ALTERING THE TERMS OF EMPLOYMENT AND SOME RECENT DEVELOPMENTS IN CONTRACT OF EMPLOYMENT LAW

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English courts and industrial tribunals have recently been asked to re-examine the rules governing an attempt by the employer and the employee to alter their terms of employment. This article collects these cases in the course of an analysis of the alternative legal characterizations of the attempt to change the terms. The article notes the recent developments in the governing rules and relates these rules to the realities of the employment relationship.

AREA

(a) *The Contract*

Conceding that the subject of changes in terms of employment is a large one, the survey of the article is confined to a consideration of the effects of attempts at change upon the contract of employment. An attempt to change a term of employment can have varying consequences for the contract: it can involve no change in the terms of the contract itself, it can effect a variation in the contract or it can result in the determination of the contract, with or without its replacement by a new contract.[1]

(b) *Awards and Legislation*

The survey is confined to changes[2] initiated by the parties to the

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1 Little has been written on the legal aspects of alteration to the contract; now see D. Kloss, "Changing The Terms of Employment" (1975) *Sol. Jo.* 650; M. R. Freedland, *The Contract of Employment* (Oxford, Clarendon Press, 1976) Ch. 2.

2 In concentrating on the actual alterations and any exchange of intent regarding them, the article will not deal with the effects on the contract of any industrial action that may accompany them. The withdrawal, the strike or lock-out, will not be viewed as an alteration in terms of itself or the declaration of intent, but rather as a bargaining ploy and temporary weapon in its support. The effect of industrial action on the contract, in particular the strike, has been the subject of considerable controversy in the courts and its treatment, due particularly to its instrumental and contingent nature, requires special attention. See e.g. J. M. Thomson, "The Effect of a Strike upon the Contract of Employment" [1977] *J.R.* 187; *Australian National Airlines Commission* v. *Robinson* [1977] V.R. 87; *Hall* v. *G.M.H. Limited* (1979) 21 A.I.L.R. 90 (F.Ct.). The distinction between an alteration and industrial action will not always be easy. Nevertheless, by way of illustration, it is suggested that a stop-work in support of a pay claim is a strike while a refusal to work in the rain or a start to work at a new time is, as an end in itself, an attempt at an alteration.

contract. In Australia, changes in the terms of employment are also effected by the making and operation of legislation and awards from time to time and during the life of large numbers of contracts. The contract, however, remains significant.[3] While it is true that the terms of an award take precedence over the terms of a contract where the two are inconsistent, the clashes are less frequent than is often imagined. There are both aspects of employment (such as discipline) which awards have traditionally left to the contract and aspects (such as notice) for which awards have prescribed minimums and allowed for extensions or substitutions by the contract. Furthermore, various legislative and award provisions (such as the accrual of leave or pension rights and protection against unjustified dismissal) make the status of the contract—its formation, content, breach or termination—the criterion for their operation.[4]

(c) *Relevance of English decisions*

Before the legal characterizations being made are set out, the context in which the matter of alteration has been presented for decision should be noted. In both England and Australia, the matter may become a justiciable one when a party presents a claim for the breach of the contract constituted by the other party's failure to abide by an original term while seeking to impose a new term. This can also arise by the other party's failure to abide by a new term while holding to the original—for instance, an action for wrongful dismissal when the employee is summarily dismissed for failure to comply with an altered term. Recently in England, however, the matter has arisen in the context of deciding whether an employee is entitled to the protection of certain new employment legislation,[5] for example the *Employment Protection Act* 1976 (U.K.). Eligibility for these statutory protections depends upon the satisfaction of various conditions precedent which require reference to the contractual position of the parties. For instance, to qualify for the protection of the "unfair dismissal" provisions, the employee must have continuously served the employer against whom the claim is made for at least 26 weeks. That the contract of employment was determined during a period is a factor in deciding whether the service was interrupted. Again, eligibility for

[3] The relevance of contract to the regulation of employment in Australia is discussed in E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia* (Sydney, Butterworths, 1972) 565-588; J. J. Macken, G. J. McGarry and C. M. Moloney, *The Common Law of Employment* (Sydney, Law Book Co., 1978) 208-213, 224-228; and J. L. Webb, *Industrial Relations and the Contract of Employment* (Sydney, Law Book Co., 1974) 11-23. To assert contract's relevance is not to accept its appropriateness: the latter comes under regular criticism, see e.g. R. W. Rideout, "The Contract of Employment" (1966) 19 *Current Legal Problems* 111.

[4] See e.g. *R.* v. *The Industrial Court of South Australia, ex parte G.M.H. Pty Ltd* (1974) 10 S.A.S.R. 582; *Roberts* v. *G.M.H.'s Employees Canteen Society Inc.* (1975) 25 F.L.R. 415 (A.I.Ct.).

[5] For comprehensive treatment of this legislation, refer Grunfeld, *The Law of Redundancy* (1971); Bercusson, *The Employment Protection Act 1975* (1976); Anderman, *Unfair Dismissals and the Law* (1973).

redundancy pay turns on whether the employee has been "dismissed". That the contract has been terminated, by either party, in certain circumstances, is sufficient condition for a "dismissal".

While parallels may be drawn with sectional Australian enactments, the absence of full-scale counterparts to the English statutes here means the authority of the English decisions is somewhat diminished. This is not only because the rules of precedent say so, but also because it is possible that the English judges have leaned towards one characterization of the attempt at a change in order to ensure the employee is eligible for the statutory protections. Nonetheless, the cases are instructive. While many have been in the specialist industrial tribunals, several have been thoroughly considered in the Divisional Court or the Court of Appeal. And there are now indications that the English authorities will be followed here.[6]

At the same time, there are few Australian cases of either breach of contract or award or legislation in the law reports to consult on the matter of alteration. This dearth of cases might not only be because there are few disputes over alterations, it might also be because the disputes are not litigated, or because the decisions of the lower courts are not reviewed, or because the decisions of the higher courts are not reported. This dearth of cases does not necessarily signify that the rules here are working. In England, by contrast, the specialist tribunals offer a more accessible forum to the individual employee for resolution.[7]

ANALYSIS

(a) *Provisos*

Finally, certain distinctions between form and substance, theory and practice, have to be made if this area is to be fully understood. The lawyer's cautious concentration upon the contractual forms and theory leads to the neglect of the practices of the parties. For example, it has been observed that the terms of the contract are not always the operating terms of the employment. The termination of the contract is not always the end of the employment relationship, and the contractual remedies for non-compliance are not always the actual remedies of the parties. In these ways, the legal rules to some extent embody the practical realities, to some extent the rules attempt to overcome them, to some extent the rules pretend that they do not exist. It is therefore important that the reader keep

[6] *Stratton* v. *Illawarra County Council* [1978] 2 N.S.W.L.R. 494.

[7] The operation of the tribunals is covered in Whiteside and Hawker, *Industrial Tribunals* (1975). For the few figures on "take-up rates" under the new legislation, see Bercusson, op. cit. v-vi; B. Weekes et al., *Industrial Relations and the Limits of the Law* (Oxford, Blackwell, 1975). Statistics on recourse to the ordinary courts are harder to obtain but see K. W. Wedderburn and P. L. Davies, *Employment Grievances and Disputes Procedures in Britain* (Berkeley, University of California Press, 1969) Ch. 2. Cf. De Vyver, "Australian Boards of Reference", in J. E. Isaac and G. W. Ford (eds.) *Australian Labour Relations: Readings* (2nd ed. Melbourne, Sun Books, 1971) 544.

in mind, when considering the theoretical or "book" rules, the extent to which the rules are actually followed. The legal commentator ascertains practices from many sources: his clients' cases, the facts of cases reported, the media, the views of employers and employees' representatives, official statistics, surveys, studies in other disciplines, even his own employment. Good illustrations about the gaps between theory and practice are observations on the degree of recourse to legal remedies for grievances. It is a matter of common observation that access to legal assistance, and the cost of that assistance particularly in comparison with the "stake", influence the extent of the right of the employee to damages for breach of his contract.[8] Equally so, while it is true that the courts decline to order reinstatement of the dismissed employee, the strength of a union frequently achieves this result.[9] Again, while employers are entitled to sue for damages if an employee wrongfully abandons his work, such actions are rarely brought.[9a] In a similar vein, such extra-legal factors as ignorance, economic pressure and interpersonal relations may contribute to a decision to overlook some unilateral alterations that breach the contract.

