LL.M. DISSERTATION

TASK FLEXIBILITY IN EMPLOYMENT: INJUNCTIONS, COMMUNITY LAW AND JUDICIAL REVIEW IN ENGLISH LABOUR LAW

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1989-90

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INTRODUCTION

This is an unfashionable study. As Europe seeks to construct a political order based on a free market, with labour regulated by contract, supplemented by an interventionist legislature providing some of the minimum standards to which all labour agreements comply[1], the themes pursued here are much more antiquated. The tools used, for a confessedly more limited legal goal, are the more ancient, medieval legal institutions of intangible property and "office". These are, of course, the heirs to the feudal legal system, where power was a fusion of economic and political entitlements[2] But these regulated, fixed arrangements were progenitors of very powerful workers' institutions such as the craft guilds, imputed to Durkheim as his model of the ideal social arrangement[3]. Recent developments in English labour law have led me to explore the utility of the "office" and "status" concepts as means of developing workers' entitlements. This is also a basis for the wider question of how the development of these legal categories can change the character that labour law takes within European Law.

Similarly, Community law on fundamental rights and the protection of the right of property within Community law raises questions as to the nature of such property rights, and the role that this legal institution might play in the legal analysis of the employment relationship. Contemporaneously and alongside the renewed legal interest in the "office", English law has started to permit injunctions of contracts of employment at the behest of the employee, which provide substantive possibilities for legal job security. Trying to unite this English law proprietary development with the European Community Law protection of fundamental rights constitutes a major part of this work. To that extent, the study is not merely noetic, and has the practical aim

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1 Kahn-Freund, " A note on Status and Contract in British Labour Law" [1967] MLR 635
2 Holdsworth, "A History of English Law" vol. 2
3 Lukes, "Alienation and Anomie" ch.6 of "Politics, Philosophy and Society"

of aspiring to write an argument. But within its academic terms of reference, it explores the interdependency yet distinctness of two of the oldest concepts in English law, and their application to labour law.

The areas in which I wish to explore these concepts is that of unilateral change in the method of working at a job. Whenever the employer seeks to restructure the enterprise, either to introduce new technology, or for some other reason, the firm might change working practices, and English law affords little protection to the employee against what might amount to a very disturbing and debilitating change. The choice is between acceptance of the new terms and conditions or resignation compensated by damages, which in this type of case will only be nominal. This study is concerned with fashioning legal resistance to a change in job content, motivated by an unfashionable attachment to the integrity of the job and respect for "skill".[4]

My research is not empirical, in the sense of questionnaires and multicoloured pie-charts, although it uses the conventional legal materials of reported cases. It is contemporary, in that it is located in the intellectual climate of researches into post-industrialism and labour market restructuring. While the pursuit of job-security through the courts is a rather white-collar, privileged modus operandi, and in relying on the development of the common law doctrines, my study might be regarded as reactionary. But in manipulating the dominant themes of common law jurisprudence for a different end, it is more "lawyerly" than the social policy consensus that is the favoured model at present. Wedderburn[5] complains of an individualistically-oriented common law being an inadequate tool for engaging the collective issues involved in employment law. Hepple & Byre[6] make the same

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4 be inspired by the poetic testament of Braverman,"**Labor and Monopoly Capital**"
5 "**Labour Law: From Here to Autonomy?**" [1987] ILJ 1
6 "**Labour Law in the United Kingdom: A New Approach**" [1989] ILJ 129

criticism in the application of Community law. But this study engages these structural features as advantages, and thus makes rather unusual claims seem intellectually orthodox.

THE CONTRACT OF EMPLOYMENT AND A CHANGE IN WORKING METHODS

The principal relationship between employer and employee in English law is a contract. Thus the contract of employment is the "corner- stone" Kahn-Freund [1a] of English labour law. On a purely contractual analysis, the myriad complexities of a relationship involving the sale of personal labour and of an ongoing continuing nature has to be accommodated by the constructs of a general and universal law of contract. Thus Freedland[1] takes the traditional headings of a contract text- book and seeks, in a formalistic way to discuss the employment relationship in terms of these general concepts. But his continual recourse to "implied terms" and the frequent assertion that a particular area is problematical serves merely to demonstrate that contract is inadequate as the sole regulator of the employment relationship.

This fact, alongside the desire of successive governments to achieve both industrial peace and progressive social goals has led to legislation prescribing important for the employee. Such legislation gives the individual employee some protection against redundancy and some security against being dismissed due to employer caprice. But the vast bulk of this legislation is inextricably bound to the common law of contract. So Wedderburn[2] rages against the judicial manipulation of the law of contract in frustrating some of the purposes of the legislation, and proposes new institutions for dealing with labour disputes. Such institutions may eventually emerge, but this study seeks to engage some of the emerging influences on labour law doctrine, and seek to reconceptualise the employment relationship to absorb other common law ideas. In this way, contract is not normatively different from statute law, rather contract and statute are seen as elements of a unified employment relationship.

1a [1967] MLR 635
1 "The Contract of Employment" OUP 1976
2 "Labour Law: From Here to Autonomy?" [1987] ILJ 1

The particular situation used to explore this is a legal analysis of a change in methods of working, which Towers[3] labels "flexibility of task".

Contract provides four different analyses of an employer's introduction of new working arrangements. One such is that the employer's actions are a unilateral variation of the contract, and hence a breach of contract. In Keir and Williams v. Council of Hereford & Worcester [4], the withdrawal of car allowances incorporated into the contract of employment of social workers was held impermissible. But even where a breach of contract is established, to claim damages requires that the employee terminate the contract and lose his/ her employment, in which case, damages would be limited to the wages that would have accrued in the period of notice, discounted to the extent that the emp[loyee might find alternative employment in this period. There might additionally be a claim for "unfair dismissal" underm the Employment Protection (Consolidation) Act 1978, although again, this presumes that the employment be terminated. But it is rare for the imposition by the employer of a new working regime even to constitute a breach of contract. Freedland identifies three different contractual analyses of a change in the employee's terms and conditions that leave the employer under no liability to the employee.

The first of these is where the employer terminates the contract on notice, but re-employs the affected workers on different (inferior) terms and conditions. The damages that would normally equal the amount of wages that would have accrued in the p[eriod of notice are in fact zero, because in being re-employed on the revised terms, the workers suffer no financial loss. An example of this sort of situation is Burdett Coutts v Hertfordshire CC[5a] where the local authority re-employed its "dinner ladies" on worse terms in this way. Another analysis sees the contract remaining in force, but certain of its terms being varied. This is very difficult

3 "Managing Labour Flexibility" [1987] IRJ 79
4 [1985] IRLR 505
5a [1984] IRLR 92

conceptually, since both contractual consideration and acceptance of the new terms have to be demonstrated. It is difficult to find "consideration", since it is unlikely that the new terms would be a detriment to the employer or a benefit to the employee, and after also difficult to infer "acceptance" by of the new terms merely by unadvised acquiescence by the employee. A third method by which the employer can lawfully introduce new working arrangements is through implied contractual terms. Such terms can afford a wide tacit power to the employer to vary terms and conditions. Fredman & Morris[5] identify this method as the most amenable to employers introducing new technology. A demonstration of this is Cresswell v. Board of the Inland Revenue[6].

In that case, the plaintiff tax officers sought a declaration that their contracts of employment did not oblige them to use a new computerised tax system, and an injunction preventing its implementation. The case is confused by the fact that for various procedural reasons, the case was treated as the complete trial of action, and not just the preliminary application for an interlocutory injunction/ declaration. The employees argued that the computerisation of their working methods was so fundamental as to be a completely new contract of employment, and therefore, that it could not be imposed on the employees without their consent. Their first problem was that civil servants do not have formal contracts of employment[7], but the judge discussed the grading structure of the Civil Service Order in Council of 1982 in contractual parlance. The grades were not regarded as complete job descriptions, but the employees' duties were held in the main, to be derived from the label given to it by the parties. Walton J imputed a wide power to the employer to alter these duties, it being necessary that the job be "fundamentally changed" for the plaintiffs to be successful.

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5 "The State as Employer: Labour Law in the Public Service" ch.3
6 [1984] ICR 508
7 Fredman & Morris, "Civil Servants: a Contract of Employment?" [1988] PL 58

This seems to introduce an ontological, factual criterion into the discussion of managerial powers to vary terms and conditions. This test assessed both the extent to which working methods had been revised, and the reasonableness of the employees having the new skills. This can be analogised to legal judgment of redundancy. Recent cases separating unfair dismissal from redundancy go beyond the parties' contractual description of the job. In McCrea v. Cullen & Davison [8] the employee manager was made redundant on returning from illness, his duties having been absorbed by the managing director. He unsuccessfully claimed an unfair dismissal payment. Gibson LJ's judgment is concerned with the statutory definition of redundancy, but inasmuch as he marries the contractual existence of the job with the actual functions performed by the employee, accepts that the content of the job extends beyond the description given in the contract. It is thewrefore not adequate for Walton J in Cresswell to look only to the contractual description of the job. The job is an objective fact, with a real-life manifestation, rather than the paper shell of a contractual label.

A case that goes even further than Cresswell in assuming an unfettered managerial right to vary the content of the employees' jobs is MacPherson v. London Borough of Lambeth[9]. In that case, the local authority employer disregarded the agreement reached with unions regarding the introduction of new technology. The employee housing officers refused to operate the new computerised method in consequence of the dispute, and the employer refused to pay them. The employees sued for their wages and sought a mandatory injuction requiring the employer to ovbserve their contractual terms. It seemed clear that a breach of a collective agreement such as the one at issue would be a breach of contract. But Vinelott J refused their application, refusing to entertain any attempt to question

8 [1988] IRLR 30
9 [1988] IRLR 470

managerial authority in such a case. It was "clear beyond question" that the plaintiffs could not perform their duties to full effect without the computer, and that the employer could not be compelled to reorganise the working requirements to enable the work to be done without a computer. This seems to result in the obligation on the employee to work being effectively an obligation to work according to whatever process the employer decides, and that the employee cannot challenge a managerial breach of contract and still be paid for it.[1]

The contractual analysis of a variation of employee task sees, as Walton J put it in Cresswell[2] only a, "very fine line from [these] submissions to the submission that employees have a vested right to preserve their working obligations completely unchanged as from the moment they first begin work. This cannot, by any stretch of the imnagination, be correct." But ontological inquiry and its resulting legal "reification" of the job and the identification of status entilements to employment can inculcate common law formalism with a substantive reality. The development of the injunction of the contract of employment manifests both these characteristics.

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1 see further on the complex relationship between work and remuneration Wiluszynski v. London Borough of Tower Hamlets [1989] IRLR 259
2 [1984] ICR 508

INJUNCTIONS AND CONTRACTS OF EMPLOYMENT

Recent years have seen the incorporation of different legal concepts into the contractual framework of the contract of employment partly because the 1980's saw a huge growth in the development of public law. Public law justiciability became of ever-expanding ambit, culminating in the Datafin case[1], which linked reviewability in public law to the function of the body concerned rather than the formal constitutional source of the body's powers. Another public law development was the courts' fashioning of a spectrum of procedural requirements for decision-makers. "Natural justice" moved from being a complete package, either required in total or not at all, to being an amorphous range of procedural standards. These developments suggested that public law might be used to secure the rights of employees by challenging issues related to their employment. But in R. v. East Berks. AHA ex.p. Walsh[2] , the Court of Appeal introduced formal limits on the availability of public law remedies, precluding their use in circumstances where the issue was really one of private rights arising out of the contract of employment.

The applicant in Walsh was an "ordinary" employee, in the sense that his employment was governed by contract, albeit a contract with a public body and on terms incorporating criteria themselves reviewable in public law. But the court held that since the applicant's employment waws contractual, this was not a matter for which public law remedies were obtainable. This case, the logical corollary of the famous O' Reilly v. Mackman[3], thus preserves the formal divide between public law and private law, in distinguishing the issue of public law justiciability from the availability of public law remedies. Public law, "prerogative" remedies will no longer be available in the absence of (per Lord Donaldson MR in Walsh) "statutory underpinning" of an employment relationship. Thus Walsh reduced the utility of

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1 R. v. Takeover & Mergers Panel ex.p. Datafin plc [1987] 1 All ER 504
2 [1984] 3 All ER 425
3 [1982] 3 All ER 1124

public law in ordinary-employee cases. However, this ostensibly limiting decision is intellectually facilitating in other respects, encouraging the common law mind to seek out other paths to the fashioning of substantive remedies for the employment relationship. An important exploration of these areas is undertaken by Ewing and Grubb, in their seminal article "**The New Labour Injunction**".[4]

The writers draw attention to the distinction made by Purchas LJ in the Walsh case between incorporation of natural justice entitlements in the ordinary contract of employment, and employment regulated by public law. In Walsh, partly due to pleading deficiencies, there was no way in which the courts having decided that there was no public law element to the applicant's employment, could treat the case as an ordinary private law case. Hence there was no possibility in Walsh for arguing that his particular employment status yielded remedies other than a contractual remedy in damages. But the writers assert that the doctrines of public law can be transposed into private law, to fashion remedies of a substantive nature. These they label the "new labour injunction".

