

common-law rule may sometimes totally be changed, or a new rule may be introduced. Both these processes constitute development of the common law.⁵⁷

In another recent South African decision it was observed that the interface between the South African Constitution, labour legislation and the common law depends on the right claimed and the way it is pleaded.⁵⁸ The result thereof is that when a party chooses to base a claim on breach of contract the court is compelled to decide the case on that basis subject to four principles.⁵⁹

It is submitted that the flurry of court decisions in recent years where the judiciary refer to, and often apply contractual principles unique to the employment relationships, highlight either a re-interest in the role of contractual principles in employment, or follow a side-by side approach through consideration of available legislative provisions and applicable contractual principles alike. It should be borne in mind that although protective legislation often provides inderogable rights, it also assumes the prior existence of a valid, voluntarily entered- into employment contract. Whether contract and statutes are opposites or whether they should rather be viewed as interdependent layers of regulations is an important consideration in this regard.⁶⁰

4.3 Decline of Collective Bargaining

Forty years ago Rideout alluded to the growing importance of collective bargaining during that specific period, and concluded that the employment contract was losing its important position during that period.⁶¹ But at present collective bargaining is not doing too well. Voluntary collective bargaining rather than regulatory legislation is seen as a major obstacle to growth in a flexible workforce, resulting in policies and legislation in the United Kingdom

the rules of precedent enshrine the fundamental principle of justice and mean that all cases which are alike must be treated alike. In an earlier case Cameron JA held in a matter pertaining to tenders and administrative justice in terms of s 33 of the South African Constitution, that when performing an administrative act the local province still had to act lawfully, procedurally and fairly in exercising its contractual rights. See *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 7. Although this case pertained to the interaction between the Constitution and contractual principles in respect of administrative law, it gives an apt example of how the court gave recognition to contractual principles in a statutory setting. It was observed that Cameron JA's decision meant that 'the principles of administrative justice framed the parties' contractual relationship'. See C Hoexter 'Contracts in Administrative Law: Life after Formalism?' (2004) 121 *South African LJ* 595 at 612.

⁵⁷ At 756F-G. The Constitutional Court held that the common law principles of vicarious liability could be expanded to harmonize them with the values of the Constitution.

⁵⁸ See Pillay J in *Jonker v Okhahlamba Municipality & Others* (2005) 25 *ILJ (SA)* 782 (LC) 787H-I where an employee applied for an interdict to prevent the employer from proceeding with disciplinary proceedings against him.

⁵⁹ First, the provisions of s 39(2) of the South African Constitution must be followed, namely the development of the common law to promote *inter alia* the objects of the Bill of Rights. Secondly, if the breach of contract is also a statutory violation, it must be determined whether the statute supplants the common law. Thirdly, as the common-law breach of an employment contract remains an employment dispute, the primary object of the Labour Relations Act *in casu* should be kept in mind. Finally, the claimed right must be consistent with the overarching authority of the Constitution irrespective of whether the right is claimed under the common law or under a statute. See *Jonker v Okhahlamba Municipality & Others* supra note 58 at 787H-788D.

⁶⁰ Deakin & Morris supra note 54 at 131.

⁶¹ R Rideout 'The Contract of Employment' (1966) 19 *Current Legal Problems* 111. In a similar fashion albeit years later it has been argued that courts should avoid a sui-generis development of contract law in employment. Mundlak has suggested that a deviation from the general law of contract should rather be attempted by relying on some of the other components of labour law namely statutory standards and collective bargaining. See G Mundlak 'Generic or Sui-Generis Law of Employment Contracts' (2000) 16 *Winter Internat Journal of Comparative Labour Law & Industrial Relations* 309.

directed at the weakening of trade unions and collective bargaining.⁶² Other pivotal reasons for the decline of trade unions and collective bargaining are global trends embracing decentralisation of bargaining at enterprise levels together with deregulation.⁶³

In the United-States of America trade unions have drastically declined with the effect that collective agreements only cover ten to fifteen percent of the workforce in the private sector.⁶⁴ A number of factors have apparently contributed to an overall decline of trade membership and collective bargaining in the United States.⁶⁵

In Canada, particularly with reference to British Columbia, a more fluid and adaptable employment relationship has been aspired to in contrast to those types of relationships provided by collective bargaining. The purpose of achieving more flexible employment relationships is to achieve change in workplaces on an ongoing basis.⁶⁶ Accordingly, the central question posed in this context is where exactly all the developments in the post-industrial society have left the individual contract of employment in light of legislation and collective agreements.⁶⁷

5. Return of Contract

5.1 Background

One of the most distinguished academics in British labour law, Sir Otto-Kahn-Freud described the contract of employment years ago as the ‘cornerstone of the edifice of labour law.’⁶⁸ During the early 1980s some academics observed that although statutory rights were influencing the ‘common-law contractual framework,’ contract still remained valuable for the operating of these statutory provisions.⁶⁹

⁶² See Hepple in Gladstone supra note 35 at 291. Rideout noted that during the late 1990s the power of collective bargaining in the form of agreements in Great Britain has so weakened that its continued effectiveness is doubted. See Rideout supra note 51 at 415. Likewise in the United Kingdom collective agreements are not directly enforceable in law although they provide an instrument for the regulation of employment. Collective agreements only acquire a binding character by being incorporated into the individual employment contract. See Burgess supra note 42 at 380.

⁶³ Decentralisation involves the devolution of rule-making and governance to levels of political or hierarchical authorities lower than those where such rule-making and governance were previously exercised. It is of particular importance in respect of the crucial interaction between workers and employers in fixing terms of conditions of employment. Apparently this process is leading to the individualisation of the employment relationship in contrast to collective representation of interests. Deregulation means a lightening or abolishment of the rules imposed on business, and the lessening of labour costs by legislation. See Gladstone in Engels & Weiss supra note 8 at 164-165; Rood in Bellace et al supra note 13 at 143.

⁶⁴ Fahlbeck supra note 10 at 48 ftnt109.

⁶⁵ PC Weiler *Governing the Workplace The Future of Labor and Employment Law* (1990) 7-15. These factors include the rise of individual agreements pertaining to terms and conditions of employment based on needs and available resources and influenced by the state and capital markets from which employers had to operate, economic pressures evident in the closure of many plants with strong union membership contingencies, intensified foreign competition, a decline for demand of collective bargaining, an increase of white collar, especially female workers who were not interested in union membership, better equipped human resources management which are attuned to the needs of employees, and a general failure of what unions could do for their members.

⁶⁶ Fahlbeck supra note 10 at 47 ftnt 104. It is noted that legislation must ensure that the workplace encourages cooperation and flexibility.

⁶⁷ See also Betten supra note 6 at 5.

⁶⁸ D Davis ‘From Contract to Administrative Law: The Changing Face of South African Labour Law’ in DP Visser (ed) *Essays on the History of Law* (1989) 79.