(b) *Characterizations*

1. The original contract permits such an alteration within its existing terms

Where the original contract allows for alterations in the terms of employment, the contract itself is clearly not affected. The contract may provide for alterations in several ways.

(i) The broadest provisions is for the parties to reserve to one the power to prescribe all but the bare form of the contract

This is not the place to establish what matters the agreement must settle, expressly or by implication, to be a contract all.[10] It is sufficient to say those matters are few and many contracts of employment only state expressly the parties, the title of the job, the wage rate, and perhaps the notice required to terminate it. An agreement can stand even if it fixes only the bare essentials of the bargain—service for payment—and purports to leave most of the terms of employment to one party to determine. It is not susceptible to the objection of uncertainty if it has identified the means of deciding those terms.[11] Nor does it fail for want of consideration even though it is one-sided. At the same time, it can be distinguished from an agreement merely to negotiate[12] or an agreement to employ in the future if there is work to do.[13]

8 E.g. Wedderburn and Davies, op. cit. 28, 38.
9 E.g. M. Derber, "Changing Union-Management Relations at the Plant level in Australian Metal Working" (1977) 19 *J.I.R.* 1.
9a E.g. Wedderburn and Davies, op. cit. 28, 38.
10 Sykes, op. cit. 29-33, Macken, op. cit. 27-33.
11 *National Coal Board* v. *Galley* [1958] 1 W.L.R. 16 (C.A.).
12 *In re Richmond Gate Property Co. Ltd* [1965] 1 W.L.R. 335 (Ch.D.).
13 *Puttick* v. *John Wright & Sons (Blackwall) Ltd* [1972] I.C.R. 457 (National Industrial Relations Court). Cf. *Flood* v. *Coates Brothers Australia Pty Ltd* [1968] 3 N.S.W.R. 646.

In practice, large institutional employers are often conceded the right in the contract to prescribe and alter most terms of employment. The writer's present contract simply states his position, salary and tenure and then includes by reference ". . . the terms and conditions of employment from time to time in such Statutes and Regulations of La Trobe University as may apply and in such rules as the Council of La Trobe University may determine." We commonly operate on the basis that there are many mandatory obligations and rights in every contract of employment which the courts have implied as a matter of law, but the courts have said that these obligations and rights do not operate where there is agreement between the parties to the contrary, except to assist in the interpretation of the ambiguous provisions of such agreements. In other words, the parties are free to agree to their own terms.

Public Employment. At this juncture the rider is added that the right of the one party to set and alter terms of employment may be constitutional, legislative or derived from some other common law doctrine than contract. The most important case of this is the public authority. Without trying to enumerate all the sources of power to do so, or their extent, one can say that the public employer has certain authority to "legislate" terms of its employees and this discretionary power cannot be substantially contracted away.[14] Of course the authority must be exercised according to the enabling law which may restrict the subject-matter and the form of the rules and those who may make them, but if the rules are within the power then they apply somewhat like the industrial legislation and awards above. The rules from time to time may in fact be incorporated in the contract of employment but the incorporation is not necessary for their effect.[15] There may be consultation, bargaining and agreement on the content of the rules but again this process is not necessary to their legal rather than practical operation.

Ordinary Worksrules. On the contrary, for the worksrules of the private employer to affect the terms of the contract of employment, they must be incorporated in the contract.[16] For incorporation the knowledge and assent of the other party is required. Hence the rules must be in existence at the time of contracting. For rules made after the contract was formed to alter that contract, fresh agreement must be obtained.

Rules may be incorporated in the contract by express reference. But it seems that the employee does not have to know of and assent to the specific content of the rules. They may be incorporated by reference only to their existence and essential nature, particularly if the employee signs

[14] E.g. C. Arup, "Security at Law of Public Employment in Australia" (1978) 37 *A.J.P.A.* 95, 103-105.
[15] E.g. *Miller* v. *British Railways Workshops* (1968) 3 Industrial Tribunal Reports 89, 90.
[16] Generally B. A. Hepple and P. O'Higgins, *Employment Law* (1976) 93-95.

an acknowledgement that he is bound by them.[17] It has been recognized in a few cases that the reference in the contract may be oblique, as in a reference to the usual or going terms.[18] Indeed, drawing on general contractual principles, it has been suggested[19] that rules might be incorporated if the employer merely took reasonable steps, before or at the time of contracting, to notify the employee of the rules. The steps must be reasonable. Some active indication such as a display on a prominent noticeboard[20] or a brochure at the personnel office will be required unless the employee has worked for the employer before, or the employer is the large kind of institution where rules are expected.[21] In addition, where there is only a reference to the rules, the full rules must be accessible. While we know that many employees will not read a copy of the rules even if it is given to them, consent to rules will remain a fiction if the rules cannot be consulted because they are not written down or consolidated or readily produced. The need for accessibility can be brought within the contractual requirement that the terms be capable of incorporation and thus reduced to a contractual form or document.[22]

To reiterate, if new rules are to constitute terms of the contract itself, they must receive agreement. At the same time, employers do add to and modify their worksrules from time to time. Many of these rules are of a minor or incidental nature, concerning for example working methods, and are not intended to be terms of the contract in themselves, but rather to be directions within the scope of the contract.[23] These rules may be altered unilaterally provided the alteration does not conflict with the contractual terms, on the basis that the employee has agreed to a right in the employer to give directions, on matters not covered by the contract, and on details of how the contract will be performed. As this sort of right falls by default to the employer anyway, because the courts will imply it in the absence of agreement to the contrary, an acknowledgment of it in the express terms may either serve to ensure there is no doubt that it has been retained, or to establish that disobedience of such rules is to be treated as a breach, and a serious breach of the contract,[24] even though the rules are not all terms of the contract themselves.

[17] Wedderburn, op. cit. 22. E.g. *Gascol Conversions Ltd* v. *Mercer* [1974] I.C.R. 420 (C.A.).
[18] *Marshall* v. *The English Electric Co. Ltd* [1945] 1 All E.R. 653 (C.A.).
[19] Hepple, op. cit. 94.
[20] *Devonald* v. *Rosser & Sons* [1906] 2 K.B. 728; *Pearson* v. *William Jones Ltd* [1967] 1 W.L.R. 1140 (Q.B.); *James* v. *Hepworth & Grandage Ltd* [1968] 1 Q.B. 94.
[21] *Petrie* v. *MacFisheries Ltd* [1940] 1 K.B. 258; *Warburton* v. *Taff Vale Railway Co.* (1902) 18 T.L.R. 420.
[22] *Carus* v. *Eastwood* (1875) 32 L.T. 855. Furthermore, some of the statements in the rule-book will be in terms, for instance aspirational or exhortative, that indicate they are not in the nature of rules.
[23] E.g. *Secretary of State for Employment* v. *A.S.L.E.F.* (No. 2) [1972] 2 All E.R. 949, 965 per Lord Denning.
[24] *Meridan Ltd* v. *Gomersall* [1977] I.C.R. 597.

In this context, an agreement to be bound by rules made by the employer from time to time is of concern. Such an agreement purports to bind the employee to rules made after the contract is formed. This is best construed as an acknowledgement of the employer's right to give directions, subject to the contract, to fill out the details from time to time. It is somewhat like subordinate legislation. There is a tendency, however, for matters of substance rather than procedure or detail to be included in the rules and incorporated in the contract. Alterations to these matters may be attempts to alter the contract. Similarly, the introduction into the rules of a matter that had not been broached at all originally,[25] may be an attempt to alter the contract because it is unlikely that the original contract authorized the employer to make new rules in these regards. It is a question of the construction of the contract and, ordinarily, the employee's authorization could be construed to extend only to rule-making by the employer in traditional domains; it would not, for instance, authorize the employer to alter the rate of remuneration.