There are three roots of the remedy explored by Ewing and Grubb. Firstly, they seek to avoid the traditional reluctance of the courts to specifically enforce employment contracts. "Specific enforcement" might be defined as the making of a court order obliging a particular course of conduct, disobedience of which would be contempt of court, and thus includes both injunctions and specific performance. Any doctrinal differences between injunctions and specific performance in the employment context will be discussed in the next section, which concerns the theoretical effects of equitable remedies. The prohibition on specific enforcement is sometimes treated as a doctrinal barrier, sometimes as a matter of practice. The justification for this reluctance is the liberal idea that specific-enforcement, i.e. , is that specific enforcement of labour obligations constitutes a compulsion to work, or

4 [1987] ILJ 145

to suffer the work, of one who is unsuitable, and that this compulsion is an unacceptable invasion of one's freedom of contract and hence personal liberty. It is necessary to engage some of the formal arguments surrounding the practicability of courts granting an injunction of a contract of employment.

It is often asserted that specific enforcement cannot be ordered since, due to the employer's actions, the contract is no longer in existence. If this were the case, even where the employer had acted in breach of contract by denying the employee his contractual entitlements, the employee might be precluded from exercising these rights, and be left to the remedy of damages. It seems that the view that an innocent party can refuse to accept the breach of contract of the other party, even in the employment context[5], with the most recent House of Lords discussion, albeit tangential, endorsing this view [6]. Note however that Aldous J in Alexander v. Standard Telephones & Cables[7] saw the issue as undecided, but preferring the traditional view that such wrongful repudiation puts an end to the employee's status qua employee. This debate has arguably been rendered irrelevant by the line of cases to be outlined[8], but might still be important in considering claim that the conceptual nature of the employment relationship is changed by the cases below.

Also, the value of this conceptual objection has been diminished by cases upholding by means of injunction "restraint" clauses forbidding an employee from competing with a previous employer. One such case is Evening Standard v. Henderson[9], where the Court of Appeal enjoined a particularly skilled employee from going to work for a competing newspaper. Ewing and Grubb say what is sauce for the goose is sauce for the gander, and suggest that this case undermines the view

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5 as per Buckley LJ in Gunton v. London Borough of Richmond [1980] IRLR 321
6 in Rigby v. Ferodo [1987] IRLR 516
7 [1990] IRLR 55
8 particularly Irani v Southampton & South-West Area Health Authority [1985] IRLR 203
9 [1987] IRLR 64

that courts no longer accept that specific enforcement amounts to a "compulsion" to work.

An alternative escape route from orthodoxy is to see a "general rule", rather than a conceptual objection, prohibiting specific enforcement of employment contracts, but with "exceptions" to this "general rule" (which therefore becomes less general). Another possible route suggested by Ewing & Grubb sees the employee as bearer of rights which the courts can protect, rather than the more formalistic enterprise of identifying the situations in which particular substantive remedies can ensue. This is the logic of the rather marginalised case of Jones v. Lee[1] , which they think demonstrates that courts will take, "action to prevent a breach of duty". But their starting point was normative development in public law.

One of the important changes to public law in the late 1970's and hence one of the reasons for its expansion, was that the prerogative writs of **certiorari, mandamus** prohibition and **habeas corpus** no longer had to be sought individually, but were appended to the remedies of injunction, declaration and damages, so that the litigant sought a composite "judicial review" remedy. This change, coupled with the growth of procedural justice requirements in public law, suggested a new approach to the employment relationship, based on public law norms rather than contractual concepts, and with powerful remedies, including that of the injunction. This would be more useful than common law damages. It was for these reasons that the first instances of employees obtaining interlocutory injunctions were to prevent public sector employers dismissing an employee for disciplinary reasons without affording the correct procedural standards.

The burgeoning law of "natural justice" is the short-hand label for the subjection of decision-making to procedural requirements, applies mainly to " office-holders". It is appropriate here to describe the relationship between the law applying

1 [1980] ICR 310

to "office-holders" and general contractual employment law. In Ridge v. Baldwin[2], the House of Lords quashed the dismissal from the police force of a Chief Constable which it held was in breach of natural justice. Lord Reid separated "ordinary master and servant cases" regulated by the contract of service, from those holding offices "at pleasure [of the Crown]" including civil servants etc., and from a category of office-holders,including the applicant, who were entitled to a hearing before their dismissal. Since the employers had not afforded the applicant a disciplinary hearing before dismissing him, his dismissal was quashed.(Lee & Fredman[3] point out however that the applicant's purpose was to preserve his pension rights rather than to obtain re-instatement, which might have influenced the substabntive decision.) Further guidance on the meaning of "office-holder" came in Malloch[4], where a teacher opposed to the re-organisation of education refused to comply with the new requirements and was dismissed. Lord Reid held that he was referred to as "holding office" under the relevant legislation and so was entitled to a hearing before dismissal, as did Lord Wilberforce, who however muddied the waters in interpreting Lord Reid's classification from Ridge as less "compartmentalised", and in fact more expansive, because only where there was no element of public employment or service, no support from statute, and nothing in the nature of an office or status worthy of protection would the case qualify as an "ordinary" master/servant type.

This decision paved the way for the "office" category to become much wider, and in Reg. v. BBC ex. p. Lavelle[5] , the remarks of Woolf J suggested a wholesale expansion of the "office-holder" concept. The plaintiff employee sought judicial review, and an injunction in particular, to secure compliance with the disciplinary code under which she worked. The judge held judicial review procedures

2 [1964] AC 640
3 **"Natural Justice for Employees: Unjustified Faith in Proceduralism"** [1986] ILJ 15
4 Malloch v. Aberdeen Corporation [1971] 2 All ER 1278
5 [1983] 1 WLR 23

to be inappropriate, because the plaintiff worked under a contract, but the case was able to be switched to the private law procedure as if begun by writ[6]. Woolf J thus considered the case as an application by the plaintiff for an injunction. The employment protection legislation, presumbly being the Employment Protection (Consolidation) Act 1978 allowed the courts to order that employees be re-instated. This, Woolf J thought, had "substantially changed" the common law position on termination of contracts of employment, conferring even on ordinary master/ servant contracts the character of an office. In Ewing & Grubb's unjudicial phrase, "We are all toffs now."[7] Woolf J further held in Lavelle that the employer had "engrafted" a disciplinary code onto the employment contract, which although merely procedural, substantially altered the plaintiff's rights.In addition to the entitlement to contractual damages, the court could intervene by injunction or declaration. Although on the facts, declining to exercise his discretion to order either of these remedies, Woolf J had effected important doctrinal changes to the character of the employment relationship.

The office-holder concept could thus infuse even employment under contract with some of the normative, if not the remedial aspects[8] of public law. It also has a function for ascribing the disciplinary entitlements of contractual employees, who could now secure procedural standards before a disciplinary dismissal that would be protected by the courts through the substantive remedy of the injunction. Thus the injunction possibility used to vindicate public law status entitlements can now be available also for private law disciplinary procedures. Procedural protection is no longer dependent on the formal status of the employee,

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6 Under Rule 9 (5) of RSC Order 53, "Supreme Court Practice" 1991
7 [1987] ILJ 145
8 at least after ex.p.Walsh [1984] 3 All ER 425

but on the need for the remedy of injunction[9]. The subsequent case law demonstrates this possibility.

In Irani v. Southampton & South-West AHA[1] , the plaintiff opthomologist obtained an interlocutory injunction preventing his dismissal after a quarrel with a more senior colleague, without a disciplinary hearing to which he was contractually entitled. Warner J's motives in so doing were to prevent the employer being able to "snap its fingers at the rights of employees". This seems to show that a disciplinary code can be secured substantively to the extent that it could be described as a quasi-proprietary right. This is because it would seem to provide an enforceable safeguarding of one's job-security, and that that security is a valuable, albeit not in cash terms, asset. The courts' ability to underpin an employee's disciplinary entitlement was again the matter in issue in Dietman v. London Borough of Brent[2].

That case again concerns dismissal for disciplinary reasons, where a social worker was dismissed after a public inquiry into the notorious death of a child known by the council to be at risk from her parents. The employers purported to dismiss the social worker, and although declining to intervene by way of injunction, the court accepted the argument that the disciplinary code had fettered the employer's powers of dismissal for misconduct. This formal contractual underpinning of the employer's prerogatives to dismiss employees for misconduct could paradoxically afford the employee greater immunity from dismissal than s/he would otherwise have had, because the court could enjoin the employer from acting in breach of the contractual code, and hence afford a status of irremoveability to the employee pending the resolution of the disciplinary procedure. This can mean the more broadly-drafted the disciplinary powers the employer reserves, the greater a

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9 applying the balance of convenience test in American Cyanamid v. Ethicon [1975] AC 396.
1 [1985] IRLR 203
2 [1988] IRLR 299

restriction on dismissal it constitutes. Dietman, along with Ali v. London Borough of Southwark[3] , shows the courts aware of the use that an injunction can be put to in ensuring compliance with a contractual disciplinary code.

It could be argued that these cases objectivise and reify the employee's disciplinary code rather than the job itself. With this public law model, it is almost as if fidelity to a constitutional exercise of authority is seen as more important than the merits of the dispute. After all, is his/ her job, rather than a fair procedure, that the employee is seeking to protect. For example, in Malloch[4], the employee was battling against the new Scottish education system, using his employment status as a weapon in the grander battle to be allowed to continue teaching, and not individuated procedural protection, as Fredman & Lee point out[5]. But the availability of th injunction can develop a legal entity of "the job" permitting the kind of job security that Fredman & Lee assert is only possible by statutory regulation.

The authority transforming the possibilities for injunctions from objectivising disciplinary codes to objectivising the job as a quasi-proprietary entity is the Court of Appeal case Powell v. London Borough of Brent[6]. The plaintiff employee had been internally promoted, but owing to extraneous controversy surrounding the employers' general appointments procedures, the employers tried to revoke the appointment. The applicant sought, successfully, an injunction restraining the re-advertisement of the post and requiring the employer to treat her as validly appointed. The case was not therefore dealing with a disciplinary dismissal, and was therefore much more concerned with contractual entitlements than public law/ natural justice norms. It is a much more orthodox employment situation. Moreover, in

3 [1988] IRLR 100
4 [1971] 2 All ER 1278
5 ."Natural Justice for Employees: Unjustified Faith in Proceduralism" [1986] ILJ 15
6 [1987] IRLR 466

dispensing with many of the theoretical arguments against specific performance of contracts of employment, although positing such conditions as exceptions, the case provides the employee with a method of securing rights in his/ her employment, underpinned by substantive remedies.

In Powell, the leading judgment of Gibson LJ posited a "general rule" against specific performance but with exceptions to this general rule. This focus on expanding the exceptions follows the structure of the Irani case[7] referred to earlier. Such orders would only be made, however, on two conditions. These were firstly that it was just so to do, and secondly, that there was sufficient trust and confidence in the employee for specific enforcement to be reasonable. Since it would normally be unlikely that the employee could satisfy the court that such mutual confidence existed, injunctions were rarely ordered in practice. However, sufficiency of confidence seems to be more than a subjective issue: such circumstances as the nature of the work, the attitudes of colleagues and the likely effect on the employer's operations of the employee's contined employment were all relevant. In Powell, this condition was satisfied in two senses: on the level of potential personality clashes, the council was a large organisation, there was no friction between the plaintiff and her immediate colleagues, and the employer was a "rational and fair-minded organisation". In the second sense, which seems to be more an assessment of the applicant's individual abilities, her competence was demonstrated by her having done the job for several months, and this was not being a case concerning misconduct. No aspersions had been cast as to the plaintiff's ability to do the job apponted to . This second sense of the use of "trust and confidence" might overlap with the condition that the grant of an injunction be "just". The speeches of Nicholls LJ and of Sir Benjamin Ormrod dealt with the narrower issue of application of the "balance of

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7 Irani v. Southampton & South-West AHA [1985] IRLR 203

convenience" test, further consideration of which follows in the next section and the practical justice of making the order on the particular facts of the plaintiff's claim.

Powell has thus extended the availability of employees' injunctions of their contractual terms and conditions of work, going beyond an infusion of public law control of pre-dismissal procedures, and suggesting a framework by which the contract of employment can be used to obtain substantive remedies generally. The injunction can be used as a tool for conferring an immutability to almost all aspects of the employee's job. In doing so,the proprietary nature of the injunction remedy is being used to construct and underpin a conception of the job, and hence prescribe a legal entity of the job, with a substantive normative content. The fact that Powell can be used for securing terms and conditions generally is evidenced by Sir Benjamin Ormrod's emphasis that the case was not about dismissal as a reason for ordering the injunction. The sea-change effected by Powell was followed by Hughes v. London Borough of Southwark[8] , not least because Taylor J (in the High Court, Queen's Bench Division) described his task as being to consider the circumstances in which an injunction could "regulate" a contract of service.

The employer council in Hughes tried to manage a manpower shortage by seconding some social workers from group therapy duties for certain days of the week. The workers objected to this on grounds that it would destroy the value of their work at the other hospital, and because they thought it a political move, unreasonable and hence a breach of their contracts of employment. The judgment is a very rich analysis of how the employment relationship is constructed, embarking on the sort of ontological analysis of job-content necessary for a "flexibility of task" investigation.

Taylor J takes Powell as his starting point, and deals swiftly with the mutual confidence point, Gibson LJ's key criterion, by holding that the employers

8 [1988] IRLR 55

clearly had very great confidence in the employees for the ovious reason that they had been entrusted with the very difficult task to which they were being transferred. The issue is now the practical "balance of convenience" test as posited by Lord Diplock in American Cyanamid v. Ethicon [1975] AC 396, which will be discussed later. The requirement that there be a serious triable issue, focusses on potential breaches of contract. The judge makes some interesting remarks on the correct exercise of managerial authority. To comply with the contract, the order has to be "reasonable", following the test in Sim[9].