⁶⁹ Hepple in Gladstone supra note 35 at 289. About twenty years ago it was observed that the employment

Other academics submitted that despite the fact that contractual concepts are fulfilling a fundamental role in the definition and formation of the individual employment relationship, the role of the freedom of contract is limited in respect of the contents and termination of the employment relationship.⁷⁰ Halson put forward that concepts which form part of the general law of contract are sometimes required to do valuable work in other concepts,⁷¹ whilst Harker in turn observed that to deny the binding effect of contractual promises in economic affairs is to ignore the important role of contract as a tool of social and economic engineering in Western society.⁷² Brodie simply referred to the evolution of the law of the employment contract during recent years, and predicted that the way in which it will continue to develop is less than 'straightforward'.⁷³

5.2 Features of Contract in Employment

Traditionally, the role of contract in employment involved regulation of the employment relationship in four areas. Firstly, it was the source of an employer's powers of supervision and control based on an employee's implied duty of obedience. Secondly, it was a source of rights and obligations. Thirdly, it was a source of remedies, and lastly, it operated as a framework for statutory regulation of employment.⁷⁴

Another purpose of an employment contract is perceived as its 'human norm.' This characteristic is viewed as the foundation of any contract because it implies that a contractual party is both altruistic in the sense that he wants to aid others with their projects while at the same time wishing to assist himself.⁷⁵ Traditionally, an analysis of the individual employment

relationship was already so 'shot by' statute and collective bargaining agreements that it has become an inextricable complex of rights and obligations with its sources in contract, common law, trade custom and practice, legislation and collective bargaining. See Coaker et al supra note 23 at 340.

⁷⁰ Deakin & Morris supra note 54 at 127. These authors remark that the common law of contract at least retained most of its force during the hiring-process, subject to discrimination laws which in their view are not too comprehensive.

⁷¹ R Halson *Exploring the Boundaries of Contract* (1996) 2.

⁷² Harker supra note 27 at 126-127. Simitis refers to the protective role of labour law in employment relationships. Labour law came into existence due to the increasing deficiencies in the systems of legal regulation of employment. Simitis concludes that even where the legislator did not intervene and consigned independent decisions to an individual, the individual contract was still discredited. See S 'Simitis 'The Rediscovery of the Individual Labour Law' in R Rogowski & T Wilthagen (eds) *Reflective Labour Law* (1994) 183 at 185.

⁷³ Brodie supra note 48 at 100.

⁷⁴ B Jordaan 'The Law of Contract and the Individual Employment Relationship' in TW Bennett & DJ Devine & DB Hutchinson & I Leeman & CM Murray & D Van Zyl-Smit (eds) *Labour Law* (1991) 70. Harker states that the function of a contract is not to bring about contractual freedom but contractual justice simply because contractual freedom as a general principle does not exist in a contemporary society. See Harker supra note 27 at 129. Hoexter refers to the role of contracts in administrative settings, and observes that a contract is a device used by governments and their administrators in the procurement of goods, the provision of services and in other regulatory affairs. See Hoexter supra note 56 at 595. An important aspect in this regard is the difference between contracts in general and the employment contract. In contract law, a contract serves the function of determining the content of the legal relationship established by the contract. An employment contract serves to indicate inter alia the scope of mandatory legislation applicable to the particular employment relationship. This principle means that the content of an employment contract is largely determined by mandatory legislation, collective agreements and unilateral employer decisions. See R Nielsen *European Labour Law* (2000) 143-144.

⁷⁵ P Macniel 'Values in Contract: Internal and External' (1983) 78 *Northwestern University LR* 340 at 348-349. The result of the human norm in contracts is that the legal institution of contracts is viewed as a way of accomplishing contractual exchange necessary to fulfill both aims. An important feature of the classical contract theory is the endeavour to develop a general body of contract law applicable to all types of contracts and overshadowing the various branches of specific contracts. The ideology of the common law of contract remains a single body of principles worked out with some differences in particular contexts. See J Beatson & D

relationship regarded it as being founded on contract although the law of contract rarely has been noted as a satisfactory way to regulate this relationship.⁷⁶ A premise exists that the protection offered by the common law are the best ways of solving problems posed by the termination of long-term employment, thus serving as 'a default, a fallback against the voids created by the demise of unions and the partiality of protections under the various discrimination laws'.⁷⁷

There are two types of contracts in contemporary employment which do not only predominate in number but also in importance, namely contracts to provide goods and contracts to provide services.⁷⁸ So from the view of economic and social policy the individual contract in Western society reflects the basic social economic acts in law.⁷⁹

Others allude to the functions of the employment contract in society. According to these academics the contract of employment has a dual function in society. Firstly, while the managerial power of the employer is underpinned, it in the second place also serves as a gateway for the social protection of employees.⁸⁰ A valid question in this context is how the employment contract achieves social protection of employees.

Another important consideration is that the sources of many of the rights and obligations in the employment relationship lie outside what the parties themselves agree, giving employment law both a complex and a peculiar nature.⁸¹

Hepple is of the opinion that the traditional perception of the contract of employment is undergoing a functional transformation, especially pertaining to the particular types of work in different countries. This aspect implies that the employment contract is transforming into a mechanism for collaboration as illustrated by the use of the concept 'organisation' instead of 'control' as a guiding principle for determining whether statutory regulations are applicable to an employment relationship.⁸² Perhaps the concept of contract as viewed by the French political philosopher Leon Bourgeois deserves consideration in this context. Bourgeois views contract as both the 'definitive basis of human law' and as the 'eventual and final outcome of progression' which releases man from the 'shackles of statutes' to ultimately afford individuals access to freedom.⁸³

5.3 Problem with Contract in Employment

The employment relationship has once been outlined as follows:

Friedmann 'Introduction: From "Classical" to Modern Contract Law' in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 7. Nielsen observes that the function of an employment contract in labour law is primarily to designate the personal scope of mandatory legislation and collective agreements at individual level. See Nielsen *supra* note 74 at 144.

⁷⁶ Jordaan in Bennett et al *supra* note 74 at 73.

⁷⁷ S Issacharoff 'Contracting for Employment: The Limited Return of the Common Law' in *Conference on Labor New York University* (2000) 499 at 534. Szakats notes that '[the] legal basis for the employment relationship remains, and cannot be anything else than ... contract. The law of contract, however, should be regarded not as a strait-jacket but as a loose garment which must be fitted to the special character of the employment relationship, as distinct from purchase and sale transactions'. See A Szakats *Law of Employment* (1983) at 3, referred to by Jordaan in Bennett et al *supra* note 74 at 74.

⁷⁸ Harker *supra* note 27 at 128. Contracts, either in the form of sales contracts, employment contracts or service contracts, generate and accompany economically vital transactions.