Judicial authority on the status of worksrules is limited. The case of *National Coal Board* v. *Galley*[25a] is a neat example of several of these aspects of incorporation and alteration. In this case the employee had entered into a written contract of employment in 1949 as a deputy in a collinery. He thereby agreed that his wages would be regulated by those collective agreements between his union and the employer for the time being in force. In 1952 the union made an agreement with the employer that contained a provision that deputies shall work such days or part days in each week as may reasonably be required by management. In 1956, the employee and his colleagues indicated that they would no longer work Saturdays, commencing with the next Saturday in two days. The employer sued the employee claiming damages for breach of contract. The Court of Appeal held the employee's contract was "regulated" by the 1952 agreement and that the employee, by working on the terms of that agreement, had entered into an agreement which included the term in dispute. There are several cases in the area like this that do not articulate the precise basis of the contracting. Here, the term in dispute might, for instance, have been incorporated by the effect of the 1949 contract, or incorporated in a variation of that contract evidenced by conduct. A variation might have been required because the 1949 contract incorporated by reference only agreements regulating wages.

A private employment case, and an Australian case, concerning worksrules is *Adami* v. *Maison De Luxe Ltd.*[26] In this case, the employee had

[25] *McClelland* v. *Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594, 597 (H.L.); *Barber* v. *Manchester Regional Hospital Board* [1958] 1 W.L.R. 181 (Q.B.).

[25a] [1958] 1 W.L.R. 16.

[26] (1924) 35 C.L.R. 143.

entered into a written contract of employment to act as a dancehall manager and agreed that:

> "The said Louis James Adami while acting as hall manager shall have the engagement and full control of all the staff of the company attached to any hall of which the company may be the owner or lessee and the general supervision of the business carried on by the company in connection therewith subject always to the board of directors of the company but he shall not be subject to any control or interference in the performance of his duties by any individual director or directors but all instructions of the directors shall be officially communicated to him by the secretary of the company."

The hall was open at first on evenings only, but after a month, the board of directors sent Adami a letter instructing him to attend on Saturdays afternoons for it had decided to open the hall at that time. Adami refused and was dismissed. He sued for damages for wrongful dismissal, contending that it had been understood that he would not work on Saturday afternoons. The High Court held that the direction was an order within the scope of his contract and that, in disobeying it, he had repudiated the contract.

(ii) Alteration of specific aspects of terms of employment

The process of alteration within the scope of the original contract becomes clearer when the original contract provides that one party is empowered to alter terms in one specific aspect of the employment. The one party may be empowered to alter the content of the other's obligations or simply to vary his own. In this context, one must distinguish a provision that exempts a party from liability in the event of his breach. Rather, the proposition contemplates a provision that anticipates contingencies and allows one party to opt not to perform for so long as the defined circumstances exist, or a provision that allows one party to vary the manner of performance by either party.

One example is the parties' agreement to reserve to the employer the right to suspend his employees. While the courts imply, in the absence of agreement to the contrary, an obligation upon the employer to pay his employees whether there is work or not[27] (provided the employees are ready to work), they have upheld agreements to rights of suspensions broad in circumstance or duration.[28] Resistance extends as far as a reluctance to imply the right to suspend from circumstance alone rather than express words. In other words, to say that there was a works practice or custom of suspension incorporated in the contract or that "business efficacy" would require such a term.[29]

[27] *Hanley* v. *Pease & Partners Ltd* [1915] 1 K.B. 698.
[28] *Puttick* v. *John Wright & Sons (Blackwall) Ltd* [1972] I.C.R. 457; *Hulme* v. *Ferranti Ltd* [1918] 2 K.B. 426. Cf. *Cromer* v. *Harry Rickards' Tivoli Theatres Ltd* [1921] S.A.S.R. 325.
[29] *Devonald* v. *Rosser & Sons* [1906] 2 K.B. 728. Cf. *Browning* v. *Crumlin Valley Colleries Ltd* [1926] 1 K.B. 522.

Agreement to permit one party to alter a term can still be implicit. For example, even though an employee is usually assigned on hiring to a specific task and location, the contractual job definition may be expressed in terms wide enough to require a shift on the employer's direction. The obligation to transfer may be found in express or oblique words, but often it must be inferred from such circumstances as understandings, the nature of the occupation, practices, customs and so on. For this reason, the subject of transfers has occupied the English courts considerably in recent years.[30]

The extent of mobility required cannot be generalized, except to say that unclear obligations to transfer will be assessed in the light of the courts' view that a fundamental characteristic of the contract of employment is the employee's obligation to render personal service to his employer.[31] To that view an underlying principle is being added that each party must co-operate with the other to ensure the performance of the contract and the maintenance of the relationship.[32]

Lawful Orders. As part of his obligation to serve, the employee has been obliged to obey the lawful and reasonable orders of the employer. Obedience was once almost a contractual obligation in itself and the employee could easily risk summary dismissal for a single act of disobedience. Today when relationships of authority are not so clearcut, disobedience does not so readily amount to repudiation of the contract. Indeed, in a recent case the strict obedience of a "work-to-rule" constituted a breach of contract.[33]

To be lawful, an order must be within the scope of the contract[34] as well as consistent with any other laws such as legislation. As the parties are theoretically free to contract on any terms they wish, the obligation of the employee to serve as the employer directs may be severely circumscribed by a contract that specifies in detail working methods and objectives or allocates to the employee the authority to determine such matters. In practice, however, many of these matters remain with the employer and are considered "managerial prerogatives".

It is important to realize that while many of the prerogatives can be contracted away, the onus is usually upon the employee to bring about the shift in authority. In the absence of his initiative, the courts accept the common fact of the relationship, a fact brought about by a mixture of causes. Part of the employer's traditional authority to regulate the job is supported by a dominant ideology in society to which many employees

[30] E.g. *O'Brien* v. *Associated Fire Alarms Ltd* [1968] 1 W.L.R. 1916 (C.A.); *U.K. Atomic Energy Authority* v. *Claydon* [1974] I.C.R. 128.
[31] *Commissioner for Government Transport* v. *Royall* (1966) 116 C.L.R. 314.
[32] Freedland, op. cit. 27-32. See J. F. Burrows, "Contractual Co-operation and the Implied Term" (1968) 31 *M.L.R.* 390.
[33] *Secretary of State for Employment* v. *A.S.L.E.F.* (No. 2) [1972] 2 All E.R. 949.
[34] Note there may be areas of personal discretion for the employee because they are outside the scope of the usual contract, e.g. *Talbot* v. *Hugh M. Fulton* [1975] Industrial Relations Law Review 52 (personal appearance).

adhere.[35] Part of the authority is a result of the employer's control of resources, owning the workplace, obtaining the supplies, selecting the markets, choosing the technology, picking the other employees and making many more decisions that set the scene for the employment.[36] Except to ensure certain minimum safeguards for the employee such as his physical safety, the courts do not consider it their role to alter the balance actively by prescribing the content of such decisions.[37]

The courts' view of the relationship is influenced with reason by legal rules external to the employment relationship. The employer's role as owner, occupier, company, partner, public authority, and the like attracts obligations to third persons. These obligations will be harder to observe if control is relinquished. They may even limit the employer's capacity to contract away his control. To share in the control, employees need to be elevated to the status of independent contractor, partner, co-director and the like so that they share also in the responsibilities.

Thus at a certain point employees acquire too much control or independence for the relationship to remain one of employment. Nonetheless, there is room within the relationship for encroachment upon managerial prerogatives. This is neatly evidenced by the change[38] in recent years in the criteria for distinguishing the employment relationship for other relationships, usually for the purpose of determining liability to prevent and compensate injuries, to pay taxes and so on. The "control test" was transformed from a question of whether the employer actually controlled the way in which the employee worked to a question of whether the employer was reserved the ultimate right to control even if he did not exercise it because the employee had the expertise to decide how the function would best be performed. Today, control is only one of a number of factors to be taken into account in characterizing the relationship and other elements such as a lack of an entrepreneurial interest and a power to delegate are considered.[39]

While contractual encroachments on the traditional managerial prerogatives have been upheld by the courts, the commentator should still concede that the employer and his managers exercise extra-legal sanctions against the employee who insists on his strict rights in order to obtain compliance with directives for which there is no authority. Common sanctions include passing over for promotion, failing to consult, assigning the least interesting jobs, and giving notice. Where the other employees are doing so, the employee may also comply with directives that lack authority for the sake of efficiency, co-ordination and related goals.

35 Dunlop, *Industrial Relations Systems* (1958) 16-17.
36 Banks, *Trade Unionism* (1974) 17.
37 E.g. C. Arup, "Job Security or Income Support" (1976) 7 *F.L.R.* 145, 159-163.
38 C. D. Drake, "Wage-Slave or Entrepreneur?" (1968) 31 *M.L.R.* 407.
39 *Ready-Mixed Concrete (South-East) Ltd* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497.