In Sim (which is not an "injunction" case) the issue was the right of an employer to deduct sums of money from the salaries of teachers taking industrial action. The industrial action taken was that the teachers had taught only the classes that they had been timetabled for, and had refused to undertake any duties outside of these teaching periods, including covering for absent colleagues. The employers had deducted sums of money in consequence of this, and the teachers sought to recover these monies. Scott J discussed the relationship between the teachers contractual duties and the timetable, and held that their contracts did not really spell out teachers' express duties, most of their contractual obligations being supplied by "professional obligations". The judge's analysis of these professional obligations is that they are incorporated into the teacher's contract of employment by the mechanism of impied terms. Those implied terms seem not to be implied by the Moorcock[1] business efficacy test, but seem to of the sort intrinsic to the particular type of contract, as in the case (cited by Scott J) of Liverpool City Council v Irwin[2].

There is thus tacitly in Sim, as developed by Hughes, an attempt to establish a separate doctrinal regime for contracts of employment. The "professional obligations" in a sense abrogate the contractual rights and duties of the parties. The

9 Sim v. Rotherham Metropolitan Borough Council [1986] IRLR 391
1 (1889) 14 P.D. 64
2 [1977] AC 239

employment contract is thus the representation of an inherent, normatively-discrete concept of a profession. This can be seen as ascribing a content to the job, and treating it as a separate entity. In Hughes, the reasonableness test and the idea that the concept of a profession can supply the principal sources of an employee's duties is taken further. The idea of professional skill is used to ground an entitlement, that entitlement being the right, specifically enforceable, to work in accordance with general and previous professional good standards. The "reasonableness" of the Council's re-deployment is judged not solely by its effects on the individual social-workers, but also by its impact on the content of their work and the recipients of it: "their whole objection is monetary, but related to what the job is, what they feel it ought to be and the distress they feel at the removal of important work"[3]. The judge seems to be respecting the "job" as an independent entity, with a normative content in some measure independent of the contractual relationship between the parties, and with a social and legal existence of its own. This moving beyond contract is further instituted by the availability of an injunction remedy, the judge cleverly using the adequacy of damages test to spot a type of loss ("distress") that is not compensable by common law damages[4]. The reasonableness of the employers' managerial decision seems also to be scrutinised against a tacit Wednesbury[5] test, both at the stage in the Cyanamid[6] algorithm of "triable issue" and the "balance of convenience". The latter issue will be discussed more fully in the next section . As to the public law analogy suggested by the Wednesbury test, this will also be discussed in a later section. It is worth noting now perhaps that the courts might be more interventionist in the employment context than the Wednesbury test would permit in public law. This is because managerial authority is not "constitutional" authority. Scott J in Sim

3 [1988] IRLR 55
4 authority being Bliss v. South East Thames Regional Health Authority [1985] IRLR 203
5 Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
6 American Cyanamid v. Ethicon [1975] AC 396

deliberately left the question as to whether Wednesbury was the appropriate test open.

Hughes might permit the transformation of the contract of employment from despotic source of subordination to formal setting for the incorporation of an objectivised legal structure for the employment relationship. In this sense, contract might be used as Kahn-Freund suggested twenty years ago[7] . Contract identifies the beginning and end of the relationship, but its content consists of a cocktail of diverse legal sources.

After Irani and Powell, the crucial element governing the availability of injunctions is the concept of "trust and confidence" in the employee. At one level, this refers to the meta-contractual social understandings that facilitate contract. The difficulty of representing this within the law must be one of the reasons that it palely loiters on the periphery of remedial discretion, and has now been appropriated by the body of law surrounding the circumstances in which an injunction could or could not be ordered. In the disciplinary context, "trust and confidence" becomes a factor personal to the employee's suitability to occupy a particular job. In that sense, it is not "mutual" trust and confidence, but a concept describing the attitude of the employer to the employee. But it is not truly "personal" in the sense that there are legal circumscriptions of the employer's ability to decide that trust and confidence should no longer exist. Thus in Irani[8], the distinction was made between a desire to be rid of the employee (that case involving a clash of personalities) and faith in the honesty and integrity of the employee. It seems to me, though this has not really been canvassed in subsequent cases, that Powell and Hughes are cases where trust and confidence existed in the latter sense; in Ali[9], it did

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7 "A note on "Status" and "Contract" in English Labour Law" [1967] MLR 635
8 Irani v.Southampton & S.West AHA [1985] IRLR 203

9 Ali v London Borough of Southwark [1988] IRLR 55

not. Ali shows how trust and confidence has been subsumed under the legal attempt to control the exercise of managerial prerogative. The case was an application for an interlocutory injunction to secure certain procedures in the disciplinary hearings deciding the fate of various care-workers. The application was denied, the judge holding that the employer had not unfairly prejudiced the employees, but even if it had, an injunction would only be granted if the employer retained confidence in the employee or such loss of confidence was "on an irrational ground" 1). The law thus seeks to set standards of managerial conduct here, assimilating faith in the employee to a managerial prerogative. This is the situation in the "disciplinary" cases. But in the case of an employee seeking to assert rights in the content of the job, as in the Hughes situation, "trust and confidence" is not really a subjective issue dealing with the conduct of the particular employees. Instead, it is an objective legal, rather than a managerial, entity. So in Alexander v Standard Telephones & Cables Ltd.[2] , the relevance of trust and confidence where the employer is trying to implement a redundancy dismissal rather than a disciplinary dismissal, Aldous J should have been more interventionist. "Trust and confidence" in that situation should rather be trust and confidence in the allocation of jobs within the enterprise, and hence an objective inquiry into the firm's organisational needs. This is the inquiry undertaken in Hughes.

This section demonstrates that the courts can now preserve elements of employees' jobs by injunction. The doctrinal effect of an injunction, and the validity for my claim that employment rights have been rendered quasi-proprietary rights by this, is elaborated in the next section.

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1 **ibid.**, per Millett J, @ 61
2 [1990] IRLR 100

EQUITABLE REMEDIES AND DOCTRINES OF EQUITY

The early English common law engendered a need to comply rigidly with established formalities, so that success in a legal action became more a a matter of such compliance than the merits of a particular case. The obvious injustice that this permitted was tempered by the development of a separate jurisdiction of equity, whose remedies were dependent on the justice of the case rather than rigid formality. This equitable jurisdiction had its own courts, dealing with rights and interests principally related to proprietary interests, and, being separate from the Common Law courts, developed its own doctrines and procedures. Equitable remedies included injunctions and specific perfomance. With the Judicature Act 1870, the common law courts and the courts of Equity were merged, but Equity made doctrinally pre-eminent. So today, an equitable remedy can often be sought in addition to, or instead of, the more conventional contractual (i.e Common Law) remedy of damages in the same action. Since the Equitable jurisdiction was built on the idea of deserving litigants being entitled to adequate remedies, its doctrines are the product of the granting of particular remedies in particular situations. Hence doctrine follows remedy. It is hence a flexible and dynamic body of law. As Meagher, Gummow and Lehane put it[1], "....equity remains as vital and fruitful source of principle as it has ever been, because the fundamental notions of equity are universal applications of principle to continually recurring problems; they may develop but cannot wither." The source of "principle" germane to this study is to explore the doctrinal grounds for granting an injunction (or, correlatively, specific performance), of an employment contract, and the effects of so doing, since only with a theoretical understanding of these equitable remedies can an attempt be made to transfer the effect in domestic law of the cases considered to the framework of European Community jurisprudence.

1 preface to "**Equity: Doctrines and Remedies**" (2nd ed.)

Despite the institutional fusion of the common law and equity, their jurisdictions are not entirely co-extensive. Since the grant of an equitable rather than a common law remedy depends on the nature of the legal rights before the court, there has to be some doctrinal, structural limit to the availability of equitable remedies. Meagher, Gummow and Lehane writing on equitable remedies in general, assert that equitable remedies exist to preserve equitable rights, but their notion of what is an equitable right is itself a product of their text-book rationalisation of the reported decisions. But generally, the grant of an equitable remedy is reasoned by analogy to situations in which a particular remedy has been granted, rather than theoretical investigation of the nature of rights. Indeed, it would be more correct to say that the **corpus** of equitable remedies has established the English law conception of property, Kahn- Freund regards equitable remedies as the chief reason for English law's very flexible concept of property, so that Equity's jurisdiction is based principally around proprietary interests. Thus a right to specific performance although a "mere equity" is a proprietary interest nonetheless. This is perhaps the reason that "right" and "remedy" become so entwined. The focus on "principle" at least forces discussion of the conceptual nature of different equitable rights.

"Injuctions may be described as court orders forbidding or commanding the person to whom they are addressed to do something."[2] . One can divide this **genus** into its various manifestations of **quia timet**, prohibitory, mandatory, interlocutory and perpetual. The useful divide for these purposes is between the interlocutory injunction (a provisional order relating only to period before trial) and the perpetual injunction, which is an injunction granted in final judgment after full trial of the relevant issues. Under section 37 of the Supreme Court Act 1981, a court has a very wide discretion in deciding whether or not to grant an injunction. It is possible, "in any case in which it appears to the court to be just and convenient to do

2 **ibid.** ch. 21

so."[3] This discretion has been used much more liberally in the case of interlocutory injunctions than with permanent injunctions.

A permanent injunction is decisive of the parties' legal rights, and affords a successful plainfiff both the ability to invoke the coercive power of the court to secuire the defendant's compliance with the order and also constitutes and crystallises an equitable right. An interlocutory injunction is intended to prevent the applicant for a permanent injunction from suffering uncompensable damage in the time that it would take for a court to convene a full hearing of the plaintiff's complaint. It is thus more in the manner of a procedural step than a substantive remedy, although in practice, an interlocutory injunction can obviate the need for a full trial. The practical effect of an interlocutory injunction may therefore be the same as that of a permanent injunction. It does however make sense to discuss interlocutory injunctions in isolation from permanent injunctions, and to analyse the case American Cyanamid v Ethicon [4].

In Cyanamid the House of Lords considered an application to restrain by injunction an anticipated breach of a drugs patent. The first instance judge, Graham J, granted the injunction.The Court of Appeal discharged it, but it was restored on further appeal to the House of Lords. Lord Diplock gave the leading speech, in which he laid down criteria by which the grant of an interlocutory injunction should be considered, emphasising the temporary, discretionary nature of the remedy. The principal idea expressed is that of "the balance of convenience".

The term "balance of convenience" is used, confusingly, in two senses. It is chiefly used to emphasise that the main issue is not formally being decided and that an interlocutory injunction is just a practical procedural stage. The balance is sought between the need to protect the plaintiff against violation of rights which could not be compensated by damages were the claim ultimately to be successful, against the desire to protect the defendant against loss suffered were the interlocutory injunction to be discharged at final trial, for which damages might also be inadequate. The key question is thus the adequacy of common law damages to the respective parties.

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3 Supreme Court Act 1981, section 37
4 [1975] AC 396

The court thus has to consider the likely consequences ensuing from the grant or refusal of the interlocutory injunction. This entails identifying the likely losses and considering both whether that particular type of loss is recognised by the common law of damages and whether the losing party would be able to pay any damages assessed against him or her. It is unlikely that this issue will be evenly balanced, but if it is, a "balance of convenience" in a second, narrower sense is invoked, being that the pre-trial **status quo** is preserved. The point of time to be nominated as the **status quo** is not clear, at least in the employment context: contrast the suggestion of Lord Diplock in Garden Cottage Foods[5] (the point immediately prior to the plaintiff's issue of the writ) with the point chosen by Taylor J in Hughes[6], where the situation prior to the employer's change in working arrangements was adopted. The latter view seems better, although the Wadcock case[7] might suggest a different route.

It is clear that the Cyanamid decision liberalised the grant of interlocutory injunctions. Evidence of this is supplied by the necessity for the enactment of section 17 (2) of the Trade Union and Labour Relations Act 1974, which restored the pre-Cyanamid necessity to investigate the merits of the plaintiff's case in situations where an employer was trying to restrain a strike by use of an injunction. There are further judge-made exceptions to the Cyanamid test in where freedom of expression is in issue. However, in the situation of an employee's application for an interlocutory injunction of his/ her contract of employment, it is clear that the Cyanamid criteria are the correct ones[8] But the effect that the Cyanamid liberalisation has had on the doctrinal nature of the interlocutory injunction

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5 Garden Cottage Foods v. Milk Marketing Board [1983] 2 All ER 770
6 Hughes v London Borough of Southwark [1988] IRLR 55
7 Wadcock v London Borough of Brent [1990] IRLR 224
8 see particularly, Hughes v. London Borough of Southwark [1988] IRLR 55

is unclear, judges adopting very different reasoning in following the "balance of convenience" procedure.

Jones v. Lee[9] shows the rather procrustean methods of Lord Denning MR: the contract of employment established a disciplinary procedure, damages were not available in respect of the employer's breach of contract, so it was a "plain" case in which to order an interlocutory injunction. Then in Irani[1], Warner J put a sophisticated gloss on this by holding that the refusal of an interlocutory injunction would result in the contract of employment terminating, albeit in breach of contract, and thus the destruction of the employee's ability to obtain a permanent injunction at eventual trial. Furthermore, common law damages could not compensate the loss of income from private patients nor the loss of employment prospects in the NHS should the plaintiff should the plaintiff be successful at trial. The same idea was used in Powell v London Borough of Brent[2] , where Nicholls LJ granted an injunction since the plaintiff could not be compensated in damages for loss of job satisfaction nor for the embarrassment at being removed from her promotion. The non-compensability of loss of job satisfaction being a loss justifying the intervention of the court was also used in Hughes[3]. Although not adverted to in the cases cited, there is in fact authority that common law damages are not available to compensate for distress suffered on wrongful termination of employment: Bliss v. South-East Thames Regional Health Authority[4]. These cases demonstrate that equity recognises and remedies losses which the common law will not compensate: in fact the common law view expressed by Walton J in Cresswell[5] would deny that a loss of job satisfaction could even be a cause of action.