⁷⁹ Harker *ibid.*

⁸⁰ Deakin & Morris *supra* note 54 at 128.

⁸¹ Coaker et al *supra* note 23 at 340

⁸² Hepple in Gladstone *supra* note 35 at 295.

⁸³ Leon Bourgeois referred to by Supiot *supra* note 40 at 321.

[I]n its inception it is an act of submission, in its operation it is a condition of subordination, no matter how much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the contract of employment.⁸⁴

So one of the problems of the contract of employment is founded on the idea that contract is in its core a relationship characterised by the inequality of the contractual parties which is normally not a feature of other contracts.⁸⁵ The second problem regarding contractual principles featuring in an employment contract is that an employment contract creates a form of status which is separate from the express agreement between the parties.⁸⁶ Irrespective of the usual problems caused by the principle of freedom of contract, contract theory is generally also perceived as problematic. One of the foremost writers in contract law observes:

What is contractual liability based upon? We no longer believe in the will theory ... the extreme objectiveness of contract rules in practice belie this apparent basis of liability. The truth is that there are a great many circumstances in which a person is made liable in contract even though he did not intend to assume the liability ... at the time of the contract.⁸⁷

Some academics stress that an employer controls the manipulation of the contract of employment because the employment contract is a structure that provides a hierarchy of subordination. This relationship of subordination essentially depends on the single duty to obey orders which are issued by a bureaucracy, thus turning the employment contract into a binding system of private law.⁸⁸

In the United States of America the contractual approach to employment relationships has certain advantages, especially for employers seeking maximum flexibility in adjusting workforce composition, terms and activity but it is not an inevitable doctrinal basis for resolving disputes arising out of employment. Goldman rather cynically observes that the arrangement what lawyers referred to as 'contract' is regarded as a useful tool for facilitating beneficial interactions in the United States of America.⁸⁹ But it should perhaps be stressed that the employment contract was never based upon purely contractual principles because pre-capitalistic influences caused the employment contract to have a more hybrid nature.⁹⁰

Other academics warn against the practice of applying general contractual principles to the employment contract. While these academics accept that not all the general principles of contract are irrelevant to the employment relationship, they observe that care must be taken to ascertain whether general contractual principles are sufficiently flexible to be applied to the

⁸⁴ Kahn-Freud as referred to by Deakin & Morris supra note 54 at 129.

⁸⁵ See Rood in Bellace et al supra note 13 at 141. However, Brodie believes that the greater role of the principles of mutual trust and confidence in employment contracts along with other common law devices may combat the abuse of power in contractual exchange situations. See Brodie supra note 48 at 100.

⁸⁶ This status derived from implied obligations of the nineteenth century where the needs of employers were met by infusing the traditional law of master and servant with an employment contract so that employers were granted a legal basis for the prerogative they required. See Deakin & Morris supra note 54 at 130.

⁸⁷ PS Atiyah *Pragmatism and Theory in English Law* (1987) 3, referred to by P Olivier 'The Tortification of Contract' in TJ Scott & D Visser (eds) *Developing Delict Essays in Honour of Robert Feenstra* (2000) 289.

⁸⁸ R Rideout 'Implied Terms in the Employment Relationship' in Halson supra note 71 at 119; H Collins 'Market Power, Bureaucratic Power and the Contract of Employment' (1986) Jan *ILJ (UK)* 1.

⁸⁹ AL Goldman 'Industrial Democracy: Slogan or Metaphor' in Engels & Weiss supra note 8 747 at 749.

⁹⁰ Davis in Visser supra note 68 at 100.

employment relationship without producing artificial reasoning and unsatisfactory results.⁹¹

6. Contractual Freedom and Legislation

6.1 Role of Contractual Freedom

The concept 'freedom of contract' has a dual meaning. Firstly, it has a positive aspect encompassing the creative power of the participants in the contractual process to act as private legislators to legislate rights and duties binding upon themselves. Secondly, it embraces a negative aspect pertaining to the lack of freedom of obligation unless the latter is consented to and embodied in a valid contract.⁹² Freedom of contract or contractual autonomy has once been described as the freedom of a person with contractual capacity to determine with whom and on which terms he is prepared to contract with the purpose to create legally enforceable relationships in terms of which performance must take place.⁹³

Another commentator refers to the history of the 'idea' of the contract of employment as the history of a false aspiration.⁹⁴ Apparently, the promise of freedom of contract in the employment contract has never been fully achieved, simply because the freedom of workers in labour markets was impeded by their social conditions.⁹⁵ So during the various stages of the economic, social and political evolution of the employment relationship as characterised by three distinct phases, the status of a worker has changed from being a journeyman bound to his master⁹⁶ to a member of a social group⁹⁷ to ultimately being accepted as the weaker party in a contract of subordination. Therefore, it is not strange that individual freedom to contract and its corollary, freedom to compete, have been perceived as only being workable norms in so far as they are based upon equality of bargaining power.⁹⁸

It has been accepted that during the twentieth century the freedom of contract in certain circumstances had to give way to the emergencies of the state as well as to the ethical

⁹¹ Deakin & Morris *supra* note 54 at 131. See also CW Summers, 'Similarities and Differences between Employment Contracts and Civil or commercial Contracts' (2001) 17 *Internat Journal of Comparative Labour Law & Industrial Relations* 5 at 6; 21-22, who notes that all contracts have similarities pertaining to their basic requirements to establish validity including acting in good faith and contractual terms not being contrary to morality. Globally one of the most fundamental differences between employment contracts and other contracts is the way in which the law treats employment contracts in its limitation of freedom of contract. Rood remarks that despite the new circumstances to which labour law must adapt to, the employment contract has been the 'primarily vehicle' in labour law at the onset that has been kept as a basic concept. In Rood's view the employment contract is not flexible to fit the various requirements of a changing world, particularly as it pertains to the changing needs of employers. See Rood in Bellace et al *supra* note 13 at 149.

⁹² See N Cohen 'Pre-contractual Duties: Two Freedoms and the Contract to Negotiate' in Beatson & Friedmann *supra* note 75 at 25. Nielsen has explained that the principle of freedom of contract stems from the general principles of the law of contract and implies that each individual is free to choose the occupation and employment desired. On the side of the employer this principle means that an employer is free to choose with whom he wants to conclude an employment contract. See Nielsen *supra* note 74 at 143.

⁹³ See DW Jordaan 'The Constitution's Impact on the Law of Contract in Perspective' (2004) 37(1) *De Jure* 58 at 59.

⁹⁴ Veneziani 'The Evolution of the Contract of Employment' in B Hepple *The Making of Labour Law in Europe* (1986) 70.

⁹⁵ Also known as an employee's 'status' in the labour market. The notion of the status of a worker in the labour market may disappear and the latter is then viewed as a contractually mature figure in the true sense of the word when the worker is able to participate in the control of his job. See Veneziani in Hepple *supra* note 94 at 70-72.