The corollary to the above observation is that the employer also cannot always enforce his contractual rights.

Collective Agreements. The law assists the employees to the extent it leaves them free of penalty for exercising their collective industrial power to negotiate intrusions into the employer's traditional domains or to ignore his directives on such matters. Employees are free in this way in Australia to the extent that laws prescribing industrial action are not enforced, and, of course, that arbitration does not take over.

The exercise of industrial power can produce changes of consequence to the contract of employment in the form of collective agreements. Obviously collective agreements are negotiated during the life of many individual contracts, indeed collective bargaining may concern an individual matter common to a group of contracts. The terms of individual contracts may be altered as a result of the incorporation of a collective agreement. There has been continuing debate in England about the relation of collective bargaining to the contract of employment.[40] It is at least agreed by the courts that the collective agreement is not the same as legislation. It does not automatically or compulsorily govern the individual relationship. To be incorporated, the terms of the collective agreement must first be capable of inclusion in the individual contract and in this vein the terms should not simply concern matters of collective relationships such as notification and consultation requirements.[41] Secondly, there must be knowledge of and assent to the collective agreement by the individual parties,[42] unless the collective agreement has become a custom. If there is any trend in the courts' attitude to incorporation, it is a view that assent to incorporation may be implicit (as in the case of worksrules) and evidenced by conduct, especially where the collective agreement is the product of a well-established, regular and comprehensive bargaining relationship.[43] Especially where the bargaining is institutionalized, assent may readily attributed to alterations by collective agreements after the

[40] E.g. O. Kahn-Freund, *Labour and the Law* (London, Stevens & Sons, 1972) 124-164. On the likely Australian position, see Sykes "Labour Arbitration in Australia" in Isaac and Ford, op. cit. 365. It is important not to confuse the intentions of the collective parties as to the status of their agreement, with the intentions of the individual parties as to incorporation. At the same time provisions of the collective bargain that express distinct individual benefits such as severance pay or over-award payments should be more readily incorporated than inexact or group-oriented arrangements such as grievance procedures or working practices. Of course, collective agreements can only be considered in the shadow of the compulsory arbitration schemes, but the fact of the arbitration schemes could indicate either that the agreements outside were intended to be binding by the individual parties or that they were not. Each case must be taken on its merits.

[41] E.g. *Young* v. *Canadian Northern Railway Coy* [1931] A.C. 83; *Rodwell* v. *Thomas* [1944] K.B. 596.

[42] *Spring* v. *National Amalgamated Stevedores and Dockers Society* [1956] 1 W.L.R. 585 (Ch.); *Joel* v. *Cammell Laird (Ship Repairers) Ltd* [1969] I.T.R. 206.

[43] *Tomlinson* v. *The London Midland & Scottish Railway Co.* [1944] 1 All E.R. 537 (C.A.); *Allen* v. *Thorn Electrical Industries Ltd* [1968] 1 Q.B. 487; *Camden Exhibition and Display Ltd* v. *Lynott* [1966] 1 Q.B. 555 (C.A.).

contract of employment has been formed, such as an agreement to be bound by the outcome of collective bargaining from time to time can effect.[44] But the same reservations must apply to collective agreements made after the contract as to such worksrules, particularly where a major alteration is proposed. Fresh individual assent must be obtained if prospective consent was not given in the original contract.[45]

Thus it will require a special transaction to incorporate the *ad hoc* local bargain struck to overcome problems of the individual relationships, unless the employees' spokesman can be considered their agent. It is insufficient for agency that the spokesman be an officer of the employees' union.[46] If the rules governing unincorporated associations are recalled (and no legislation confers extra capacity on union officers), then "particular transaction" authority is required either in advance or by ratification. While the facts may readily justify authorization with a small group and a single issue,[47] each employee must give his authority to be bound so that if the majority voted on the shopfloor to approve a settlement, the minority would not be contractually bound.[48] Nonetheless they might well suffer group sanctions for failure to abide by it.

Employee Practices. There remains one further source of alteration to actual terms in practice that do not usually affect the contract. Experience shows that there are many ways in which employees, particularly as concerns the job, ignore, depart from or cheat on the contractual rules for their own convenience, safety, or to work more efficiently. In these ways the employees assert control unofficially.[49] The employer may ignore the practice because he is tolerant or sees less advantage in insisting on the rules or the employer may not be aware of the departures.

Thus, there is a large area of modification and supplementation informally and sometimes unilaterally applied by the employees, as is illustrated by such practices as control on the pace of work, fiddling time-sheets and using short-cuts in working methods. Some such practices merely fill vacuums left because the contract has nothing specific to say on the matter and the employer has issued no relevant directives.[50] Other practices, however, amount to modifications that acquire a certain legitimacy if not legal effect. Primarily they are supported by group sanctions among the employees. Some must also come to the notice of a manager because they affect areas that have been management concerns.[51] As an example, the employees build up their own system of allocating over-time among

44 *Maclea* v. *Essex Lines Ltd* (1933) 45 L.L. Rep. 254.
45 *Morris* v. *C.H. Bailey Ltd* (1969) 7 K.I.R. 75 (C.A.).
46 *Holland* v. *London Society of Compositors* (1924) 40 T.L.R. 440.
47 *Deane* v. *Craik* (1962) The Times, March 16, 1962; *Edwards* v. *Skyways Ltd* [1964] 1 W.L.R. 349 (Q.B.).
48 E.g. *Smithson* v. *Sydney Chambers & Co.* [1977] I.R.L.R. 13.
49 Brown, "A Consideration of Custom and Practice" (1970) 10 *British J. of I.R.* 42.
50 Brown, op. cit. 47.
51 Ibid. 53.

themselves. This comes to the notice of the foreman or supervisor and he endorses it or at least tacitly accepts it, because the employees will cause trouble if he does not, the system is more efficient than the management's system, and so on. Whether the practice results in a reduction in the area of the employer's lawful orders or a variation in the contracts depends upon a number of factors that will be examined below,[52] including the substance of the practice, whether it is actually condoned by management or not, the degree of authority of the representative of management who accepted it, and the length of time it was observed.

Subsequently, the management might adopt the employees' practice, taking the initiative to instal it in fresh contracts. Alternatively, the practices might be consolidated in a collective agreement or an industrial award. Further, a well-established but unwritten works practice will be readily implied into new individual contracts by the courts.[53] If the practice spreads until it is certain, notorious (and reasonable), it becomes a trade custom that some cases suggest is implied into a contract even if it cannot be established that the employee knew of it.[54]

2. The parties vary the original contract by agreement

The reader knows that contract law accommodates the variation of a contract.[55] Traditionally, for the variation to be binding it must constitute a contract within itself. There will be little problem in this regard for agreements of mutual advantage but in many cases one side will seek an alteration to improve or alleviate his own position and the evidence of the other side's assent to the alteration and consideration for his concession will be tenuous.

Acceptance. If the acceptance is express and in writing, the first major requirement for the variation will be established. Equally so, if there is an express written refusal, it will not.[56] Usually, however, in employment disputes, assent will have to be sought *post hoc* by way of inference from conduct and surrounding circumstance. Consequently, the English courts have developed interpretations of recurring circumstances and these interpretations have exhibited a certain scepticism about claims of implicit consent. In particular, the courts have held that working on once the change in terms has been put does not necessarily indicate acquiescence.[57]

[52] Below, 39. Also note Freedland's suggestion of "non-obligatory arrangements concerning terms and conditions of employment " e.g. overtime working. Freedland, op. cit. 17-18.

[53] E.g. *Bird* v. *British Celanese Ltd* [1945] K.B. 336 (C.A.).

[54] *Reynolds* v. *Smith* (1893) 9 T.L.R. 494; *Sagar* v. *H. Ridelhagh & Sons Ltd* [1931] 1 Ch. 310. But cf. *Meek* v. *Port of London Authority* [1918] 1 Ch. 415; *Lord Forres* v. *Scottish Flax Co. Ltd* [1943] 2 All E.R. 366 (C.A.).

[55] For treatment of the general topic see G. H. Treitel, *The Law of Contract* (4th ed., London, Stevens & Sons, 1975) 70-88.