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9 [1980] ICR 310
1 Irani v. Southampton AHA [1985] IRLR 203
2 [1987] IRLR 466
3 Hughes v. London Borough of Southwark [1988] IRLR 55
4 [1985] IRLR 308
5 Cresswell v. Board of Inland Revenue [1984] ICR 508

The use of the "adequacy of damages" test as a means of identifying new types of loss suggests an analogy with the doctrine of specific performance. Specific performance is basically a court order requiring that a contract be performed, disentitling the party in breach or threatened breach of the contract from paying damages instead of performing the bargain. Again, it is an equitable remedy. There is a case for maintaining, as Harris[6] seems to argue that injunctions (at least, permanent injunctions) are a species of specific performance. Certainly, it is often stated that a court will not grant an injunction of a term in a contract of employment beacause the courts will not grant specific performance of an employment contract and an injunction amounts to indirect specific performance. But it is not strictly true. As Meagher, Gummow & Lehane point out[7], specific performance is an order dealing with the entire contract, equity "doing what ought to have been done" in ordering full peformance of the contract. An injunction on the other hand is, as we have seen, based on the inadequacy of damages for breach (or apprehended breach) of a particular contractual term. Another difference is that the equitable interests under consideration are not formally the same. In Hutton v. Watling[8] , Jenkins J considering an order for specific performance of a contract for the sale of a dairy, explained that the jurisdiction to grant specific performance did not arise from the purchaser's equitable interest in the land arising on the formation of the contract of sale, but from equity seeking to perfect the sale in circumstances where damages would not be an adequate remedy. It might therefore be in my interests to maintain a formal separation between specifc performance and injunctions, since the equitable right arising on grant of an injunction is more easily treated as a right in the job than is the explanation of the equitable rights affording specific performance in Jenkins J's analysis.

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6 "Remedies in Contract and Tort", ch. 13
7 "Equity: Doctrines and Remedies"
8 [1948] 1 Ch. 26

But an analogy with specific performance serves a useful purpose inasmuch as it can facilitate the development of my rather romantic, personal view of work. Specific performance of a contract of sale is an abrogation of the "market" remedy of common law damages. It is in this sense not an "efficient" method of enforcing contracts, and thus it is thought that limitations on its useage are necessary to encourage contractors to behave in an economically efficient way. Hence it is invoked only where the subject matter of the sale is so highly specific that damages would fail to compensate the purchaser for his/ her failure to secure the article contracted for. The degree of specificity required was described poetically in Falcke v. Gray[9] as being where the article was of "unusual beauty, rarity and distinction". In the line of cases setout above, the courts have identified types of loss arising out of a change in working conditions which permit of equitable relief.This perhaps supports the "craft" conception of useful work underlying my attempts to ascribe a content and legal cocoon for "the job". A whole panoply of non-marketable rights intrinsic to one's employment can be legally preserved. Hence job satisfaction (Powell, Hughes); social utility of the work (Hughes); continuation of employment status within a monopolistic employer (Irani); ability to assert one's legal rights and facilities to exploit one's abilities to economic advantage with persons other than the employer (Irani, and, arguably, Evening Standard v. Henderson[1]). All of these have already been recognised, and there seems to be no doctrinal bar to the institution of other subjective and objective elements of one's job. Equitable remedies will be available in all of these cases. The list is not closed: Sachs J stated in Bertola[2] that the courts are increasingly aware of many areas of damage that would fall outside the ambit of common law damage. The analogy between injunction and specific performance justifies the extension of heads of loss for which damages would be inadequate so

9 (1859) 4 Drew 651
1 [1987] IRLR 64
2 Evans Marshall & Co. v Bertola SA [1973] 1 All ER 992

long as these remain true to the factors that a court would approve if the application were for specific performance of a contract of sale. Furthermore, the courts have started to relax some of the formal requiremants of specific performance. In Posner v Scott- Lewis,[3] Mervyn Davies J had no qualms in dispensing with the perceived necessity for the court to be able to supervise any order of specific performance. That case is interesting also in that the order was specific performance of a contract requiring lessors to provide a resident caretaker, and is thus[4] specific performance of an employment contract. It might thus be asserted that linking specific performance and injunctions will also prevent applications for injunctions failing on the incantation that an injunction represents a back-door to specific performance. If specific performance can be justified, there can be no objection in principle to the grant of an injunction. The comparison between what are essentially prohibitory injunctions and specific performance should also dispel any formal argument that prohibitory injunctions afford lesser protection than mandatory injunctions.

But to return to the principal theme of this section, the effects in equity of interlocutory injunctions and the consequent conceptual treatment of such injunctions necessitate consideration as to whether there is any theoretical difference between an interlocutory and a permanent injunction. Firstly, even after Cyanamid[5], a succesful plaintiff must demonstrate a triable issue. While this does not mean that the plaintiff has to prove the facts that would be required for the ultimate success of the claim, the plaintiff must presumably prove that the facts if proved could justify the Court's grant of a permanent injunction. This would explain Lord Diplock's opinion in Cyanamid that a court should not order an interlocutory injunction if there were no possibility of a permanent injunction being granted at final trial. An

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3 [1987] Ch 25
4 albeit at one remove: Giles v. Morris [1972] 1 All ER 960
5 American Cyanamid v Ethicon [1975] AC 396

interlocutory injunction would seem therefore to impart the same equitable rights to a successful applicant as would be constituted by a permanent injunction. Put another way, it might be reasoned that since there are cases in which the courts have granted interlocutory injunctions of employment contracts, and according to Lord Diplock, an interlocutory injunction is conditional on the availability of a permanent injunction at final trial of action, the nature of the equitable rights arising out of an interlocutory injunction is the same as is established by a permanent injunction, albeit limited in point of time. The equitable interest protedcted or constituted by an interlocutory injunction is thus not merely ephemeral. Therefore, an interlocutory injunction has the doctrinal effect of a permanent injunction.

While this is germane to the theoretical debate surrounding equitable remedies and their substantive legal effects, the "balance of convenience" criterion is important at a practical level. All of the injunction cases referred to so far have arisen out of employment in the public sector. The judges granting the injunctions seem to have been much influenced by the public authority employer not really being inconvenienced by an order effectively preserving the employment of the aggrieved employee. This factor was expressly referred to in Irani v Southampton AHA[6] and further in Powell v. London Borough of Brent[7] where the Gibson LJ pointed out that the council was a large organisation in which the possibilities for personal friction between employers and employee were much less, and also that the employers were a "rational and fair-minded organisation" (although the facts revealed in Powell seem rather good evidence to the contrary). The second point suggests further that since public bodies' actions are generally susceptible of judicial review (although not those employment obligations effected in private law [8]), the courts are more ready to

6 [1985] IRLR 203
7 [1987] IRLR 466
8 Reg. v East Berks AHA ex. p. Walsh [1984] 3 All ER 425

question the exercise of employer authority. Evidence of this is provided by the incursion into the judgments of the language of "reasonableness" and "rationality". In Ali v London Borough of Southwark [9] , Millett J, in refusing the employee's application because of loss of trust and confidence, held that the employers had, "certainly lost it on reasonable grounds...this is not an unreasonable or irrational attitude..", and stated the more general proposition that the court will only intervene in an employment case by way of injunction to restrain dismissal where it is satisfied that the employer still retains trust and confidence in the employee, or, if he claims to have lost such trust and confidence, does so on irrational grounds."[1] The only private sector case applying for an injunction, Alexander v. Standard Telephones & Cables[2] sees Aldous J display a very different attitude to the private sector employer.

In Alexander, the employer was instituting compulsory redundancies which the unions argued breached the "last in, first out" procedures of a collective agreement and hence their contracts of employment. The employees applied for interlocutory injunctions restraining the implementation of dismissal for redundancy until the redundancy procedure had been complied with. Aside from the debates over contractual incorporation of collective agreements and Aldous J's re-discovery of a common law formalism progenitive of conceptual objection to any specific enforcement of the contract of employment, the chief reason for the judge's refusal of the employee's application was deference to what is often called the "management right to manage." In Alexander, the whole issue of employer "trust and confidence" in an employee was treated as entirely subjective, which is all the more remarkable when one considers that this case was not one of dismissal for a disciplinary reason. Aldous J stated that the employers' decision to favour one allegedly more useful type

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9 [1988] IRLR 100
1 **ibid.** para 62
2 [1990] IRLR 55

of employee over another had been reached "after careful consideration", although no evidence of this seems to have been tendered, and none was required by the judge. This contrasts very much with Hughes[3], where Taylor J's willingness to prevent the employers' redeployment of the social workers came from considering whether the employer was, "properly informed as to its priorities", and deciding that its policy of, "robbing Peter to pay Paul" was not a sensible one in the circumstances. There is thus some suggestion of a difference in the courts' treatment of public sector employers from private sector ones.

This suggestion is strengthened by examining another apparent difference in Alexander from the other cases discussed. This deals with what might be called the employer's prerogative to decide that a job is obsolete. In Powell[4], one of the reasons for granting the injunction was, as Ralph Gibson put it,that the job "needed to be done". Similarly in Irani[5], the employers' dismissal was proposed only because of a personality clash. If the employee had been dismissed, the employer would have taken on a replacement opthometrist. In Alexander, however, the whole tenor of the judgment is that the employer is perfectly entitled to divest himself/ herself of whichever jobs no longer seem necessary. The issue would then fall to be treated under the statutory regime deealing with redundancy, where the issue is not generally control over whether a particular organisational structure can be changed, but is more the impact such change has on the particualar incumbents of the jobs being lost. Aldous J's principal motivation seems to be that an injunction cannot be used to give employees jobs for life in circumstances where the employer,"believes that he does not have any work for them to do." Probably quite unconsciously, Aldous J has identified a tacit assumption in all thew applications for injunctions in cases of public sector employment. That is that whereas in the private sector, the

3 Hughes v. London Borough of Southwark [1988] IRLR 55
4 Powell v Brent [1987] IRLR 466
5 Irani v. Southampton AHA [1985] IRLR 203

organisational structure arises solely from the employer taking a "market" decision about how best to function, and employing workers to perform functions which are the the product of a contractual allocation of particular functions within the firm, in the public sector, the employers are generally under some statutory duty to provide particular services. The public sector employer therefore **requires** personnel to discharge the functions required by these statutory duties. (although the courts might decide that it is up to the body concerned to decide how it wishes to discharge such duties)[6] Thus the organisational structure of a public sector enterprise has some legal foundation independent of a contractual matrix. It is thus easier for an employee to argue that an injunction preserving his/ her employment does not result in "inconvenience" under the "balance of inconvenience" test, since the employer does not really have the same room for manoeuvre in declaring the "non-existence" of a particular job. This statutory duty point seems to be important, not least because it has never been adverted to in any case save Hughes where it was referred to in passing in the context of the court's ability to impugn the reasonableness of public sector employers' decisions.

The differences between the courts' treatment of public and private sector employment might suggest a new public/ private divide in injunction cases, although "public" would extend wider than the availability of Order 53 and would be less restrictive than the situations required by ex.p. Walsh[7]. But happily, I would expect the employee injunction to be available in private sector cases as well. One reason is that Alexander would be more aptly described as a "numerical flexibility" case than one concerning the content of the actual tasks. Another is that the remedy of an injunction being equitable and hence discretionary, and considered on the basis of the "balance of convenience" as discussed above, cannot permit of formal doctrinal

6 see the remarks of Henry J in Barrets & Baird v Institution of Professional Civil Servants [1987] IRLR 3 for the relevance of statutory duties in a different context.
7 Reg. v East Berks AHA ex. p. Walsh [1984] 3 All ER 425

bars to its grant as long as an equitable right can be identified. On a formal level, this can be found in private sector employment as much as in public sector employment. The fact that a "balance of convenience" test need not exhibit this formalism is shown by Wadcock v London Borough of Brent[8]

In Wadcock, a social worker obtained an interlocutory injunction restraining the employers from implementing his dismissal for his refusal to comply with a new, reorganised working arrangements that he had maintained were unreasonable and unacceptable. Mervyn Davies J found that the employers had "trust and confidence" in him **qua** employee. The dismissal situation arose only because of the applicant's dissatisfaction with the new work regime. He thus granted an interlocutory injunction, but the terms were such as to allow the **status quo** to be the employers' new work system until the final trial of the action. This is very important, in several ways. Firstly, it is important because a reorganising employer would find it very difficult to argue that s/he was suffering any inconvenience, under the balance of convenience test, in the court substantively protecting the worker's continued employment. It also allows contractual disputes surrounding managerial prerogative to reach a real trial forum, as applications for permanent injunctions, with both parties being protected in some measure. Thus a jurisprudence of "job content" might arise. The private sector employer's managerial powers can be reviewd and circumscribed legally, without the artificiality of a common law analysis of the employment relationship holding sway.