⁹⁶ This aspect was evident during the guild era and the French revolution. See Veneziani in Hepple *ibid.*

⁹⁷ Especially during the French revolution. See Veneziani in Hepple *ibid.*

⁹⁸ Harker *supra* note 27 at 124. The emergence of mass production and standardisation of contracts, of trade unionism, and of legislative control over the economy have seized the notion of individualism in contract.

assumptions upon which it was based. To this end a large increase in state control of economic life and social control of the individual had taken place.⁹⁹

Later contractual autonomy has been described as ‘part of freedom. Short of its obscene excesses, contractual autonomy informs also the constitutional value of dignity’.¹⁰⁰

In *Martin v Murray* Marais J commented on the value of the freedom of contract of the parties in an employment contract, and made the following comment:

Courts have not responded enthusiastically to the suggestion that they should monitor, by reference to standards of ‘equity’ or ‘fairness’, and even rewrite, contracts seriously concluded between consulting adults of sound mind.¹⁰¹

Regardless of this sentiment modern contract law is currently characterised by an increased control over the contractual regime. This control is reflected by general supervision over the process of contract formation and by intervention in the contents of contracts.¹⁰²

A number of tools exist are used for controlling contractual terms and their application, namely:

- the introduction of the principle of statutory undue influence, where consumers may rescind from a contract due to pressures that are beyond the reach of traditional undue influence,¹⁰³
- the doctrine of public policy, which is often applied to agreements restraining competition,¹⁰⁴
- the application of the doctrine of good faith,
- the tendency to dilute formal contractual requirements and to attach a greater weight to subjective fairness, for instance through the erosion of the doctrine of consideration by replacing it with estoppel and economic duress,¹⁰⁵
- the rise of non-contractual fields of obligations, namely torts and restitution in specific

⁹⁹ Harker supra note 27 at 123. Smith observes that the value of freedom itself provides one reason for limiting the value of future contractual freedom. Although the self-interest of contracting parties usually is sufficient to safeguard against disproportionate limits of freedom of contract, the law is justified to interfere to prevent unduly limitation of freedom. See SA Smith ‘Future Freedom and Freedom of Contract’ (1996) March *The Modern Law Review* 167 at 187.

¹⁰⁰ Cameron JA in *Wynn’s Car Hire Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 (2) SA 754 (A) at par 94; later confirmed by the full bench in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (A) at par 23 where it was held with reference to the decision in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) at 767A that the core principle of contractual freedom means that contracts which were freely and seriously concluded between individuals with contractual capacity should in public interest be enforced.

¹⁰¹ Supra note 17 590 I-J. In light of a number of factors Marais J held that the freedom to contract is an important social value and that parties should remain free to terminate an employment relationship on agreed or reasonable notice. The common law should not burden the freedom to contract with an *ex lege* duty (at 589C). Note that this case was decided before the enactment of the Labour Relations Act of 1995.

¹⁰² Beatson & Friedmann supra note 75 at 13.

¹⁰³ Beatson & Friedmann supra note 75 at 14.

¹⁰⁴ See eg *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 where it was remarked that public policy on the one side supports freedom of contract while on the other requires that it should be limited; Beatson & Friedmann *ibid*; M Goldberg ‘The Balance between Freedom of Occupation and Freedom of Contract in a Contract Limiting an Employee’s Freedom of Occupation’ in Engels & Weiss supra note 8 179 at 191, who concludes that it is undesirable to set criteria for restraints on the freedom of occupation by legislation. This limitation should be left to the judiciary, and the principle of good faith should always be given considerable weight in the process.

¹⁰⁵ Beatson & Friemann supra note 75 at 15.

aspects of misrepresentation and contractual liability when one party fails to perform as he should,¹⁰⁶

- the considerable fragmentation of contract law,¹⁰⁷
- the possible adoption of contract to a change of circumstances,
- the development of contractual remedies especially in the case of legal control over agreed remedies which are extended through legislation, and
- greater availability of specific performance.¹⁰⁸

Other academics criticise contractual autonomy by stating that parties in a contractual relationship seldom have equal bargaining power with the result that the principle of contractual autonomy is in actual fact based on an error.¹⁰⁹ A few years ago Cameron JA alluded to a limitation of contractual autonomy by stating that contracts which are contrary to public policy will be struck down when the provisions and values of the South African Constitution require it.¹¹⁰ Contractual freedom has been perceived further as a ‘fantasy’ that never existed as a reality especially in the current age of mass production and standardised commercial transactions.¹¹¹ Contrary to the above-mentioned notions regarding the unequal bargaining power of the parties to an employment relationship, it has been observed that this notion was a rather inaccurate social argument and not a legal one.¹¹² This opinion is based on current social realities, namely that employees and employers alike may find themselves in desperate situations, the phenomenon of ‘head-hunting’ often places certain employees in power positions to bargain, the reality of shortages of skilled workers in certain sectors, and the growth of trade unionism in South Africa with an increase in collective power that is deployed against employers.¹¹³

¹⁰⁶ *Ibid.*

¹⁰⁷ The role of *ex lege* rules lead to greater differentiation between the different types of contracts so that consumer contracts are usually treated differently compared to other contracts, and employment and credit contracts are subject to specific legislation. See Beatson & Friedmann *supra* note 75 at 16.

¹⁰⁸ *Ibid.*

¹⁰⁹ See L Hawthorne ‘The Principle of Equality in the Law of Contract’ (1995) 58 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 157. Harker notes that true freedom of contract is a workable social norm only when it presupposes economic and social equality between the parties to a contract. See Harker *supra* note 27 at 129. See also L Clarke ‘Mutual Trust and Confidence, Fiduciary Relationships and the Duty of Disclosure’ (1999) Dec *ILJ (UK)* 348; Rideout in Halson *supra* note 88 at 119. Contractual autonomy is further criticised based on a view that an unfair contract is the product of unequal bargaining positions. Since the South African Constitution guarantees equality for all individuals, the subsequent enforcement of an unfair contract is contrary to the spirit of the Constitution bearing in mind that the spirit of the Bill of Rights, including the principle of equality, must be observed when developing the common law in cases concerning, for example the enforcement of contracts. See s 9(1); s 39(1)(a); s 39(2) of the SA Constitution; D Thladi ‘Breathing Constitutional Values into the Law of Contract’ (2002) 35(2) *De Jure* 306; and criticism of this view by Jordaan *supra* note 93 at 62; 65.

¹¹⁰ *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at par 92. A similar view was adopted by the then Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) where the court held that contractual provisions which are contrary to public interest are unenforceable. Other court decisions emphasise that public policy usually prefers freedom of contract, and that contractual freedom should sparingly be limited in cases where the harm to the public is ‘substantially incontestable.’ See *De Beer v Keyser* 2002 (1) SA 827 (SCA) par 22; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (A) at par 8; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

¹¹¹ Harker *supra* note 27 at 129.