[56] *Simmonds* v. *Dowty Seals Ltd* [1978] I.R.L.R. 211 (Employment Appeal Tribunal).

[57] *Marriott* v. *Oxford and District Co-operative Society Ltd (No. 2)* [1969] 3 W.L.R. 984 (C.A.).

The thinking behind this may be the economic and organizational pressure that the proposer of the change can apply to the other. In some cases the pressure can extend beyond threats to the unilateral imposition on the other of the change.

This thinking is demonstrated by the circumstances that the courts have identified as indicating that they should be sceptical. The courts have said in recent decisions that working on should not be viewed as consent if the alternative was that the employment would be ended, or that the change was dictated rather than negotiated, or that the offeree was given no time to consider, or that the offeree continued to protest, or that the change was adverse to the offeree's interests.[58] As a result of the peculiar legislative context, the decisions all involved changes proposed by the employer but they are equally applicable where the employees propose changes.

The key illustration of this approach is the case of *Marriott* v. *Oxford and District Co-operative Society Ltd (No. 2)*.[59] The facts of this case were that the employer first suggested that the employee, a foreman, accept a reduction in wage and status because they had insufficient work for a foreman. The employee protested and, one month later the employer informed him that in a week's time it would effect the demotion for a trial period of three months. Again the employee protested but he continued to work for the employer for another three to four weeks before giving notice and taking up other employment. The employee contended he had been dismissed by reason of redundancy and claimed a redundancy payment. The Court of Appeal held that there was no evidence that the employee had accepted the demotion.

By way of contrast, the case of *Armstrong Whitworth Rolls Ltd* v. *Mustard*[60] is a case in which an agreement to vary was found on the facts. The employee agreed when employed as a process annealing operator in 1953 to work an eight hour shift five days a week. In 1963 one of the employee's colleagues left and his foreman told the employee that thereafter he would have to work twelve hour shifts five days a week. The employee did so until 1970 when he was dismissed by reason of redundancy. He claimed a redundancy payment calculated on the basis of a sixty hour normal working week. The Queen's Bench Division held that the conduct of the parties, including the employee's work under the altered system for seven years, established an implicit variation of their contract.

The trend in the courts set by *Marriott's Case*[60a] is to go below the surface of the transaction to examine the social and economic context of the relationship. In a small way, the courts may thus influence not only

[58] E.g. *Shields Furniture Ltd* v. *Goff* [1973] 2 All E.R. 653 (N.I.R.C.).
[59] [1969] 3 W.L.R. 984.
[60] [1971] 1 All E.R. 598 (Q.B.).
[60a] [1969] 3 W.L.R. 984.

the process of contract making but also the contents of contracts in shielding a weaker party from an unfavourable change, for those social and economic realities might equally have indicated that offeree did indeed acquiesce. The courts appear to be seeking at least a certain quality of assent.

Waiver. Nevertheless, there are several possible legal analyses if the offeree has worked on with the altered term but without giving his assent to a contractual variation. As we shall see below,[61] the offeree may be attempting to affirm a contract that has been breached so as to preserve his entitlements under it. Or he may be waiving temporarily his strict contractual rights in order, for example, to give the proposals a trial period[62] or to grant the offeror a breathing space to tide him over a temporary operational difficulty.[63] Instances of this could be an employee's acquiescence in some short-time working[64] or an employer's provision of light work to a partially incapacitated worker while he recovers.[65] Still, the choice of analysis remains a matter of interpreting the facts so that while it is true that a substantial relinquishment of the original contractual position, either in substance or duration, may just be a waiver, the longer the offeree works on with the new term and the more substantial the change involved, then the greater the evidence of assent to a permanent alteration in the parties' legal rights.[66]

Consideration. Even if there is acceptance, the offeree's promise to work by the new term must still be supported by consideration.[67] The general principle is that while consideration need not be adequate, it must be something additional of material value, given in return for the promise. Can consideration be found for an acquiescence in an alteration proposed to assist one side? The formal requirement of consideration does not always fully accord with what the parties' view as the *quid pro quo.* When the employee agrees to relieve his employer of part of his obligation to pay wages at a slack time, we can say that he, in turn, is relieved of his obligations to serve. But what value is the employee's release if he cannot obtain work elsewhere during the suspension? It is true that he is no longer required to exert himself but he may prefer work to idleness. One strength of the formal requirement is that the courts avoid the application of such subjective tests. At the same time, it may mean that while the parties think they are or are not striking a bargain, the court will disagree. To take an

[61] Below, p. 46.
[62] *Sheet Metal Components Ltd* v. *Plumridge* [1974] I.C.R. 373 (N.I.R.C.).
[63] *Saxton* v. *National Coal Board* (1970) 8 K.I.R. 893 (Q.B.); *Dorman Long & Co. Ltd* v. *Carroll & Ors.* [1945] 2 All E.R. 567 (K.B.).
[64] *Powell Duffryn Wagon Co. Ltd* v. *House* [1974] I.C.R. 123 (N.I.R.C.).
[65] *Runnalls* v. *Richards & Osborne Ltd* [1973] I.C.R. 225. Cf. *Plant* v. *The Commissioner of Railways* (1904) 6 W.A.L.R. 205.
[66] *Armstrong Whitworth Rolls Ltd* v. *Mustard* [1971] 1 All E.R. 598.
[67] *Anderson* v. *Glass* (1868) 5 W.W. & A'B(L) 152.

opposite view, by agreeing to a suspension, the employee might avoid the more serious alternative of losing his job.[68] The employer's promise not to dismiss the employee outright might be of great practical value to him but it is no consideration so far as it is merely a promise not to breach the contract and even a promise not to give due notice for the time being lacks definition.

The same observations are applicable to a variation proposed by the employees. If an employer agrees to make severance payments in the event of the employees becoming redundant, where lies the consideration for his promise? If the employee takes on no additional duties but merely promises to refrain from industrial action as a result of the concession,[69] the employer may be well satisfied, but there is no consideration in law because the employee is merely promising to do what he is already bound to do—to serve.[70]

This failure to accord with the practical view of the parties may simply be the result of the courts' desire to remain true to abstract, consistent, and hence "neutral", principles. Treitel[71] suggests it is also a judicial policy to discourage undesirable pressures by either party to avoid a bargain that has become more onerous. Whatever the reason for the failure in the past, the trend now is for the courts to be satisfied with proof that the parties thought at the time they were receiving something of value in exchange, because, as it is put in Cheshire and Fifoot "although the courts, in dealing with cases of variation by waiver, have seldom been over-concerned to spell out consideration for the variation, . . . they have consistently enforced the contract as varied".[72] In this way, the courts rest with a requirement of voluntariness or genuineness in the acceptance. Along these lines, if one side had presented the other with a *fait accompli*, the court would conclude that there had been no real exchange of views. Indeed, this could be made consistent with a consideration analysis, for even if the other side is released from obligations, the release will not have been regarded as the price for his acceptance.

In easing the technical requirement of consideration, the courts are encouraging the view that the relationship should be kept working and that the adjustment made should not be upset. This view has merit because the employment relationship is a fluid and detailed one, set in a changeable context, and it would be over technical to treat every adjustment as a separate bargain. If, as a result of this more accommodating approach,

[68] *Marriott's Case (No. 2)* [1969] 3 All E.R. 1126, 1129-1130; also *Raggow* v. *Scougall & Co.* (1915) 31 T.L.R. 564.
[69] This seemed to be the case in *Edwards* v. *Skyways Ltd* [1964] 1 W.L.R. 649.
[70] *Wyatt* v. *Kreglinger & Fernau* [1933] 1 K.B. 793; *Price* v. *Rhondda Urban District Council* [1923] 2 Ch. 372.
[71] Treitel, op. cit. 67.
[72] Cheshire and Fifoot's *The Law of Contract* (4th Australian ed. by J. G. Starke and P. F. P. Higgins, Sydney, Butterworths, 1974) 673.

the court is concerned that it might penalize a party for acquiescing in a change as a kindness, then it may construe that voluntary co-operation as a waiver instead. The waiver may or may not be on the basis that the party is to be recompensed for his trouble when the other's situation improves again.[73] Then, to take account of the other party's interest, the court may consider whether a promissory estoppel has arisen.