Wadcock shows how equitable rights, and their quasi-proprietary effects, are artificial products of language, being based on the particular text of a drafted order. Law, a linguistic discipline, is to be homogenised in the Community context through legal institutions such as property which are common to all of the member states' jurisdictions yet not uniform, and with some proprietary rights arising

8 [1990] IRLR 224.

out of language. Proof that Community Law has to accept the domestic, language-based institution as almost a factual rather than a legal matter is shown by the idea of copyright. Copyright is a property right, artificially constructed and delimited by language, yet effective in Community jurisprudence, as in the Warner Bros. case[9]. But this discusson of the manifestation of domestic rights and remedies as Community rights justifying Community or domestic remedies will follow in the next section.

9 Case 158/ 86 Warner Bros. Inc. & Metronome Video Aps. v. Erik Viuff Christiansen [1988] Reps. Cases 2605

MANIFESTATIONS OF DOMESTIC RIGHTS IN THE COMMUNITY LEGAL ORDER

The analytical choice between regarding remedies as a consequence of legal rights and legal norms as a product of legal remedies is carried over into European Community law in trying to connect the English law equitable rights in employment to a putative Community law right of employment security. Community Law is structured such that defined rights generate remedies, whether in the domestic law of member states or within the Community's own legal system. When it is necessary to transpose a municipal law right to the Community system of rights, the process used is what Mendelson's international lawyer's perspective calls describes as "evaluative comparative law".[1] This idea is necessary where the Community legal order is anxious to protect the basic rights extant in municipal law, but has no legislative or other means of doing so.

The operation of this evaluative comparison must depend on how the municipal law concept is presented. The (alleged) equitable right to employment security might be presented as a proprietary right. In this case, the evaluative comparison would investigate the correspondence between this proprietary right and the pre-existing norms of Community jurisprudence. Where the domestic "right" is the claimed effect of a domestic remedy (e.g. the injunction), the process has a further stage. The effects of that remedy can only be assimilated into Community law according to a Community law interpretation of the remedy's effect in the domestic law of the member state (it being the requirement of the Rutili case[2] that the level of protection afforded to fundamental rights be a Community judgment rather than a domestic law judgment.). Then, but only if the remedy is regarded as having the domestic law effect claimed, the correspondence between the domestic norm and the relevant Community norm can be assessed. So in either case, there has to be some

1 Mendelson [1981] 1 Ybk. Eur. Law 125
2 Case 36/ 75 Rutili [1975] ECR 1219

reasonably secure notion of the content of Community law in this particular area, manifested either in the Treaty or some other Community legislative instrument, or divined from the developing fundamental rights jurisprudence.

The idea of "fundamental rights" in Community law is an attempt to reproduce in Community law some of the constitutional traditions of the Community's member states. The approach taken has hitherto been to derive a normative balance of the different constitutional rights in the Community's component states. This is thus a goal-based, architectonic approach, the Community's fundamental rights being the results of self-consciously prescriptive assessments by the European Court of Justice of the effects of European constitutional traditions. It is difficult to examine this jurisprudence without some identification of the underlying conceptual assumptions made by the Court.

Weiler's paper **"Methods of Protection of Human Rights in the European Community"**[3] adopts a grandiose "taxonomy" of human rights "generations" His main paradigm seems to be a rather old-fashioned notion of the vulnerable private individual protected from governmental authority. But when considering, for example , rights of property, it is however necessary to consider private parties as potential violators of rights, as well as potential owners. This is particularly the case when the internal market will encourage general power groupings which are formally "private", yet will assimilate certain characteristics of public power., and annexe certain functions of public power (for instance, private regulatory bodies). All of this would seem to be excluded from the Weiler model of rights. It therefore seems not to be sensible to cast the molten Community fundamental rights jurisprudence in the mis-shapen mould of citizen/ state power relationships.

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3 EUI Colloquium Paper

Another feature of "fundamental rights" in the European legal tradition is observed by Henkin[4]. He contrasts the French concept of declaratory, defined rights which includes affirmative obligations of the State to the individual (a Social Contract) with the American tradition of rights being inherent limits on the authority of the State over the individual. It is helpful to observe in passing that the French project of the European Social Charter adopts the "entitlements" approach to the construction of its Articles ascribing certain rights to the European worker/ citizen. The Social Charter might thus play a hegemonic role in influencing the structure of the Court of Justice's approach to fundamental rights. But this Henkin dichotomy suggests two methods of building a job property right as a fundamental right in Community Law.

The first of these is to adopt the "American" conception of rights, identifying a right of property and discussing how Community law can prevent violation of this right. The analysis here would be of the "injunction" cases and the interpretation that these were constitutive of a right of property in English law, in the sense of affording protection against the action of others. The second would be to take the European tradition of rights as including entitlements, and cast the employee's ability to preserve particular elements of his/ her employment from being over-ridden as a positive entitlement to job security. Whichever rights construction is adopted, it is necessary to "pigeonhole" a right into the relevant Community concept. But by identifying both of these conceptions of rights, it is easier to present a domestic law right so as to facilitate its incorporation into Community law. This is made slightly eassier anyway with fundamental rights, in that their case-by-case development makes fundamental rights inherently quite fluid. It is now necessary to

4 "Economic and Social Rights as "Rights": a United States view" [1981] Human Rights Law Journal 223

find suitable vehicles by which the domestic law injunction might manifest itself as a proprietary right in Community law.

The first of these is Article 222 of the EEC Treaty. This rather obscure provision is tucked away in Part Six of the Treaty. It reads, "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." This Article can be construed in many different ways, almost to the extent that it can be invoked to establish directly-contrary propositions. On one hand, there is the view of Advocate- General Capotorti in the Hauer case[5]. His remarks in response to the plaintiff's recourse to Article 222 seek to limit its extent, in that, "it confirms that it was not the intention of the Treaties to impose upon Member States or to introduce into the Community legal order any new system of property or system of rules appertaining thereto." This suggests that the Community property norm is only passive, allowing Community nationals to utilise their domestic law property rights as a check on Community legislative action (which is in fact what Frau Hauer was trying, unsuccessfully, to achieve. The interpretation that Article 222 as designed to subject the Community's executive action to constitutional limits is continued in the Fearon case[6]. There, Advocate- General Darmon adopted the remarks quoted in Hauer, which were again approved in the Warner Bros. v Christiansen case[7]. This view of Article 222 might be categorised as the "American" conception outlined above; as Reich puts it[8], property rights guard, "the troubled boundary between individual man and the state."

But in the tradition of rights as entitlements, the hallmark of property should not be the right to exclude,but the "right to use", Macpherson[9] seeing this as

5 Case 44/ 79 Hauer v. Rheinland Pfalz [1979] Reps. Cases. 3727
6 Case 182/ 83 Fearon v. Irish Land Commission [1984] Reps. Cases 3677
7 Case 158/ 86 Warner Bros. Inc. and Metronome Video Aps. v. Erik Viuff Christiansen [1988] Reps. Cases 2605
8 "The New Property" [1963-4] 73 Yale LJ 733
9 "The Changing Concept of Property" in "Socialism, Capitalism and Beyond" ed. Kamenka & Neale

the culmination of property development. Also, since there is a tradition in some member states of property rights being entitlements, or rights of access, it would "prejudice the rules..[in those].... Member States governing the system of property ownership" were this tradition to be excluded from the content of the emerging European property norm. If an "entitlement" right were adopted, it would effect changes in those states that do not have such a conception, since where Community law applies, it is pre-eminent over national law. It is therefore necessary to look for "rights as entitlements" featuring in the Court's jurisprudence on property rights. One relevant case is the Testa case[1].

In that case, the European Court of Justice considered whether migrant workers' social security claims arising from their employment in another member state constituted property rights in Community Law. Both the Court and Advocate-General Reischl left the question open, deciding on other grounds that the claims were no longer extant. But the arguments put forward in the case were interesting. Firstly, the Court refused to exclude what in the Nold case[2] had been dismissed as "mere commercial interests" from being regarded as a proprietary right. Further, the Advocate- General expressed the view that property rights be examined against against a background of the social function of property, so that the limits of these rights be decided with reference to the overall objectives of the Community. The latter incantation of the Rutili formula[3] that the infringement of fundamental rights be judged by Community law itself was also expressed by the Court, who assessed the plaintiffs' entitlements against the proportionality criterion. The linkage of these two elements is interesting.

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1 Cases 41,121 and 796 /79 Testa, Maggio and Vitale v. Bundesanstalt fur Arbeit [1980] ECR 1979.
2 Case 4/ 73 Nold v. Commission [1974] ECR 491
3 Case 36/ 75 Rutili [1975] ECR 1219

The rights claimed by the Testa[3a] applicants come from Community law, being the obligation under Directive for member states to meet the social security entitlements of migrant workers. The applicants' claim that these rights are proprietary was founded on the domestic constitutional guarantee of private property provided by the German Basic Law. But the assessment as to whether these rights had been infringed is to be made by Community law, which means that Community law has, rather by sleight of hand, created a property norm, since it requires domestic property to correspond to Community ideas of property. Such a property norm would have appended to it ancillary concepts, such as the requirement of proportionality, diluting a standard municipal law conception of property with a European policy aim. In doing this, the court evades the stated purpose of Article 222. This was demonstrated in the Hauer case[4]. There, a viticulturist claimed that her rights of property were being infringed by a Community Regulation restricting the amount of wine- grapes that could be grown. The rights claimed were again under the German Basic Law, but it seems that the Court of Justice, in applying Community criteria to its judgment as to whether her rights of property had been infringed, was in effect treating her domestic rights merely as elements in a policy judgment by the Court. The same thing happened in Testa.[5] Thus, notwithstanding the views expressed by Advocate- General Capotorti in Hauer on Article 222, the fundamental rights doctrine over-rides domestic property rights with the policy judgments of the European Court of Justice. The fact that the German legal system accepted the Court's ruling is just evidence that municipal legal orders accept the doctrinal supremacy of Community law as a logical consequence of its being formally supreme.

3a Cases 41,121 and 796 /79 Testa, Maggio and Vitale v. Bundesanstalt fur Arbeit [1980] ECR 1979
4 Case 44/ 79 Hauer v Rheinland-Pfalz [1979] Reps. Cases 3727
5 Cases 41,121 and 796 /79 Testa, Maggio and Vitale v. Bundesanstalt fur Arbeit [1980] ECR 1979.

Furthermore, since the claimed domestic property right in Testa was itself only the domestic law manifestation of rights furnished from Community legislation, the earlier suggestion that the Community property norm accommodates "entitlements" in its concept of property is supported. So Community law might have a property norm that affords entitlements, in which these entitlements and the test of infringement would be the product of a policy judgment by the Court. These points refer back to the concept of "evaluative comparison" as the source of Community rights. Since the Court has a wide liberty in deciding whether or not to give effect to the claimed rights, the "system of property ownership" in any member state would be a valid empirical source for this policy judgment. So with the injunction of the employment contract, the Court could, if it took that view, interpret the effect of this remedy as establishing a right to employment security in Community law. Alternatively, since German labour law has very different notions of production as a collectivised social arrangement, a right to employment security might be extracted from these concepts, taken to be a Community right, and installed in English law to require the greater availability of injunctions as elements in the balance of convenience test, in the manner alluded to by Taylor J in Hughes[6]. But in the Cinetheque case[7], the European Court of Justice held that it had no jurisdiction to review for fundamental rights national legislation unconnected to Community law. So all of this speculation about the content of fundamental rights is useless without some discussion of the justiciability of such rights in the European Court of Justice, and its jurisdictional basis for intervention. It is also better if the rights identified are directly effective, so as to permit of what Weiler[8] calls "horizontal vidication" of these rights, i.e. assertion of the right by one private party against another, rather than

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6 Hughes v London Borough of Southwark [1988] IRLR 55
7 Case 60/ 84 Cinetheque SA v Federation Nationale des Cinemas Francais [1986] 1 CMLR 365
8 "Protection of Human Rights in the Community Legal Order"

having to look to the state to take action to prevent any violation of such rights. There are several grounds on which the European Court of Justice may assume jurisdiction over domestic law issues to which fundamental rights are claimed to be in issue.

One basis follows the argument of Dauses[9]. He argues that since the Court ensures observance of the "general principles of law" (of which, as the judgment in Testa[1] states, "fundamental rights form an integral part") that fundamental rights must have a foundational role in the Community legal order, akin to that of "general principles" in Article 38 (1) (c) of the Statute of the International Court of Justice. If this is true Dauses maintains, fundamental rights must be **a priori** directly effective in Community law, which would mean that individuals could enforce them.

Another possibility, if the proprietary right is thought to be underpinned by Article 222 of the Treaty, is to interpret the Treaty as the basis of a directly effective right. In Defrenne v. Sabena[2], an airline stewardess sought arrears of payment suffered due to her employer having operated a sexually- discriminatory system of remuneration, in breach of both Article 119 of the EEC Treaty and a Directive establishing the principle of Equal Pay. The European Court of Justice held that notwithstanding the Directive, Article 119 was directly effective since firstly, states complying with their Commubnity obligations should not be put at a competitive disadvantage, but also because Article 119 was part of the Community's social objectives. The Article was therefore held to apply to all agreements intending to regulate paid labour, including ontracts between individuals, with the worker being able to rely on these rights before national courts. The Article was thus directly-effective **horizontally**, which makes it enforceable against private individuals as well

9 **"Protection of Fundamental Rights in the Community Legal Order"** [1987] 10 ELR 398
1 Cases 41,121 and 796 /79 Testa, Maggio and Vitale v. Bundesanstalt fur Arbeit [1980] ECR 1979
2 [1976] ICR 547

as the state, and is clearly the most useful type of direct applicability for the employment context. Although it seems that Article 222 would not be directly-effective, if the Treaty were used to supplement and underpin the right to employment security, direct applicability could operate horizontally as in Defrenne. One such combination of Article 222 and a more general jurisdictional basis founding horizontl direct effect is where the employer firm is relying on a right afforded by the EEC Treaty, e.g. the right of establishment in another member state. In this circumstance, Community law might claim jurisdiction on the "benefits and burdens" principle, in that one cannot rely on an instrument to one 's benefit without taking the burdens or liabilites imposed by that instrument and concomitant of the benefits taken. The "burden" here would be Article 222, which could be regarded as underpinning the employee's property in his/ her terms and conditions, and made horizontally directly-effective against the employer on the benefits and burden principle.