¹¹² Marais J in *Martin v Murray* *supra* note 17 at 602G-I. Marais J further acknowledged that a few exceptions did exist, but overall stated that an ever existing unequal power relationship is not an accurate view, for instance where the fluctuation of markets, an increase of job seekers, and too few employment opportunities, or a reverse in a particular sector are prevalent.

¹¹³ Marais J in *Martin v Murray* *supra* note 17 at 603A-G.

6.2 Impact of Legislation

Recently, academic scholars engaged in empirical studies studying contractual behaviour in respect of the social effects of the legal regulation of contracts and found an apparent contradiction. On the one hand it is suggested that in a market economy the law of contract comprises of a fundamental mechanism of social order. On the other hand, evidence from studies of contractual behaviour emphasises the marginal and sometimes socially disruptive effects of the law of contract.¹¹⁴ But the function of statutory intervention in an employment contract has also been regarded as enforcing a basic standard of fairness between the parties.¹¹⁵

Additionally, statute has apparently overall been recognised as having enormous importance in social terms as well as in terms of determining and defining liabilities. This is even clear in areas where the common law predominately rules, for instance in tort¹¹⁶ and contract.¹¹⁷ So another consideration is how these insights can be reconciled bearing in mind that the law of contract has been described as being fundamental to the social system, and yet sometimes irrelevant to daily market practices taking cognisance of the regulating effect of legislation. The kind of law best suited to the task of regulating employment markets should be considered.¹¹⁸

The statutory control over contract emphasises that the conclusion of a contract should apparently no longer be viewed as a private act because it can be controlled and dictated by either legislature or economic pressure.¹¹⁹ Adding to this is the critique leveled at private-law regulation of contracts based on its inherent weaknesses.¹²⁰

¹¹⁴ H Collins *Regulating Contracts* (1999) 5.

¹¹⁵ See B Watt 'Regulating the Employment Relationship from Rights to Relations' in H Collins & P Davies & R Rideout (eds) *Legal Regulation of the Employment Relation* (2000) at 335; 340. Watt does not support this function of statutory intervention in the employment contract because the above statement supposes that the contract of employment derive from regulatory schemes applied in other areas of the law. Instead Watt views the employment contract as *sui generis* and subject to its own particular regulatory scheme.

¹¹⁶ The English law of obligations has been divided traditionally into contractual obligations, which are undertaken voluntarily and owed to a specific person(s), and obligations in tort which are based on the wrongful infliction of harm to certain protected interests owed to a wider class of persons. 'Tort' is thus the word used in English law for the South African word 'delict'. See J Beatson *Anson's Law of Contract* (2002) 22.

¹¹⁷ See Beatson *supra* note 41 at 301.

¹¹⁸ More particularly labour markets and commercial transactions. See Collins *supra* note 114 at 5.

¹¹⁹ Harker *supra* note 27 at 125. However, another academic is of the opinion that statutory regulation of day-to-day employment relationships is much more limited than what many people care to think. See D Brodie 'Legal Coherence and the Employment Revolution' (2001) Oct *Legal Quarterly Review* 604 at 606; 625. Brodie explains that one should look at the contractual role ascribed to the motive of an employer at the termination of an employment contract and the relationship between express and implied terms. The positive nature of the implied contractual term of mutual trust, which *inter alia* implies that an employer should render support to an employee by ensuring that the latter can carry out his duties without disruption by co-workers, involves a modification of traditional contractual thinking, but it does not require the discarding of general contractual principles.

¹²⁰ These weaknesses are especially evident in the sanctions offered by private law for breach of its regulations, the difficulty of proving a violation of a regulatory standard, the lack of an appropriate level of enforcement as is usually evident by a cost and benefit analysis, and the comparative absence of explicit policy justifications simply because policy objectives are vague. See Collins *supra* note 114 at 82, 88, 90; 93. Nonetheless, these difficulties may be overcome by public regulation through the setting of standards, monitoring and enforcement.

Another view dictates that the employment contract operates in the hands of an employer as an instrument of servitude, simply because the employer usually controls its inception and initiates its variation in practice.¹²¹ This process is accordingly endorsed by legislation through the introduction of the statutory requirements for written statements, normally prepared by the employer and pre-emptory of employee veto, of more freely encountered contractual terms.¹²²

Modern law recognises three methods for the purpose of defining the relationship between contractual rights and statutory rights.¹²³ These methods bear evidence of the space created by British legislation where agreements may operate to make the protective standards of legislation more flexible and to mould the form that an employment agreement may take. Accordingly, the legal adjudication of contracts may contribute to the construction of trust by providing an ingredient in the enforcing of non-legal sanction regarding business-reputations.¹²⁴

Freedland illustrates the problematic interaction between contractual agreement and legislation by observing that the general idea of agreement prevailing over legislation has been the central theme in the discussion of modern employment law. The problem has centered on disagreement about the kind of agreement, that is individual or collective, that ought to be given priority.¹²⁵

Almost two decades ago the close statutory regulation of the employment relationship became the subject of new trends preferring a more 'flexible' governance of the employment relationship through individual contracting instead of the rigidities imposed by legislative regulation or collective bargaining.¹²⁶ Watt remarks that if one is looking for a regulatory regime to govern the employment relationship, it does not seem beneficial to reach out for an 'outfit' intended for another area of the law. In his view it makes more sense to select a tailor-made design intended to reflect the specific features of the employment relationship whilst acknowledging its constant features, including inequality of bargaining power, the profitable purpose of association, the need for parties to rely on each other, and the changing nature of the relationship.¹²⁷

7. Contract in British Employment Relationships

¹²¹ Rideout in Halson *supra* note 88 at 119.

¹²² *Ibid.*

¹²³ According to Deakin & Morris *supra* note 54 at 133. The three methods are: (i) legislation may dictate little or nothing on the formation of a contract; (ii) legislation may provide 'a floor of rights' or the minimum standards that may be contracted for; and (iii) legislation may establish a role for contracts by explicitly allowing for contractual derogation from the norms it lays down.

¹²⁴ Collins *supra* note 114 at 126.

¹²⁵ M Freedland 'Ius Cogens, Ius Dispositivum and the Law of Personal Work Contracts' in P Birks & A Pretto (eds) *Themes in Comparative Law in Honour of Bernard Rudden* (2002) 165 at 169.

¹²⁶ Freedland in Birks & Pretto *ibid.* It was already suggested during that period, ie the late 1980s, that a balance must be struck between social concern and economic reality, implying that the actual degree of labour law autonomy is bound to vary in time. Only so much employee protection is possible as the economic system is able to bear, and the challenge is to look for a new balance in the employment relationship. See Vranken *supra* note 7 at 112.