Estoppel. The requirement for an estoppel need not be set out in full again.[74] Where the promisor works on according to the altered term, the promisee might well act on the promise to change his position. The employer whose employees went along with a transfer or suspension, might re-organize his system of work or make external commitments on the strength of the promise. The employees might intend that he do so. The doctrine is, all the same, of limited support to the promisee. It remains true that the promise may be revoked if the promisor gives the promisee fair notice of his intention to do so and the parties can resume their original positions. Furthermore, the promisor may insist retrospectively on his strict contractual rights during the period of the forebearance, if it would not be inequitable for him to do so. Consideration of the equities again permits account to be taken of any undue pressure or hardship caused to the promisor.[75] More importantly, the estoppel acts only as a "shield", not as a "sword". It will only protect the promisee from a claim by the promisor to his rights under the original contract and will not support a claim by the promisee on the promisor's failure to observe the altered terms of employment.[76]

3. The original contract is determined and a new one is or is not formed

The final analysis of an attempt at a change is the determination of the contract, with or without its reformulation. The determination may take several forms.

(i) First the determination maybe lawful and either unilateral or bilateral

The party seeking the alteration might give *the notice required to terminate the contract* and propose that on the termination a new contract be formed including the modified terms. Of course the other side is free in law not to agree to the new contract but in any case the old is terminated unless the proposer withdraws his notice. Here, as before, dealing might well not be explicit and some courts have as a result read this analysis into a situation in which one party proposes that a change be instituted in

[73] On a breach, the party might waive its right to rescission but not its right to damages.
[74] Note *Smith* v. *Blandford Gee Cementation Co. Ltd* [1970] 3 All E.R. 154 (Q.B.); *Evenden* v. *Guildford City Assocn F.C. Ltd* [1975] I.C.R. 367 (C.A.).
[75] Along the lines of *D. & C. Builders Ltd* v. *Rees* [1966] 2 Q.B. 617.
[76] Freedland, op. cit. 58-60.

a week or some other period,[77] the question becoming how the parties intended this proposal and, in particular, whether the proposer intended to give notice to terminate, or notice of intention to breach the contract instead.[78]

Rescission. On the facts, the alteration, if carried through, might be viewed as *a mutual rescission of old contract*, a termination by mutual agreement, and the formation of a new one. An effective rescission has the advantage of being immediate. Mutual consent is required and there is a tendency similar to that emerging from the variation cases for the courts to practise scepticism where the change is to the advantage of one side.[79] Consideration can be made out simply in the release by each of the other's outstanding obligations under the original contract.[80] The scepticism must therefore be employed in the demand that there be a real, voluntary exchange of the two releases, that, in particular, the party responding to the proposal view his own release as the price for his promise. The demand is more easily satisfied if there were an actual benefit to that party in the rescission.

Where the rescission analysis would result in the replacement of the original contract with another which is identical in every term but the one the initiating party sought to alter, the facts might better justify a variation analysis. Where again the facts are not explicit,[81] a rescission and reformation analysis should correspondingly be preferred to a variation analysis only if the transaction is substantial—for example, if the dealings are elaborate, or the contract rewritten, or the changes are important to the contract or numerous.

The lawful termination and reformation approach has the advantage of satisfying the formal requirement of consideration with ease. At the same time, the termination brings forward the performance of obligations to meet certain entitlements such as leave pay, but the parties could, if the entitlements were only contractual, agree to postpone them.

(ii) Lastly but significantly, when one party purports unilaterally to vary the contract whatever the other's response, the contract may as a result be determined

Determination by a repudiation, or by the acceptance of a repudiation,

[77] *Spelman* v. *George Garnham* [1968] I.T.R. 370; *McCulloch Ltd* v. *Moore* [1968] 1 Q.B. 360. Note also *Emery* v. *Commonwealth of Australia* (1964) 5 F.L.R. 209, [1963] V.R. 586.

[78] Treitel, op. cit. 575.

[79] *Lees* v. *Arthur Greaves (Lees) Ltd* [1974] I.C.R. 501; *McAlwane* v. *Boughton Estates Ltd* [1973] I.C.R. 470; *Cowey* v. *Liberian Operations Ltd* [1966] 2 Lloyds Rep. 45.

[80] *Hempel* v. *Parrish* (1968) 3 I.T.R. 240; *Steadman* v. *Halsales Ltd* (1966) 2 K.I.R. 24.

[81] *Adams* v. *Union Cinemas Ltd* [1939] 1 All E.R. 169 (affd C.A. on other grounds [1939] 3 All E.R. 136); *S.W. Strange Ltd* v. *Mann* [1965] 1 W.L.R. 629 (Ch. D). Cf. *Federal Mutual Insurance Co.* v. *Sabin* [1920] S.A.L.R. 284; *Tallerman & Co. Pty Ltd* v. *Nathan's Merchandise (Vic.) Pty Ltd* (1957) 98 C.L.R. 93.

is indeed a subject of recent consideration by the courts. A similar issue arises if a party fails to comply with a contractual variation.

Breach. The first question is what the desire to alter a term signifies. A breach of a contract is constituted by a refusal or failure to perform or observe a term of the contract. The breach may be evidenced by a statement of the offending party that he intends not to abide by the term of the contract; if this statement is made before performance is due, it signifies an anticipatory breach. However, a breach does not require a guilty mind. Simply failure to comply in the absence of an intention to do so is enough. Nonetheless, in the instance of a unilateral alteration to the contract, the intention will be present even if the motive behind it is to save an arrangement that has become more difficult. It can be contrasted with an intention to pressure the other party, to bluff or "try on", by communicating a resolve not to perform when the time comes unless the other agrees to an alteration, when really the offending party means to perform if the other resists. It can also be contrasted with a breach which the offending party mistakenly intends to be proper performance because of a misunderstanding of the terms of the contract.

Repudiation. According to general contractual principles, the injured party may, on a breach, elect either to affirm the contract or treat it at an end when the breach amounts to a breach of a central term of the contract, to a repudiation of the contract. The effect on the contract of a breach has conventionally depended first on whether the breach is a breach of a condition or a warranty, of a major or essential term going to the root of the contract, or a minor or subsidiary term. To establish the importance of a term, the courts have asked whether it was such a term that the injured party would not have entered into the contract if he had not been assured of strict or substantial performance of it. But the courts have not stopped there. They have also looked to the consequences of the breach itself in the particular case rather than the status of the term and asked whether the effect of the breach was substantially to frustrate the contract's venture or deprive the injured party of his benefit from it. On occasion, the courts have, in addition, taken into account the manner of the breach and, in particular, whether the breach was a deliberate or sustained flouting of a term.

These three factors can be reconciled in the approach to the employment contract. We can ask not simply whether the breach was a breach of a condition or a warranty but whether it had the practical effect of frustrating or discontinuing the employment substantially as described in the contract or it signified an intention to do so. If it did not, then the breach only entitles the injured party to claim damages and not to rescind the contract. The question can be explored in relation to an example of both an employer's and an employee's breach.

A suspension or a demotion of the employees proposed by an employer because there is insufficient work for them to do, might be partial or total, temporary or indefinite, short-term or long-term. Whatever the extent of the suspension, it could be viewed as a repudiation because the employer has failed to meet his essential obligation to pay his employees the agreed remuneration. However, if the suspension were only partial or temporary or short-term, then viewed against the nature of the work, the minimum duration of the hiring, the causes of the lack of work and so on,[82] it might better be viewed as a minor breach because it did not constitute failure to co-operate with the other party to facilitate his performance of the contract, to continue the employment.

Similarly, a refusal of an employee to handle certain goods or operate a machine might be temporary or indefinite, provisional or absolute, incidental to his major duties or extensive. Again, the breach could be a repudiation because the employee failed to obey a lawful order to serve, but, instead, the degree of the failure, the reason for the failure and its deliberateness might more properly indicate whether the breach was only a minor breach.[83]

A convenient example of a repudiation by an attempt to impose an alteration is the case of *Shields Furniture Ltd* v. *Goff & Anor.*[83a] In this case, the respondents had been employed as upholsterers at the employer's premises in Chelsea for some years. On 5th May, 1972 they were informed by one of the directors of the company that the company would be moving to new premises in Fulham at some time and on 1st May they were directed to work at Fulham from the following day. The employees worked at Fulham for five weeks to give it a fair try, but the premises were in bad condition and further away from their homes. They therefore gave notice and claimed redundancy payments. The National Industrial Relations Court held that there had been no agreed variation or rescission and replacement of their contracts, the employees had never been asked whether they wished to move and they had been given no time in which to assess the proposal before they were directed to move. The employer had repudiated their contracts and, when they gave notice, the employees accepted the repudiation. The employees had thus been "dismissed" by the employer.