An alternative jurisdictional basis the Court might utilise engages the concept of "pre-emption". Weiler[3] is concerned to limit the effects of the Cinetheque[4] case described above. In the Klensch case[5],the European Court of Justice held that Community law was subject to a residual requirement of fairness, which the domestic legislation Luxembourg implementing the Community's milk quotas policy had breached. Although that case concerned a "positive Community policy", Weiler seizes on the Court's phrase, "predominantly under Community jurisdiction" as suggesting further juridictional possibilities for the Court to revie for

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3 **"Methods of Protection of Human Rights in the European Community"** EUI Colloquium Paper
4 Case 60/ 84 Cinetheque SA v Federation Nationale des Cinemas Francais [1986] 1 CMLR 365
5 Case 201/ 85 Klensch v. Secretaire l'Etat a l'Agriculture et la Viticulture [1986] ECR 3477

fundamental rights. The concept he suggests is the American idea of "pre-emption", citing the work of Waelbrock.

Waelbrock[6] explains pre-emption as concerning situations where, "there is no outright conflict between federal (or Community) and state law, but where a state measure is alleged to be incompatible with the general policy objectives which federal (or Community) law hopes to achieve." It is distinct from the primacy of Community law, since Community law is only pre-eminent in spheres where the Court of Justice has jurisdiction. Pre-emption, on the other hand, is in the nature of a heuristic device to establish the concordance between Community and domestic jurisdiction. The doctrine works by comparing national law to the general policy objectives of Community law in a sphere in which there is, "a positive Community policy". If the national law is at variance not just with the form or the detail of Community law, but would tend to subvert the Community's policy objective in that area, then there is a jurisdictional conflict between national and Community law, which is resolved by Community law prevailing due to its formal primacy. If there is neither a positive Community policy nor a subversion of that policy by the national law, then the variance of national from municipal law is permitted, treating the two legal regimes as operating in two different jurisdictional spheres. Waelbrock's identification of a "pragmatic approach" to pre-emption allows the possibility of interdependence between national and Community law, and not necessitiate the rigid demarcation of "Community" from "national" legal regimes.

The European Social Charter might be sufficiently declaratory of Community competence in the labour law field as to permit of a pre-emption argument. This document, in combination with the Action Plan for its legislative implementation produced by the Commission, makes a claim to regulate, and furnish

6 Waelbrock **"The Emergent Doctrine of Community Pre-Emption - Consent and Re-delegation"** from volume 2 of **"Courts and Free- Markets"** eds. Sandalow and Stein

a common policy for, the area of employment rights in national legal systems. While as yet, there is no Community legislation, directly effective or otherwise, implementing the new rights it proposes, it would seem to constitute a "positive Community policy" and hence "pre-empt" the labour law field. Since, even if all of the Charter were implemented, national legal systems will still be important in the labour law area, the rights being designed to supplement and be assimilated into national law by the national legal system, the "pragmatic" interdependence of the national and Community legal systems in the employment field would be useful. Ther Charter would thus be of value in an indirect sense, providing the jurisdictional basis for the Court to protect the right to employment security as a fundamental right, rather than trying to derive this right from the proposals in the Charter. Although there is no right defined in the Charter seeking to effect a right to security of terms and conditions, the derivation of such a right from either Community fundamental rights or national law couold hardly be said to be contrary to the policy proposals set out in the document. Pre-emption would tend to bolster, rather than exclude, such a right.

Since it was sensible to impute horizontal direct effect to "fundamental rights", there is now the problem of deriving possible remedies in domestic law. Any suggestion as to remdies is nebulous and scpeculative, partly because the rights under consideration are themselves very ill-defined. Nevertheless, it is for the English legal system to find a method of transcribing the now Community- based right to security of terms and conditions. Oliver[7] and Steiner[8] evince the relevant principles. There is, as yet, no harmonisation of domestic remedies (except in the Customs & Excise area), and the Comet case[9] held that there

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7 "Enforcing Community Rights in the English Courts" 50 MLR [1987] 881
8 "Domestic Remedies for Breach of European Community Law" [1987] 12 Euro. L. Rev. 102
9 Case 45/ 76 Comet BV v Produktschap voor Siergevassen [1976] ECR 2043

is no requirement for states to establish special remedies for breaches of Community law. However, in Rewe[1] , it was held that although it was for the member states to designate the appropriate court and remedies for implementing Community rights, these should be no less favourable to Community law than would relate to a similar action in domestic law (the "non- discrimination" rule). Additionally, after the Harz case[2], there is a requirement that these be "effective remedies". This issue will be discussed below. It is presumed that failure by the domestic legal system to comply with these requirements affords a right of action at Community level against the member state. Johnston v. Chief Constable of RUC[3] is a labour law case demonstrating that the European Court of Justice can require national courts to effect the Community rights claimed, in that case, the prevention of illegitimate exemptions from sex- discrimination legislation. This residual remedy against the state would also be the approprate remedy if the putative entitlement to maintain the terms and conditions of employment was taken to be an entitlement from the state rather than a right against a private employer. But the assumption has been made that remedies are for directly- effective rights.

The main authority on the implementation of directly- effective rights in English law is Garden Cottage Foods v. Milk Marketing Board[4]. In that case, a majority of the House of Lords discharged an interlocutory injunction obtained by the plaintiff butter distributor who claimed the defendants' administration of the Community milk quotas scheme amounted to an "abuse of a position of dominance" in breach of the (directly- effective) Article 86 of the EEC Treaty. There being no Community law obligation to invent a new cause of action, with "wholly novel remedies", Lord Diplock, with whom three other Law Lords agreed, assimilated

1 Case 33/ 76 Rewe Zentralfinanz eG v. Landwirtschrafskammer fur das Saarland [1976] ECR 1989
2 Case 79/ 83 Harz v. Deutsche Tradax [1984] ECR 1921
3 Case 222/ 84 Johnston v. Chief Constable of RUC [1986] 3 CMLR 240
4 [1983] 2 All ER 770

breach of a directly- effective right to the English law tort of breach of statutory duty, which would afford a civil right of action to those affected by the breach. Since this right of action was in tort, (described as a "Eurotort" by Henry J in the subsequent Barrets & Baird case[5]) Lord Diplock thought that the primary remedy of the plaintiff should be in damages. It would only be if damages were an inadequate remedy pursuant to the Cyanamid test[6] that an injunction could be granted. On the facts of Garden Cottage[7], Lord Diplock thought damages to be very obviously an adequate remedy, particularly since damages would be very easily assessable. But the decision produces many difficulties.

Firstly, and particular to fundamental rights is that the right is constructed by an "evaluative comparison" that can utilise domestic law remedies as demonstrating the existence of that particular right in the particular national legal system. Although these domestic remedies were in part the source of the Community law right, since the remedy is now for a Community law situation, it might occasion different remedies than were previously extant in national law for the same type of right. Thus with the right to preserve terms and conditions of employment, the empirical source of this being a right in English law was the availability of the proprietary right of the domestic law injunction. This injunction was obtainable because damages were not an adequate remedy. But after Garden Cottage Foods, Community law rights are assimilated into English law by likening breach of these Community rights to a breach of statutory duty, which unwittingly increases the possibility of obtaining damages. The problem is that a court's jurisdiction to award damages is two-fold. The usual jurisdiction for the award of damages is under common law, but there is also an equitable jurisdiction (under Lord Cairns' Act) to

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5 Barrets & Baird (Wholesale) v Institution of Professional Civil Servants [1987] IRLR 3
6 American Cyanamid v. Ethicon [1975] AC 396
7 [1983] 2 All ER 770

order damages as an alternative to an injunction. Steiner[8] argues that this distinction was obfuscated in Garden Cottage Foods[9], and that therefore the connexion between damages and Community rights being in common law is not necessarily valid. It might be, as Lord Wilberforce argued in his dissent in Garden Cottage Foods, that Community rights need not be transformed (to use the parlance of dualistic international law) into an English law right of action.

The problems with the majority reasoning in Garden Cottage Foods extend beyond this. Another issue identifed by Steiner is that some directly - effective legislation does not permit of a civil right of action. This is because the courts treat some breaches of Community law as being the sort of breach of statutory duty that does not afford a civil right of action. In Bourgoin v. Minister of Agriculture[1], a French farmer who had been adversely affected by the British Government's revocation of an import licence which was found to be a breach of Article 30. He brought an action against the Government for damages, claiming that breach of this Treaty Article should be civilly actionable as abreach of statutory duty. The Court of Appeal held that this Article afforded no private right of action, since the breach of Community law complained of was an administrative act and should be remedied in administrative law. This administrative remedy is considered later on. However, on the particular facts, the Government had withdrawn the licence knowing that it had no power to do so and that such action would injure people such as the plaintiff, so the plaintiff was able to obtain damages for the tort of "misfeasance in public office". This tort will only be relevant against public authorities, and after the House of Lords decision in Jones v. Swansea City Council[2], has been very heavily circumscribed

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8 "Domestic Remedies for Breach of European Community Law" [1987] 12 Euro. L. Rev. 102
9 [1983] 2 All ER 770
1 [1985] 3 All ER 585
2 [1990] 3 All ER 737

anyway. But the possibility of breaches of Community rights establishing some other rights of action in tort should be explored.

It is doubtful that English law affords the possibility of general innominate tort[3]. But the "economic torts" are in a particularly fluid state, and since these are used in other aspects of employment law (to restrain strike action), they are worth discussing in this context. Liability under economic torts is based on the intentional causing of harm to the plaintiff's interests. But the basic limitation on liability was established in Allen v Flood[4] that the tort requires that the defendant uses unlawful means tp cause loss if the plaintiff is able to have a right of action.But the label "unlawful means" is of no use in itself: the courts decide what unlawful means constitutes. One particularly apposite tort is that of intimidation. This occurs when, as Clerk & Lindsell puts it[5] , A commits the tort if he threatens B that unless he commits a particular act (normally, but not necesaarily, being to damage C), A will use unlawful means against B and B refrains. It is thus a "two party" tort, although C can have a right of action . Committing a tort is clearly "unlawful means" for these purposes. But in Rookes v Barnard[6], the House of Lords held that a threat of a breach of contract could be unlawful means. It is thus highly arguable that "breach of fundamental rights", whether or not manifested as a directly effective right, could be regarded as the unlawful means necessary to establish the tort. So if the employer threatened that unless an employee acquiesced in new working arrangements in breach of his existing contract of employment and in breach of a putative right to job security, there is an arguable possibility that this would constitute intimidation. There are two advantages of establishing liability in tort[7]. Firstly, the measure of damages in tort could be more than in contract because a contractual treatment of the job-

3 Dunlop v. Woolahra M.C. [1982] AC 158
4 [1898] AC 1
5 chapter 15, 16th ed 1989
6 [1964] AC 1129
7 There is arguably a third: using Rookes v Barnard for a progressive cause!

change issue seeks to infer the acceptance of a new contract, and damges under the old contract are limited to the wages accruing under the "notice" period. In tort, damages are given for the harm to one's economic interests but also, distress and loss of dignity might be compensable under tort compensation. Secondly, a tortious model would make English law consistent with the structure of the decision in Harz v. Deutsche Tradax[8], which is after all, a labour law case. In Harz, the plaintiff's job application was rejected after she was unlawfully discriminated against, in breach of the German law implementing the Community Directive. The defendant employers argued that her compensation should only be the nominal costs incurred for postage and copying of the application. The European Court of Justice held, on preliminary reference, that although Community law left remedies to the individual state, there had to be an appropriate sanction if the object of the Directive was to be attained. The Court spoke of "a real deterrent effect" in explaining that adequate compensation was necessary. The type of damage and of damages suggested by this to a common lawyer familiar with rights following remedies, is tort compensation. The structure of Harz is that of a tort of unlawful harm to economic interests. The structure of a tort remedy suggests that breaches of directly effective Community law rights are easily assimilable as a tort of intentionally causing economic loss, or one of the other economic torts.