¹²⁷ B Watt 'Regulating the Employment Relationship from Rights to Relations' in Collins et al *supra* note 115 at 345-346. Nielsen has observed that all Western countries have undergone a development from treating employment contracts as subject to the ordinary law of contract, towards a situation where special requirements are put on the employer in a contract of employment. These requirements are either laid down in mandatory legislation or collective agreements or in both these sources of regulation. Consequently, the function of the employment contract has changed. See Nielsen *supra* note 74 at 143.

7.1 Role of the Employment Contract

Employment falls under the auspices of labour law in Great Britain. The latter has two features which are likewise found in other countries. Firstly, labour law is based on a contractual foundation embracing an obligation of work and an obligation to pay remuneration. Secondly, labour law is influenced by a growing number of imperative norms designed to protect workers which may not be set aside to the detriment of the economically weaker party.¹²⁸

An employment contract, however, creates a close personal relationship between an employer and an employee in which employees are frequently vulnerable, therefore justifying the obligation of mutual trust and confidence as an implied term of an employment relationship.¹²⁹ In this sense labour law has apparently served as a tool addressing the element of vulnerability by interfering with the normal market forces of the labour market in order to protect the weaker party in the employment relationship. In turn, the fundamental elements of labour law reflect the meeting of three major processes, one being the development of the freedom of contract.¹³⁰

Deakin stresses that one should understand the contrasting features of the contract of employment in order to realise why it was considered as the ‘cornerstone’ of an employment relationship on the one hand, whilst it was later viewed as the source of confusion and dysfunction in the application of the law on the other hand.¹³¹ A similar viewpoint, albeit with reference to different aspects, suggests that various factors, including the influence of European Union law and the impact of the provisions of the British Human Rights Act, have lead to the decline and marginalisation of the common law in British employment.¹³²

Lord Wedderburn observed that the individual contract is of paramount importance in the United Kingdom in contrast to collective agreements. By referring to the primacy of employment contracts, Lord Wedderburn noted that the personal contract of employment determines the outcome of the terms agreed to between employers and individual

¹²⁸ O Kahn-Freud ‘A Note on Status and Contract in British Labour Law’ in Lord Wedderburn *Otto Kahn-Freud Selected Writings* (1978) 78; 86. Therefore, labour law has not developed from contract to status but instead from status to contract.

¹²⁹ *Malik v Bank of Credit and Commerce International SA* [1997] 3 ALL ER 1 (HL). Brodie has referred to the *Malik* decision as a possible new beginning for employment law because of its emphasis of the employment contract as one of good faith. See D Brodie ‘Beyond Exchange: The New Contract of Employment’ (1998) June *ILJ (UK)* 79 at 102.

¹³⁰ The other two processes are: (i) the societal goal of regulation for freely bargained contracts within acceptable political and economic limits, and (ii) the introduction into the mixed economy of systems of societal security. See AC Neal ‘Comparative Labour Law & Industrial Relations: “Major Discipline?” Who Cares?’ in Engels & Weiss *supra* note 8 56 at 59.

¹³¹ S Deakin ‘The Many Futures of the Contract of Employment’ in Conaghan et al *supra* note 5 at 186-188. Deakin explains that the employment contract personified the inclusive agenda of the welfare state aiming at an ideal social citizenship and mirroring the notion of civil and political rights. However, it was also based on a set of contingent social and economic circumstances which soon became undone, endangering the democratic emancipation it embodied for three reasons. Firstly, it was based on the model of economic subordination which later became a source of weakness when employment features were changing. Secondly, the contract of employment was traditionally based on the notion of the division of household labour which lost its strength following the gradual abolition of discriminatory legislation. Lastly, the basic model influencing the existence of the contract of employment, namely a model of a self-contained, nation-state insulated against the pressures of transnational economic integration, does not hold ground in today’s working world with its integration and globalisation strategies.

¹³² The Human Rights Act of 1998. See S Middlemiss ‘The Demise of the Common Law in the UK Employment Law? – Part 1’ (2004) *Irish Law Times* 138.

employees.¹³³

It is accepted that employment relationships in England are made up in contractual forms,¹³⁴ and since employment contracts remain contracts, general contractual principles still apply although some matters are affected by statute.¹³⁵ Based on the effects of recent decisions of the House of Lords, especially pertaining to the possibility of lodging claims for breach of contract instead of utilising the available statutory remedies, individual employment rights have been observed as expanding during recent years, both in statute and in common law, although to a lesser extent as far as the law of remedies is concerned.¹³⁶

7.2 Continuing Impact of Contract in Employment

Overall in the United Kingdom, especially during the last thirty years, the trend is to increase the security of employees as opposed to their original common-law position. This trend has been achieved *via* a combination of statutory provisions, implied contractual terms, and in some cases judicial review or a combination of the latter two.¹³⁷

Another important aspect pertains to the process of modernisation of the employment relationship in the United Kingdom. The Contracts of Employment Act was adopted during 1963 as part of modernisation though regulation of aspects of the employment relationship. The goal of the legislators with this Act was to ensure that employers made essential information available to their employees without infringing too much on the autonomy of the parties to conclude their own contractual agreements.

It is thus not surprising that a gradual but unabated growth in the legal regulation of employment in the United-Kingdom has lead to a fundamental trend away from the voluntarist tradition.¹³⁸ Statutory regulation has been regarded as complementary instead of displacing to the status of the individual contract of employment. This resulted in the necessity to interpret statutory provisions in the context of express and implied contractual terms existing between contractual parties.¹³⁹

¹³³ See Lord Wedderburn 'Labour Law and the Individual: Convergence or Diversity?' in Lord Wedderburn *Labour Law and Freedom Further Essays* (1995) 286 at 302. One should seek incorporation in its express or implied terms and then interpret them on normal contractual principles, whether these terms are evident from a collective agreement or from any other document.

¹³⁴ The common law remains an extremely significant source of employment law despite the increasing role played by statute. The basic principles of contract law concerning the interpretation and implication of contractual terms are significant where a contract of service, referred to as a 'contract of employment', exists. See MR Mackay & SMW Simon *Employment Law Second edition* (2001) 2. Smith opines that although the individual employment contract remains the cornerstone of employment, in some circumstances the new legal position will be as reliant on ideas of best practice (soft law) as on the traditional contractual principles. See I Smith 'You Signed the Contract' (2004) *New Law Journal* 24 at 26.

¹³⁵ See M Jefferson *Principles of Employment Law Fourth Edition* (2002) 19-20; 83. The importance of statutes in common-law systems should not be overlooked because nearly every branch of the common law is now heavily affected by statute. See Beatson *supra* note 42 at 241. However, a renowned British academic is of the conviction that English employment law is deeply and possibly irrevocably committed to a contractual analysis of the individual employment relationship. See Freedland *supra* note 53 at 6.