Determination. The choice is important to the entitlements of the injured party and hence to the ease with which the other can impose an alteration. The damages for the injured party if the contract is ended are usually quite limited because the loss attributed either to an employer's

[82] *Scott* v. *Aveling Barford Ltd* [1978] 1 W.L.R. 208 (E.A.T.). Further see Davies and Hamwee, "The Effect of Short-time working on the Contract of Employment" [1974] *L.A.G. Bulletin* 57.

[83] *Bettini* v. *Gye* [1876] 1 Q.B.D. 183; *J. Gannon* v. *J.C. Firth* [1976] I.R.L.R. 415 (E.A.T.).

[83a] [1973] 2 All E.R. 653.

wrongful dismissal[84] or an employee's withdrawal of labour[85] is confined by legal rules and the injured party is under a duty to mitigate. It is not necessary to reiterate those rules here because they are adequately set out in many texts.[86]

In counterpoint, the observation could be made that the injured party may elect to affirm the contract if that were his wish; instead, that it would be bad policy to tie him to the contract by treating many breaches as only minor breaches. This observation must now be judged in the light of several recent holdings[87] that the injured party in the employment relationship has no choice on a repudiation but to treat the contract at an end and indeed that the contract may be automatically and instantly determined by the repudiation itself.

A case in support of the proposition of automatic discharge is *Saunders* v. *Ernest A Neale Ltd.*[88] The facts were that the employee, among others, took industrial action because two fellow workers were made redundant. The action consisted of a refusal to work overtime, to do any of the work formally done by the two dismissed employees or to undertake certain additional work, none of which work they were contractually obliged to do but which they normally did do. The employer gave the employees a deadline by which time to undertake to work normally. When the employees failed to give the undertaking, the employer refused them admission to the factory and sent them their insurance cards. The employees claimed redundancy payments. The National Industrial Relations Court held that the employer's demand that they resume normal working was a unilateral repudiation of the contract which determined that contract and that they were thus dismissed on the date of that repudiation, not because of redundancy but because they had refused to work normally.

As a practical matter, it is frequently difficult for the injured party in the employment relationship to demonstrate that he could still perform his side of the bargain despite the repudiation. In the relationship the performance of each usually depends upon the co-operation and confidence of the other; the obligations of each cannot be executed independently. It is thus difficult for the injured party to take steps to affirm the contract. If, for example, the employer shuts down the machines, the employees cannot work.[89] If the employee fails to attend for duties, the employer cannot employ him.

[84] E.g. *French* v. *Brookes & Anor* (1830) 130 E.R. 1316; *Beach* v. *Reed Corrugated Cases Ltd* [1956] 1 W.L.R. 807 (Q.B.). See further C. D. Drake, "Wrongful Dismissal and 'Sitting in the Sun'" [1969] *J. of Bus. L.* 113.

[85] E.g. *National Coal Board* v. *Galley* [1958] 1 W.L.R. 16; *Ebbw Vale Steel Iron & Coal Co.* v. *Tew* (1935) 1 L.J.N. 284 (C.C.A.).

[86] R. W. Rideout, *Principles of Labour Law* (2nd ed., London, Sweet & Maxwell, 1976) 170-174.

[87] E.g. *Sanders* v. *E.A. Neale Ltd* [1974] 3 All E.R. 327 (N.I.R.C.); *Denmark Productions Ltd* v. *Boscobel Productions Ltd* [1969] 1 Q.B. 699 (C.A.).

[88] [1974] 3 All E.R. 327.

[89] *Burroughs Machines* v. *Timmoney* [1976] I.T.R. 173.

In important respects, the liability of the offending party to perform an obligation may depend upon the prior performance of the injured party so that the injured party's performance is a "condition precedent" to the offending party's liability; for instance, if the parties have agreed the employee will be paid in arrears for work done, the courts say that the employer's liability arises or accrues when the employee completes the minimum agreed period of working, not merely when he demonstrates he is ready and willing to work.[90] The employer, just as the employee, usually has the means to obstruct this working.

Specific Relief. Before certain courts, this common but not invariable reality regarding performance has hardened into a legal rule with interesting implications for the relationship. The making of the rule has been further influenced by the long-standing doctrine that the courts will refuse to order specific performance of most terms of the contract of employment.[91] The doctrine has a number of justifications, the major being that it is against public policy to compel a personal relationship of service—either the relationship must be voluntary or the parties will be enslaved. Further justifications are more common to the criteria for the exercise of the discretion to grant an equitable remedy. In particular that the order would be too difficult to supervise as it compels personal relations of a continuing nature, and that in most cases damages are an adequate remedy because the offending party could readily terminate the contract by notice if the injured party were reinstated, and it is assumed that he will choose the lease burdensome manner of performing the contract.

The refusal to order specific performance extends to any relief that would have the indirect effect of compelling the personal relationship.[92] So, for instance, where work is seen as a condition precedent to payment, an action for wages during a suspension is a form of specific relief. On the other hand, injunctive relief to prevent the breach of a negative stipulation, commonly a term restricting an employee's work for other employers, may be granted. On this score, however, the courts are still undecided whether to acknowledge that compulsion can be indirectly effected because of economic realities. If the courts enforce a promise not to work for anyone else during an employment, rather than a promise not to work for rivals afterwards, what choice has the employee but to continue with the employer—unemployment?[93] A hypothetical parallel

[90] See *Decro Wall International S.A.* v. *Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 370 per Salmon L.J. But it is often forgotten that the parties may agree that the employee's consideration for the payment of wages is the mere holding of himself ready and willing to do any work the employer may require; *Powell Duffryn Wagon Co. Ltd* v. *House* [1974] I.C.R. 123; *Marrison* v. *Bell* [1939] 2 K.B. 187. See also the cases cited by Freedland, op. cit. at 294.

[91] *De Francesco* v. *Barnum* (1890) 45 Ch.D. 430.

[92] *Davies* v. *Foreman* [1894] 3 Ch. 654.

[93] *Ehrman* v. *Bartholomew* [1898] 1 Ch. 671; *Bull* v. *Pitney-Bowes Ltd* [1967] 1 W.L.R. 273 (Q.B.).

might be an employer's promise not to hire anyone else for a particular role in a film.[94]

Implications. If the contract is automatically discharged and if specific performance is refused, the party seeking a change in terms has a threat with which to induce the other to acquiesce in the change. There is little real choice if the alternative to acquiescence (in order to maintain the employment), is, in the employer's case, to seek other workers when they are in short supply or, in the employee's case, to seek other employment when there is considerable unemployment. In the event of a discharge, the injured party is confined to damages and must attempt to mitigate these from the moment of the repudiation whether he realizes at this time that the contract is determined or not. It is true that the injured party is not obliged as such to accept an offer of a less beneficial arrangement with the offending party in mitigation, in the employee's case a position with less pay or status,[95] etc., and hence not obliged to accept the alteration. (It is also true that even if the contract is entire, the employee can still claim in respect of partial performance on a quantum meruit.[96]) But the offending party is relieved of further obligations and the injured party must realize that his damages will be reduced to the extent he should have found a substitute employment instead of continuing to tender performance.[97] The injured party may have invested much in the particular employment that will not be reflected in damages.[98]

In contrasting cases, discharge may too readily and conveniently relieve the responding party of further performance. Especially where he fails to perform but does not deliberately reject the contract or he hopes for better terms but not at the price of a termination, the offending party may not wish to cause the discharge of the contract and certainly not of the employment. In particular, if it is conceded that there are occasions in employment when one party "provokes" the other to initiate the first change, the availability of ready discharge could be exploited.

Contrasting cases indicate once again the difficulties of balancing the need for encouragement of renegotiation and adjustment of a fluid relationship with the need to protect a weak party from undue pressure, whether it be the employee faced with a giant employer or an employer confronted by a strong union.