As previously stated, Lord Wilberforce dissented from the decision in Garden Cottage Foods v. Milk Marketing Board[9]. His view, as a Chancery judge, was that the primary remedy for breaches of one's legal rights interfering with one's lawful business activities should be the grant of an injunction. Indeed, for the rather aggrandised right to preserve one's terms and conditions of employment, interpreted as a proprietary right, this reasoning is particularly apposite. Steiner cites Emperor of

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8 Case 79/ 83 Harz v. Deutsche Tradax [1984] ECR 1921
9 [1983] 2 All ER 770

Austria v. Day & Kossuth[1] where a political refugee tried to establish a rival government in Hungary ordered the printing of baknotes, which were not counterfeit, but were intended to be a rival coinage. The refugee and the printers were restrained by an injunction, granted because the use of the notes would depreciate the legitimate currency of Austria, so that all holders of the currency would suffer economic loss. Turner LJ stated a general proposition tha the law would give a remedy wherever the property iof an individual was affected by "unauthorised and undue" acts. This proposition has been invoked subsequently in Springhead Spinning v Riley[2] where Malins V-C enjoined the blacking of the plaintiff's factory, at that time criminal, asserting that the court would protect property by preventing any activity, whether criminal or not, which tended to destroy property or make it less valuable. In ex.p. Island Records[3] Lord Denning MR gave a remedy to record producers restraining "bootleggers" using this principle, but it was cut down very considerably in Lonrho v. Shell Petroleum[4] , RCA v Pollard[5] and Associated Ports v. TGWU[6] so that the principle is now no more extensive than the tort of breach of statutory duty. So this tradition might not avail fundamental rights of much.

What might be very important though is to capitalise on the effects of Bourgoin[7] and the consequences of some directly- effective rights being remediable in public law. This point, referred to by Steiner[8] was subsequently developed in An Bord Bainne v. Milk Marketing Board[9]. In that case, the plaintiff was seeking an injunction and damages for the Defendants' breach of a Regulation. Lloyd LJ

1 3 De G.F. & J. 216, 45 ER 861
2 6 [1868] LR Eq. 551
3 [1978] Ch. 122
4 [1982] AC 173
5 [1983] Ch 135
6 [1989] IRLR 324, (upheld on this point in the House of Lords [1989] IRLR 399),
7 [1985] 3 All ER 585
8 **Domestic Remedies for Breach of European Community Law"** [1987] 12 Euro. L. Rev. 102
9 [1988] 1 CMLR 605

assumed the right to be directly applicable, but held that to be consistent with Bourgoin, the appropriate construction of the Regulation entailed an administrative law remedy rather than a civil remedy. This suggests that Community rights are amorphous in nature, with their nature depending on the particular function being performed by Community law. Since the number of justiciable issues in public law has increased, and it is only the formal limitation on the availability of Order 53 supplied by Walsh[1] that delimits the ambit of public law, then the remedial barrier can be transcended by founding the action on breach of a Community right.This is due to the authority invested in the private employer being at a normative level, very similar to the quasi- legislative authority constituting the bulk of public law. Further, Henry J suggested in Barrets & Baird[1a] that the standard by which the court should judge whether a Community right has been breached under the Garden Cottage format might be the same Wednesbury[2a] test used to assess the substantive legality of administrative acts. Managerial decisions failing to respect the fundamental entitlement to secure terms and conditions of employment could be reviewed, as a Community right producing domestic effects in public law. If this normative harmonisation were seen as too radical, then even keeping managerial authority "private", the obligation to comply with Community fundamental rights could make the exercise of this private authority contingent on compliance with Community law, with Community law manifesting itself as "public" law. In this circumstance, there could be a sufficient element of public law for judicial review remedies to be available.[1]

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1 Reg. v East Berks. AHA ex. p. Walsh [1984] 3 All ER 425
1a Barrets & Baird (Wholesale) v Institution of Professional Civil Servants [1987] IRLR 3
2a Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
1 London Borough of Wandsworth v Winder [1984] 3 All ER 83

EMPLOYMENT LAW, POWER RELATIONS & HIERARCHY

Doctrinally- amorphous Community law might transcend the formal remedial divide between public and private law in the employment context introduced by ex.p. Walsh[1] if some normative link between public law and employment law can be established. The most obvious method of effecting such a link is to adopt a functional view of public law as a mechanism for the circumscription and control of quasi- governmental power, and that the employment relationship involves a similar power- relations construct. The use of the term "power" is in a rather superficial sense, being in Talcott Parsons' definition, indissolubly linked to formally institutionalised authority[2]. The validity of the assertion that public law reviewability is now functional can be demonstrated by the Datafin case[3], in which the Court of Appeal held that the activities of the Panel on Take-Overs and Mergers could be reviewed in public law. This was an expansion of public law because the Panel had no statutory or other formal constitutional foundation, being the result of the Government's "self- regulation" of the City. The Court held that it was the nature of the functions performed by a body, rather than the formal source of its powers that should be determinative of its reviewability in public law. This decision occasioned a wide expansion of the types of power that would be justiciable in public law. In fact, Popplewell J recently lamented[4] the extension of public law reviewability effected by Datafin because domestic bodies now had to operate a public law standard of conduct that they were probably never intended to have. This section asserts that another body of authority probably "never

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1 [1984] 3 All ER 425
2 Parsons, **"On the Concept of Political Power"** , cited and criticised by Lukes, **"Power: A Radical View"**
3 Reg. v. Panel on Take-overs and Mergers ex. p. Datafin plc [1987] 1 All ER 564
4 in Reg v. Code of Practice Committee of B.P.I. ex.p. Professional Counselling **Times** 7/ 11/ 90

intended" to be justiciable in public law, the employer managerial prerogative, to some method of judicial review.

There are obvious parallels between managerial prerogative, or managerial authority, and the quasi- governmental powers already susceptible of judicial review. It is now only the Walsh[1] decision that keeps judicial review out of most public sector employment, since at a theoretical level, the view that employment is a contractual relationship confined to private law is difficult to maintain. Karl Klare[5] asserts that this public/ private divide is purely a "rhetorical" device without any analytical content.

In his exploration of the invocation by American courts of the public/ private divide in the employment context, Klare's central theme is the standard "Critical" complaint that courts' decisions are contingent on unwarranted ideological assumptions, which through the label "private" makes social division seem natural and justifies the private ownership of the means of production. Employment disputes are continually assimilated to disputes about "private" rights when, Klare argues, the issues raised are of "public" importance.It is possible to accept some of this analysis without having to accord with Klare's suspicion of the judicial process. It might be that employment rights are treated as "private" because legal relationships have been traditionally been more easily conceptualised in that way. Thus Simmonds[6] points out that in the economistic scheme of Pashukanis' theory of law, the "public" state is appended as an adjunct to the essentially private law analysis of the legal relationship derived from economic exchange, with the form of "public" law having to be assimilated into the "commodity form" of law originally applied in private law. So perhaps the normative hegemony of private law relationships is an unconscious result of the failure of legal systems to undertake a systemic analysis of the role of the State.

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5 **"The Public/ Private Distinction in Labor Law"** 130 (1982) Univ. Penn. LR 1358

6 **"Pashukanis and Liberal Jurisprudence"** [1985] Jo. Law & Soc. 135

Similarly, the exclusion of the role of managerial authority from the analysis of the employment relationship might well be that the courts are habituated to conceptualising relationships in terms of rights and duties. But the development of judicial review provides a new normative structure for the courts to use. This, coupled with the grounding of any Community law right to security of terms and conditions of employment in the self- consciously "public" arenas of fundamental rights and the European Social Charter suggest that in incorporation of Community rights into domestic employment law can be achieved through an analogy between managerial authority an public power.

Hugh Collins seeks to construct a power- relations paradigm for the employment relationship, in his article "**Market Power, Bureaucratic Power and the Contract of Employment**"[7]. Whilst his analysis utilises contract to provide the legal glue between the individual employee and the firm, his main conceptual tool is the bureaucratic organisation of production, with the employer firm conceived of as bureaucratic hierarchy rather than as a party to a contract. Thus the inequality between labour and Capital (which he subsequently invokes[8] to justify the existence of a separate body of labour law) arises not from inequality of labour market **bargaining** power, but from an inequality of power within the firm, being an **organisational** subordination of labour's role in production to that of the management. This inequality, Collins opines, is the consequence of four propositions. These are that there is no direct nexus between management and labour: each contracts with the employer firm; that management and labour roles ensue from the firm's hierarchical structure, and are not established by the individuals occupying those roles; that the firm's or manager's remedy against an employee's infraction of the rules is not monetary compensation, which would be the standard contractual

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7 [1986] ILJ 1
8 "**Labour Law as a Vocation**" [1989] LQR 468

remedy, but is a disciplinary sanction; fourthly, (and controversially) that wages are not a function of marginal product, but are determined according to the bureaucratic position in the hierarchy. On this latter point, the Teachers (Pay and Conditions) Act 1987[9] allows teachers' remuneration to be determined by managerial dictat rather than bargaining.

According to these criteria, the employment relationship is no longer reducible to a system of employee rights with correlative management duties, but is rather the means by which an employing organisation allocates and inter-relates a network of different decision- making powers. (It is perhaps germane to connect this conceptual model to the analysis of the possible public/ private divide in the "balance of convenience" criterion for granting an injunction.) In this model, entry into the organisation is by contract, but thereafter the different elements of the employment relationship are analysed not from a contractual perspective, but as the exercise of private bureaucratic power. The legitimating source of authority within the firm is its "rule- book", which incorporates procedures for changing the organisational structure and for the exercise of the decision- making powers held by personnel within the firm. Thus the lynch- pin of Collins' model is the legitimation and exercise of power. Since the normative basis of public law is the regulation of power, there would seem to be scope for analogising the law regulating the firm to public law regulation. So it is necessary to describe the concepts used in public law for controlling the exercise of quasi- governmental power. The principal concept in English administrative law is that of Wednesbury[1] unreasonableness, which allows the court to quash the decision of a public body if no reasonable decision- making body could have reached that decision, or if the decision- taker has failed to take the appropriate criteria into consideration. This is hence a review, and

9 cited in chapter 3 of Fredman & Morris "**The State as Employer: Labour Law in the Public Service**"
1 Associated Provincial Picture Houses v. Wenesbury Corporation [1948] 1 KB 223

not an appeal. The Court will not quash the decision just because it would have taken a different decision. The aim of judicial review is to examine the legality, not the merits of a particular decision. The Wednesbury criterion was elaborated and further developed by Lord Diplock in the GCHQ case[2], in which Lord Diplock identifed three heads of judicial review extant in English law. These he classified as "illegality", which is where the decision- taker has misunderstood or misapplies the law relating to the power being exercised; "irrationality", which covers part of the Wednesbury test, being where a decision is, "so outrageous in its defiance of logic or accepted moral standards that no sensible person applying his (sic.) mind to the issue" could arrive at the same decision; "procedural impropriety", being where there was a failure to observe either rules of natural justice and procedural fairness, including failure to follow procedures which had previously been agreed.

The first two "heads" of judicial review are grounds for review of the substantive decision. They are much less interventionist than Community law and Continental legal systems afford, because of English law's legal fundamental that Parliament is sovereign. The English courts thus strive for a constitutional balance between allowing the body on whom Parliament has conferred a power to exercise its own judgment and there being some legal constraints on the exercise of powers, so that no powers other than those of Parliament are unfettered. It is by reason of this balance that Lord Diplock could only tentatively admit the possibility of there being a "proportionality" criterion in English judicial review. Jowell & Lester argue[3] that English law should articulate some principles of substantive judicial review, because the Wednesbury test, even as refined by Lord Diplock, is inadequate, denying the essence of judicial review in failing to allow the courts to balance opposing interests.

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2 Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935

3 "Beyond Wednesbury : Substantive Principles of Administrative Law" [1987] PL 368

This call for a more interventionist judicial review could be heeded in the context of European fundamental rights and in the employment law situation for two reasons. Firstly, as Jowell & Lester point out, English law is already obliged to heed the concept of proportionality where Community law is in issue, for which Johnston v. Chief Constable of the RUC[4] and Rainey v. Greater Glasgow Health Board[5] are cited. But secondly, managerial authority, derived from the structure of the firm, is not "legitimate" authority and does not bring the same constitutional difficulties for courts considering its exercise.

But the third ground of judicial review, "procedural impropriety" is the more developed aspect of English administrative law. This ground, sometimes described as "natural justice", is now more orthodoxly regarded as "fairness"[6] . This is more than a merely semantic difference. "Fairness" seems to cover the conduct of the whole decision- making process and to have a more substantive root. In GCHQ[7] itself, which is after all a labour law case, the concept of "legitimate expectation" was incorporated into what was Lord Roskill expressed to be a "procedural impropriety" situation. In that case, the Government used the Crown's prerogative powers, under which civil servants are employed "at pleasure", without formal contractual rights, to remove, without consultation, the rights of those working in the GCHQ intelligence service to belong to trade unions, alleging that trade union membership could prejudice national security. The trade unions sought judicial review of this decision, but were ultimately unsuccessful, because the House of Lords accepted that "national security" considerations ousted its powers of judicial review. But the court analysed the procedure by which the Government's decision had been reached. Lord Diplock implies there might be two grounds on which the unions could have a legitimate

4 [1987] QB 129
5 [1987] 1 All ER 65
6 Reg v Commission for Racial Equality ex. p. Cottrel & Rothon [1980] 3 All ER 265
7 Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935

expectation of consultation. The most conventional, and one with which Lords Roskill and Fraser agreed, was that the previous practice of consultationwith the unions on matters concerned with working arrangements had established a legitimate expectation of consultation which had been breached in not consulting the unions about the removal of trade union membership rights. But Lord Diplock further suggests, albeit qualified by the words, "at most", that the employees had a legitimate expectation that their employment would continue on the basis that they would continue to have trade union representation.