¹³⁶ D Brodie 'Protecting Dignity in the Workplace: The Validity of Mutual Trust and Confidence' (2004) *Dec ILJ (UK)* 349 at 350. Note that during the late 1960s developments were introduced in the employment sector that aimed at providing protection against discrimination, guarantying the dignity of employees, and ensuring more autonomy for employees in employment relationships. These types of values have influenced the development of the law of contract and the content of legislation. See Oliver *supra* note 47 at 145.

¹³⁷ Oliver *ibid*.

¹³⁸ J Kenner 'Statement or Contract – Some Reflections on the EC Employee Information (Contract or Employment Relationship) Directive after Kampelmann' (1999) *Sep ILJ (UK)* 205 at 205.

¹³⁹ Kenner *supra* note 138 at 208. Ewing has welcomed more legislative intervention in employment relationships because in his view legislation may enunciate a set of fundamental guiding principles which in turn

All the same, it has been suggested that the legal framework of an individual employment relationship in the United Kingdom is still to a significant extent determined by the common law of the law of contract in the employment relationship.¹⁴⁰

Almost in contrast to the latter observation it has been suggested that the role of contract in an employment relationship is in danger of being redefined not merely in terms of an enhanced freedom of contract but also in terms of the rudimentary conception of contractual employment relationships.¹⁴¹

The continuing importance of contractual principles is evident by the role of implied terms in the employment relationship.¹⁴² It was suggested that contract plays a central role in defining the scope of modern employment protection legislation.¹⁴³ Despite increased statutory intervention in the contractual employment relationship, many common law-principles are still relevant.¹⁴⁴ Duggan states:

[I]t remains true that the employment relationship remains very much underpinned by contractual common law principles ... the common law is alive and kicking when it comes to considering breach of contract and wrongful dismissal ... contractual claims have ... come to the fore in recent years.¹⁴⁵

Another academic observes that employment legislation has continued to interact with the common law of the contract of employment in the sense that legislation has invoked that body of the common law and has had a major, substantive impact on it.¹⁴⁶

will import aspects such as equality, social justice, protection of civil liberties and fairness in employment relationships. This means that the traditional contract of employment would cease to be the focus point of individual employment. See K Ewing *Working Life A New Perspective on Labour Law* (1996) 46.

¹⁴⁰ See M Freedland 'The Role of Contract in Modern Employment Law' in Betten supra note 6 17 at 18, and Rideout supra note 51 at 447, who observes that the 'genius' of the common law, furnished with the statutory definition of rights, is overcoming those effects evident in the lack of protection available to the majority of employees.

¹⁴¹ See Freedland in Betten supra note 140 at 26.

¹⁴² The common law imported implied duties in the employment contract to protect employees during the employment relationship. See Rideout in Halson supra note 88 at 122. Rideout further explains that the mere fact of employment necessitates the use of certain contractual terms. Watt remarked that the employment relationship has unique features amongst contractual relationships. These features include the need of parties to rely upon each other and the changing nature of their relationship. See Watt in Collins et al supra note 127 at 340; 356.

¹⁴³ Legislation adopts the common-law concept of contract for various purposes including the classification of employment relationships. Nevertheless, claims of employees in this regard are still seen as being statutory in nature. See L Dickens 'Deregulation and Employment Rights in Britain' in Rogowski et al supra note 72 225 at 247.

¹⁴⁴ See J Gaymer *The Employment Relationship* (2001) 417. Common-law principles remain relevant to the question of whether an employment contract was formed and the notion of 'contract' is essential to the rights of an employee and a worker. Common-law principles further feature during the course of the relationship by means of the contractual test of 'business efficacy' or by creative use of the implied obligation of mutual trust and confidence, ensuring that the employment relationship is workable. Common-law principles also continue to apply at the point of termination of the employment relationship. So although statute may bring some form of regulation to the legal relationship between the parties, the existence and content of the terms of the employment relationship continue to depend on the conduct of the parties themselves.

¹⁴⁵ See M Duggan *Wrongful Dismissal and Breach of Contract* (2003) at iv.

¹⁴⁶ See Freedland supra note 53 at 3. In contemporary employment settings, contract law serves as protector of the welfare of workers by means of the application of implied contractual terms. General contract law is evolving from an apparatus primarily meant for the construction and enforcement of agreements into a body of law for regulating contracting in a wider sense. This broad trend in the law of contract has created a positive environment for the development of employment law in contractual terms. The growth of legislative regulation

Other writers criticise the role of contract in the individual employment setting. Firstly, Collins observes that the law of the employment contract offers a conceptual apparatus which is ill-suited to the regulation of the employment relationship.¹⁴⁷ Secondly, Hepple argues that it is unsatisfactory to attempt to construct a system of statutory employment rights upon the foundation of the common-law contract of employment.¹⁴⁸

Another observation in this regard is that it ought to be recognised that work relationships lie along a broad spectrum of integration or dependency, and that there should be no sound basis for confining the contract of employment to only one precise part of that spectrum.¹⁴⁹

However, the fact remains that the employment relationship is constituted in a contractual form which in turn allows the courts considerable discretion to shape it by means of implied terms where a matter is not dealt with by express agreement.¹⁵⁰ It has been suggested that the law of the employment contract in England should be recognised to extent across a wider range of working relationships by adopting a more variable approach to implied terms than was done previously.¹⁵¹

of fairness of contracting has to a considerable extent refocused contract law on the difficult task of interrelating statutory norms, but general contract law corresponds closely to the regulatory tasks of employment law. See Freedland *supra* note 53 at 522-523. It has been suggested that although the impact of statute in employment has increased dramatically, there are undoubtedly areas where the common law remains important, most notably contractual terms that underpin statutory claims for breach of contract or unfair dismissal. See Middlemiss *supra* note 132 at 218.

¹⁴⁷ This view was based on the idea that the law of contract as evident in an employment contract did not recognise that the power an employer had over an employee was in his view of a bureaucratic nature which had to be interpreted and controlled by the public instead of by private law if adequate regulation was desired. See Collins *supra* note 88 at 1.

¹⁴⁸ According to Hepple the common-law foundation was too technical, complex and uncertain, it favoured the interests of employers, and it is exclusive to certain categories of workers to provide a foundation on which a statutory framework could be rested. See B Hepple 'Restructuring Employment Rights' (1986) Feb *ILJ (UK)* at 69.

¹⁴⁹ See Freedland in Betten *supra* note 140 at 22. Freedland further remarks that if this latter aspect is accepted it will be easier to adapt the law of the contract of employment to the changing climate of the labour market, to update that contractual body of law in its role as a criterium for the application of statutory employment rights, and to renew its role as a regulatory system for the individual employment relationship.