Extent. It is not hard, however, to find large exceptions that undermine any rule. The analysis of automatic discharge and of no specific relief

[94] *Page One Records Ltd* v. *Britton* [1968] 1 W.L.R. 157 (Ch.D.).
[95] *Yetton* v. *Eastwoods Froy Ltd* [1967] 1 W.L.R. 104 (Q.B.); *Edwards* v. *S.O.G.A.T.* [1971] 1 Ch. 354.
[96] *Planche* v. *Colburn* (1831) 131 E.R. 305 (provided the original contract is at an end).
[97] *Brace* v. *Calder* [1895] 2 Q.B. 253.
[98] Cf. *Oldcastle* v. *Guinea Airways Ltd* [1956] S.A.S.R. 325 (recovered costs of training employee); *Dunk* v. *George Walter* [1970] 2 Q.B. 163 (apprenticeship).

seems still to allow an affirmation of the contract where the performance of the injured party is complete or it does not depend upon the personal co-operation or compulsion of the other.[99] If an employer of an author commissioned to write a novel seeks to vary the payments for it, the writer could go ahead with his work. If an employee, who has promised not to reveal his employer's trade secrets, proposes to sell them to a rival when he leaves the employment, the employer could insist on the confidentiality. There is authority[100] for such an affirmation in the case of an anticipatory breach: the injured party may continue to perform his obligation if he can do so independently, until the time the offending party's performance actually falls due.

So, the analysis can be logically confined to cases where affirmation of the contract requires an affirmation of a working employment relationship and not just the bare legal form of the contract. In other words, there ought to be situations in which the courts can declare that the contract subsists and the injured party continues to enjoy his contractual entitlements where these entitlements do not depend upon the active facilitation by the other of the relationship. A declaration that the contract subsists so that the employee continues to accrue time to entitle him to a pension[101] or so that the employer earns a tax concession based on the number he employs are two examples.

Having conceded these exceptions, it is not a large step to argue that even where the continued performance of the injured party does depend upon the two working on, an affirmation of the contract will be acceptable if the parties actually did continue working, albeit while disputing the alteration. In such a case, neither the dispute over the alteration or its resolution in favour of one side, has destroyed the elements of co-operation and trust critical to the relationship. If the dispute is dispassionate, particularly if the employer is an impersonal entity such as a large private corporation,[102] the facts might justify this finding. After all, the courts have declared that employment has subsisted for public employees with special legislative status when the nature of their employment was really little different from private employment.[103] However, it is too large a step to suggest that the courts are ready now to order the specific performance of a contract where the order will compel the reinstatement of the working

[99] *W.P.M. Retail Ltd* v. *Lang* [1978] I.C.R. 787 (E.A.T.); *Robinson & Co.* v. *Heuer* [1898] 2 Ch. 451.

[100] *Shindler* v. *Northern Raincoat Co. Ltd* [1960] 1 W.L.R. 1038 (Assizes). See further *White & Carter (Councils) Ltd* v. *McGregor* [1961] 3 All E.R. 1178, 1183 per Lord Reid, 1193 per Lord Hodson. This later decision has been widely questioned—it concerned however, a commercial rather than an employment contract.

[101] *Hill* v. *C.A. Parsons & Co. Ltd* [1971] 3 W.L.R. 995 (C.A.), esp. at pp. 1000-1001 per Lord Denning.

[102] G. De N. Clark, "Unfair Dismissal and Reinstatement" (1969) 32 *M.L.R.* 532.

[103] E.g. C. Arup, "Security at Law of Public Employment in Australia" (1978) 37 *A.J.P.A.* 95, 106-110.

relationship against one side's wishes.[104]

At least in the above cases, the threatened party's position would not be weakened if he refuses to accept an alteration. And orders made to ensure his contractual entitlements would not compel the parties to work together against one's wishes. The objection to this approach is rather that it is hard on the party who, because of an unavoidable change in external circumstances that makes the contract more onerous, wants to minimize his losses by altering the terms or, if he cannot alter, ending the contract as soon as possible. It is fairer to him that the other accept this and minimize his damages immediately. A response to this is that changes in circumstances are a business risk, the parties can provide at the outset for contingencies, and the law of frustration recognizes the determination of contracts in extreme cases.[105] An approach which allows the injured party real choice does not rule out the possibility of the alleviation of the other's position for there may be mutual agreement and interest regarding that alleviation. The injured party may still agree to a fresh contract.[106]

How may the principles governing breaches of the contract of employment be rationalized? Either a repudiation of the employment contract should never necessarily determine that contract[107] or it should determine the contract only if it signifies the repudiating party's intention to "frustrate" the other's efforts to continue the relationship and it effects this intention.[108] If, instead, a repudiation is necessarily to determine the employment contract, then, in turn, a breach should readily not be classed as repudiatory.

The case of *Thomas Marshall Ltd* v. *Guinle*[109] is the most recent consideration of the effect on the contract of a repudiation, in this case an employee's repudiation. The facts were that the employee entered into a written contract of employment as a managing director and expressly agreed not to use information about the employer's suppliers and customers or to employ anyone who had worked for the employer, after he ceased to be its director. While still employed, the director began to trade secretly on his own account and through two companies in competition with his employer, buying from the employer's suppliers selling to its customers and employing two of its former employees. Subsequently, he

[104] *Chappell* v. *Times Newspapers Ltd* [1975] 1 W.L.R. 482 (C.A.); *Thorpe* v. *S.A. National Football League* (1974) 10 S.A.S.R. 17. But cf. *C.H. Giles & Co. Ltd* v. *Morris* [1972] 1 All E.R. 960 (Ch.D.).

[105] E.g. *Turner* v. *Goldsmith* [1891] 1 Q.B. 544; *Hare* v. *Murphy Bros Ltd* [1973] I.C.R. 331.

[106] *Gresham Furniture Ltd* v. *Wall* (1970) 5 I.T.R. 171. Cf. *O'Connor* v. *Argus & Australasian Ltd* [1957] V.R. 374.

[107] *Automatic Fire Sprinklers Pty Ltd* v. *Watson* (1946) 75 C.L.R. 435; *Consolidated Press Ltd* v. *Thompson* (1952) 52 S.R. (N.S.W.) 75.

[108] E.g. the employer purports to dismiss the employee; the employee abandons his employment. Thomson suggests the repudiation should of itself determine the contract, *unless* the innocent party waives the repudiation, see J. M. Thomson, "The Effect of the Repudiatory Breach" (1978) 41 *M.L.R.* 137.

[109] [1978] 3 W.L.R. 116.

resigned his position and continued to trade in opposition. The employer sought an interim injunction to restrain the defendant from soliciting the plaintiff's suppliers and customers and using its trade secrets. The Chancery Division of the High Court held that the defendant's repudiation of the contract had not automatically discharged the contract and thus released him from his obligations under it and that the defendant could be restrained from breaches of his express undertakings and his implied obligation of fidelity and good faith. The sole judgment of Megarry V.-C. reviewed all the earlier cases in which the proposition of an automatic discharge had been entertained, including the cases of the employer's unilateral alteration.

CONCLUSION

Alterations may legally be made from time to time in the terms of an individual employment. Parties that truly wish to effect a legal alteration will not be concerned about the particular legal form of the alteration so long as it accommodates their intentions, unless one form has unwanted side-effects e.g. on continuity requires for fringe benefits.[110]

Where the attempt at the alteration is unilateral, it should be remembered that the initiating party wishes to continue the relationship, albeit on a different term or terms. While, arguably, parties should be encouraged to accept modifications in the event of changing circumstances, it is not necessary that the other party be pressured to accept a major alteration by the threat of a premature termination of his contractual entitlements. In these times it is facile to view the relationship as no more than a transitory commercial bargain. There are, as we have seen, sufficient other legal options for the initiating party.

110 Legislation conferring benefits may provide that the determination of a contract and a reformation does not necessarily interrupt continuity of employment. E.g. *Contracts of Employment Act* 1972 (U.K.) 1st Schedule. See, for instance, *Fitzgerald* v. *Hall, Russell Ltd* [1969] 3 All E.R. 1140 (H.L.). To whom a determination of the employment resulting from a unilateral alteration is attributed, may also affect legislative benefits e.g. postponement of the unemployment benefit because the claimant became unemployed voluntarily or through misconduct. Cf. *R.S. Components Ltd* v. *Irwin* (1973) I.C.R. 535 (N.I.R.C.).