This latter suggestion could amount to a substantive right, susceptible of protection in public law, to preservation of their employment conditions. Such a legitimate expectation might arise for other conditions of employment, connected with the particular job function. The substantive roots of legitimate expectation can be further consolidated by incorporating an "estoppel" idea. Lord Fraser in GCHQ adverted to legitimate expectations arising out of express promises, in particular his judgment in the Privy Council decision Ng Yuen Shiu[8] in which a television advertisement stating that a particular procedure would be followed before any deportation decisions were made established a binding legitimate expectation. This was taken further in Khan[9] in relation to assurances of particular immigration procedures and in Re Preston[1], where an agreement by the tax authorities not to investigate a particular tax matter constituted a sort of public law estoppel. Thus Lewis[2] states "that by freeing "fairness" from its procedural moorings, the decision [Preston] may have given "fairness" a substantive existence of its own which could be used as the basis for opening up new avenues of judicial review."

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8 A-G for Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629
9 Reg v. Home Secretary ex.p. Khan [1985] 1 All ER 40
1 Reg v Inland Revenue Commissioners ex.p. Preston [1985] 2 WLR 836
2 [1986] 49 MLR 251

The estoppel idea is particularly useful in preserving rights to job security, since the job- function arises in many cases through custom and practice, and is thus not articulated as a particular right of the employee. Furthermore, estoppel being a discretionary, informal mode of effecting legal rights, it can be sufficiently flexible to afford reasonable changes in job- function, where the exercise of managerial authority had given effect to the interests of workers in their job conditions being preserved.

Collins[3] makes reference to legitimate expectations and estoppel in exploring the role of collective agreements in the employment relationship. But these might also be incorporated into the more individualised analysis of the law's ability to control managerial power. Collins uses only the Wednesbury- type review of such power. This analysis of a managerial decision to modify job function likens the managerial decision to an exercise of private bureaucratic power that needs to be undertaken reasonably. The aim in reviewing the managerial prerogative is not to establish parameters of reasonable decisions for the particular subjective circumstances, but is more an attempt to prescribe objective standards for the **reasonable** exercise of managerial authority. Thus, in the Collins model, legal control is much more interventionist than the cautious Wednesbury criterion of public law. "Reasonableness" is equated with "rationality", to which end, Collins instances the normative effects on managerial prerogative of anti- discrimination legislation. Although the firm is **prima facie** free to create its own organisational structures, the law can require that these be rationally justified. Collins explains the case Home Office v Holmes[4] , in which a woman successfully argued that the employer's policy of only engaging full- time workers was sexually- discrimnatory, as more women preferred part- time work, and there was no good reason for the employers to have

3 **"Market Power, Bureaucratic Power and the Contract of Employment"** [1986] ILJ 1
4 [1984] IRLR 299

such a policy as having subjected the employer's exercise of bureaucratic power to a rationality requirement. If this incursion into managerial prerogative is intellectually feasible in those circumstances, Collins argues that legal controls of this authority would be possible in other circumstances.

One way of bolstering both the normative content of "rationality" and recognising employee rights would be to combine the "procedural impropriety" ground of review with Collins' "reasonableness" model of legal regulation of managerial power. This would require that the employee's expectation of employment continuing on the same basis would be respected by any managerial decision changing the terms and conditions of employment. Such reviewability would be a factor both in the deliberations of the firm in making the procedure, but also as an issue in determining the substantive "rationality" of the decision. "Rationality" would allow a normative link to Community law, judging decisions against Community standards (consistent with Rutili[5]) and could establish a Community law balance between an employee's entitlement to preserve the terms and conditions of employment against the firms commercial objectives, and the objectives of a European market. This would thus permit sufficient flexibility in the firm's arrangements, but ensure that the employee's interests were respected.

But doubt has been expressed that public law models are sufficiently strong to afford employees any substantive gains. As Lord Brightman said in Chief Constable of North- Wales v. Evans[6], "Judicial review is concerned not with the decision, but the decision- making process". While this might be tempered by the more interventionist basis that it has been argued would apply on the labour law context, the criticisms of Fredman & Lee[7] have to be addressed. These writers argue

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5 Case 36/ 75 Rutili [1975] ECR 1219
6 [1982] 3 All ER 141
7 "**Natural Justice for Employees: Unjustified Faith in Proceduralism**" [1986] ILJ 1

that, at least at the level of the individual employee, procedural justice ineffective. For them, natural justice has infected labour law with a timidity and a legitimation of managerial authority borne of the constitutional delicacy of courts impugning the decisions of duly designated decision- makers. The question as to whether a "review" of managerial powers could cast off this mantle needs to be raised. The Wednesbury test seems unconsciously to spring to the minds of judges when considering the control of employer decisions. In the case Sim v. Rotherham MBC[8] the issue of whether an instruction was in breach of contract depended on whether it was reasonable or not, and although Scott J did not rule on the issue, the suggestion that the Wednesbury criterion might be appropriate one was clearly in his mind.

Further, it might be argued that the utility of public law is slight in that the "quashing" of a decision does not prevent the same decision being reached again. The reviewing court does not substitute its own decision for the impugned one. Furthermore, the public law remedies are entirely a matter of discretion (though forthcoming article by Bingham LJ says that the discretion is only nominal and that remedies are a matter of substantive law). In the leading case on remedial discretion in public law, the A.M.A. case[9], Webster J held that although the Secretary of State had indeed breached a mandatory requirement that he consult with the applicants for judicial review over the implementation of benefit regulations, that the discretion in granting remedies allowed the judge not to quash the decision. This was partly because the same decision would stil have been reached even if consultation with the applicants had been undertaken. So paradoxically, as the infamous British Labour Pump principle that breaches of procedure can be excused if the breach would have made no difference to the ultimate decision is excised from labour law under the

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8 [1986] IRLR 391
9 Reg. v Secretary of State for Social Services ex.p. Association of Metropolitan Authorities [1986] 1 All ER 164

influence of public law standards (Polkey v A.E. Dayton[1]), public law is installing its own version of the British Labour Pump decision. (See Lloyd v. McMahon[2] for a House of Lords example of this) When public law has further, as with Equity, a more general discretion in witholding remedies, there is a double possibility of this remedial discretion being invoked to the detriment of the employee. In a highly competitive and dynamic commercial world, it is possible to see judges invoking this remedial discretion in refusing to grant a remedy to an employee whose interests have been infringed. The ultimate example of this is the Bruce[3] case, where a civil servant seeking judicial review of his dismissal was denied judicial review remedies under the court's discretion because he was pursuing separate legal actions for unfair dismissal and breach of contract that the court thought were more appropriate.

These criticisms might not apply to claims that job function had been unreasonably changed. It has already been seen how an entirely discretionary system of remedies, the law of Equity, has been the principal source of any English law right to security of terms and conditions. Secondly, erroneous denial of a remedy when the claim was being brought under European law as a violation of fundamental rights would afford an employee a right odf action at Community level, for failure to observe the principle in Harz v Deutsche Tradax[4] that domestic remedies be effective. The Johnston case[5] shows this process. Furthermore, unlike in the Bruce[6] case, an employee bringing an action seeking to preserve his/ her job function would not have any other remedy. The rights and domestic remedies for their breach would all come from Community law; it is only Community law that provides their existence. Furthermore, it is worth remembering that the injunction is included in the

1 [1987] 3 All ER 974
2 [1987] AC 625
3 Reg. v. Civil Service Appeals Board ex.p. Bruce [1989] 2 All ER 907
4 Case 79/ 83 Harz v Deutsche Tradax [1984] ECR 1921
5 Case 222/ 84 Johnston v Chief Constable of the R.U.C. [[1986] 3 CMLR 240
6 Reg. v. Civil Service Appeals Board ex.p. Bruce [1989] 2 All ER 907

composite remedy of judicial review contained in the reformed Order 53[7].So the bureaucratic model of the firm might be of some utility at both normative and remedial level in incorporating the "fundamental right" to enjoy particular job-conditions.

The discourse of power relations has already entered the case- law concerning partial performance by the employee of duties under the contract of employment, which places "job content" in issue. These cases have refracted managerial authority through a prism of "reasonableness", despite presenting the case as being a dispute over different contractual constructions. In Fishman[8], a teacher appointed to run an inter-disciplinary teaching resources centre was subsequently, under a new school regime, instructed to teach English, and virtually abandon the resources centre. When she refused this redeployment, she was dismissed. The Industrial Tribunal and then the Employment Appeals Tribunal held that this was unfair, because the teacher had reasonably thought that her job was to run the resources centre, and her contract did not require that she do whatever the school head ordered. The school's need for their employees to be flexible was circumscribed by subjecting orderd to work on tasks different from those for which the teacher had been engaged to a "reasonableness" requirement. The Tribunal thought that "reasonableness" dependended on the particular facts in question, but should take account of the particular duties for which the employee was engaged.

This reasonableness idea was developed further in Sim v. Rotherham MBC[9] . This case also concerned teachers and arose out of limited industrial action taken by teachers in refusing to undertake supervisory/ relief activities outside their timetabled teaching requirements, including a refusal to cover for absent colleagues. In reprisal for this, the employer local authority made deductions from their pay, and

7 **Rules of the Supreme Court**, Order 53
8 London Borough of Redbridge v. Fishman [1978] IRLR 69
9 [1986] IRLR 391

the teachers brought an action to recover these deductions. As part of a complicated discussion as to the distinction between equitable set-off and the right to recover such deductions, the germane issue was whether the teachers had worked fully in compliance with their duties under their contracts, which was thus an issue as to the content of the teacher's job and the scope of its contractual obligations. Scott J in the Chancery Division of the High Court rejected the teachers' claim. He held that the duties of a teacher included implied obligations arising from the nature of the teaching profession and the institutions in which the profession worked (being schools). Since schools were organised by a timetable, this administrative necessity created its own concomitant professional obligations, and timetabled hours were therefore not the limit of a teacher's duties. The judge accepted however that the contractual requirement to co-operate with the timetabling process should be circumscribed, and used Fishman in ascribing this limit as what was "reasonable".

Such disputes are presented as definitional struggles over contractual interpretation, but are really attacks on the assumption that the contract reserves a residue of managerial authority. Other instances in which "reasonableness" considerations are imported relate to mobility clauses. In Courtaulds Northern Spinning v. Sibson[1] , an employee was claiming unfair dismissal arising out of a dispute with colleagues after which he had refused to be transferred to a depot one mile away. This was held to be unreasonable on his part particularly since he was a long-distance lorry-driver. "Valuable guidance" as to the meaning of "reasonableness" came from Jones v. Associated Tunnelling[2], where the term to be implied depended on such factors as the nature of the business, previous moves in employment, expenses provisions etc. Since these cases are also "flexibility" cases, being effectively about flexibility of workplace, they further demonstrate that the

1 [1988] IRLR 205
2 [1981] IRLR 477

contractual paradigm of the employment relationship is beginning to incorporate norms derived from the regulation of authority relationships.

The Court of Appeal in Courtaulds regarded the implied rights of the employer to move personnel from one location to another as being "what the parties would have agreed to if they were being reasonable." This is of course more liberal than the Moorcock[3] test that a term will only be implied if it is necessary for the "business efficacy" of the contract. Thus there is a departure from the "market" rationale of contract. The courts' implication of contractual terms in the above situations has ensued from identifying the contract as being specifically an employment contract. Such implied terms are contingent on the court's legal classification, consistent with Lord Wilberforce's implication of a landlord's obligation to take reasonable care to maintain the amenities of a flat as a "legal incident" of a landlord and tenant relationship[4].

In the employment cases, such implied terms arise from a double classification of the contract. In Sim[5] , the implied term that teachers co- operate with the reasonable administrative needs of the school results from identification of the contract firstly as an employment contract, but secondly from further classification of employment being as a "teacher". This second categorisation imports "professional" obligations into the teacher's contractual duties, derived both from the institutional setting of the job, but making recourse also to the traditions and culture of teaching. (In doing this, Boltanski's analysis of professional ethos and its legal ramifications might find an echo[6].) Fredman & Morris[7] are critical of this type of implied term, seeing it as an unwarranted extension of managerial authority. But what is really occurring is the articulation of the power under which the employer purports to act.

3 The Moorcock (1889) 14 P.D. 64
4 Liverpool CC v Irwin [1977] AC 239.
5 Sim v Rotherham MBC [1986] IRLR 391
6 Luc Boltanski, "The Making of a Class: Cadres in French Society"
7 "The State as Employer: Labour law in the Public Service" ch. 3

This introduces a "status" concept, and its importation into the employment relationship allows contract to provide a source of substantive rights and obligations. The concept of "professional" obligations, derived from a public law tradition, might enter into the employment relationship in the same way as th "office- holder" concept imported procedural norms relating to the disciplinary entitlements of "public" employees into employment law generally. In that way, the possibility of subjecting managerial powers to legal constraints is realised.

CONCLUSION

I have tried in this study to incorporate flexible notions of property and developments in public law into the normative structure of the employment relationship. Community law mediates these two concepts, acting both doctrinally and, at the remedial level abrogating some of the formalism encountered in the English legal system. The development of injunctions of employment contracts is now at stage where the injunction can be granted for more ambitious and wide-ranging purposes than mere temporary and limited job security for the enforcement of pre-dismissal disciplinary procedures. It now seems that the injunction will lie to preserve other rights of the employee. In Community law, the injunction is likely to be regarded as a proprietary right, so at a substantive level, the developing law of Community fundamental rights can abstract from the English law remedy of an injunction a right analogous to a property right. At the remedial level, this Community law right can be implemented in domestic law either in private law, through tort or property, or through a method of judicial review.

The results are obviously very speculative, and not entirely unproblematical, but provide several points of departure for the establishment of a legal right to exercise those particular job skills that are the essence of an employee's self- respect within the productive process.

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