¹⁵⁰ See Deakin & Morris *supra* note 54 at 59. The implied duties of an employee to obey the reasonable orders of an employer and to co-operate in the running of a business are of the most prevalent manifestations of the inherent managerial prerogative. Brodie states that an aspect which was particularly susceptible to change was the law of implied terms. See D Brodie *The Employment Contract Legal Principles Drafting and Interpretation* (2005) at vii. Wedderburn observes: 'But in all the modern debates, the contract of individual employment itself has remained the cornerstone of positive British jurisprudence, albeit for the vast majority ... a fictitious bargain and in reality a command under the guise of an agreement'. See Wedderburn *supra* note 133 at 295.

¹⁵¹ See Freedland in Betten *supra* note 140 at 24. Gaymer observes that a push for the extension of the boundaries of the employment contract continues and that there will be a need for the courts to develop criteria by reference to which this dividing line should be drawn. The common-law principles developed at present in relation to the traditional approaches to common-law principles will need to be reassessed particularly in light of outside influences which have not been present when the earlier common-law decisions were made. Outside influences that have a direct or indirect effect upon the formation and operation of the employment relationship include international labour standards, European conventions, the effects of the Human Rights Act of 1998 and the Unfair Contract Terms Act of 1977 respectively, the effects of other legislation and collective agreements. See Gaymer *supra* note 144 at 10; 217; 230; 249; 254-255.

Brodie observes that the employment contract comprises of a mixture of express and implied terms,¹⁵² and that the common law pertaining to the employment contract is steadily evolving.¹⁵³

In a recent contribution, Freedland has referred to the statutory provisions impacting on the contractual employment relationship as ‘statutory contractual formulae’, not only because the law of personal employment contracts has itself developed through the contraction of this statutory contractual formulae, but moreover because the use and testing of the latter indicates where contractual conceptions provide a workable technical apparatus for the statutory regulation of employment relationships.¹⁵⁴

Anderman in turn supports the continuing importance of contractual principles in employment by stating that ‘a thorough understanding of the characteristics of the contract of employment is a virtual precondition to an understanding of ... labour law’.¹⁵⁵

Although it is accepted that the individual employment relationship was altered quite radically by legislation during the 1970s,¹⁵⁶ a view which dictates that contract no longer provides the foundation of employment law goes too far for a number of reasons.¹⁵⁷

It is thus not surprising that an employment contract apparently remains the foundation of the legal relationship between an employer and an employee.¹⁵⁸

¹⁵² See Brodie supra note 150 at 49. The earliest models of employee and employer have influenced the interpretation of modern employment protection legislation. An example thereof is that an employer’s need to restructure his undertaking to such an extent that a restructuring-exercise may necessitate change to the contractual terms and conditions, is considered of primary importance to the extent that it may outdo the contractual rights of employees.

¹⁵³ See Brodie supra note 150 at vii.

¹⁵⁴ See Freedland supra note 53 at 10-11. Another academic explains that the employment relationship is at present characterised by an enormous amount of statutory regulation aimed at achieving a proper balance between the parties. But it remains the case that the central relationship between employer and employee is one of contract, on which statutory requirements operate. Common-law contractual principles remain important in interpreting the statutes, although some would argue that these principles operate as a negative force. See G Pitt *Employment Law Fifth Edition* (2004) 1.

¹⁵⁵ See SD Anderman *Labour Law: Management Decisions & Workers’ Rights Fourth Edition* (2000) at 36.

¹⁵⁶ A statutory floor of employment rights and a specialised system of individual tribunals through which disputes over employment rights are adjudicated were created. See RW Painter & AEM Holmes *Cases and Materials on Employment Law Fourth Edition* (2002) 49.

¹⁵⁷ These reasons are: (i) there are still many situations for which legislation do not provide, and it is then up to contract to fill these gaps; (ii) when it comes to adjudicating statutory rights, courts and tribunals often look to the guidance of contractual theories in reaching a decision; (iii) the law of industrial action and possible immunity from economic torts is often influenced by whether or not a breach of contract has occurred; and (iv) a perceived weakness of the statutory floor of employment rights has caused workers to look towards contractual remedies as a more effective form of job protection. See Painter et al *ibid.*

¹⁵⁸ When considering an employment matter, it is important to consider whether there is in fact an employment contract which gives rise to an employment relationship between an employer and an employee. If an employment contract does exist, certain rights and obligations are created by the mere fact of its existence. See A Hough *Employment Law* (2001) 4; 19. Jefferson states that statutory rights for employees are dependent on the existence of an employment contract. If there is a contract but it is void, statutory rights are unenforceable. This position reinforces the view that contract remains the cornerstone of employment law. See Jefferson supra note 135 at 86.

7. Final Thoughts

In certain academic circles the return of contract in individual employment relationships has been advocated, albeit on different terms as a possible solution to compliance with the rules of the new global economy characterised by flexibility and the establishment of partnerships.¹⁵⁹ Olivier for one has criticised the view that contract is ‘dead’ in employment, and stated that contract has been erroneously equated with consideration. Consensus or promise is still seen as the foundation of contractual liability and it has been confused with consideration by critics. Even if consideration is on the decline it does not mean that contract is afflicted. Olivier is of view that reliance on theory complements the will of contractual parties, and entrenches the viability of contract law, thus in effect invigorating it.¹⁶⁰ Another view supports a renaissance in the field of labour law through the introduction of a greater variety of instruments that are fitted to the different situations during which work is performed by employees on the request of employers.¹⁶¹ It has been suggested that in order to assess the future of the contract of employment it is necessary to understand its past.¹⁶² One of the possible futures of the contract of employment is one where the contract is transformed into an extended form of ‘labour market status.’¹⁶³

Whatever the future may hold for the employment contract, the fact remains that it has an ongoing role to play in contemporary employment. The nature and the boundaries of that role may remain at present perhaps in many ways indeterminate, but the various contractual concepts that continue to permeate employment relationships reflect a obstinate tendency to ensure that the employment contract participates in the future of employment settings.

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¹⁵⁹ Ireland refers to a new economy where the rules of the competitive race have been changed. In order to survive both individuals and organisations need to be more flexible, adaptable and open to change. According to some it is possible for corporations to seek adaptability and flexibility through contract, a technique which emphasizes dispensability and keeping long term commitments to a minimum. See Ireland in Conaghan et al supra note 9 at 199.

¹⁶⁰ Olivier in Scott & Visser supra note 87 at 293.

¹⁶¹ Rood in Bellace et al supra note 13 149-150. These instruments include for example temporary work agreements and on-call agreements which ought to be part of the employment relationship besides the employment contract to make an employment relationship more functional.

¹⁶² See Deakin in Conaghan et al supra note 131 at 195.

¹⁶³ A ‘labour market status’ implies that the term ‘worker’ is used to extend the range of protective labour legislation. Other future transformations include the recognition of limited social drawing rights in the context of balancing work and family and that contractual restraints on managerial prerogatives are reduced. See Deakin in Conaghan et al *ibid*.