
Book Section:
Atkinson, J. orcid.org/0000-0001-5207-2231 (2022) Johnson v Unisys Ltd [2001] UKHL 13, [2003] 1 AC 518 : A Compelling Constitutional Vision of Common Law and Statute? In: Adams-Prassl, J., Bogg, A. and Davies, A.C.L., (eds.) Landmark cases in labour law. Bloomsbury . ISBN 9781509944262

13

Johnson v Unisys Ltd (2001): A Compelling Constitutional Vision of Common Law and Statute?

Joe Atkinson

I. Introduction

In *Johnson v Unisys*[1] the House of Lords confirmed the longstanding orthodoxy that the common law places no restraints on the manner employers may exercise their power of dismissal. The decision is undoubtedly deserving of landmark status. Both because it sharply limited the ongoing development of implied terms as a means of constraining managerial power, and due to the reasoning adopted by the House of Lords, namely that the presence of the statutory unfair dismissal framework prevented them from developing the common law.

Unlike many of the cases discussed in this volume, *Johnson* has starkly divided opinion among labour lawyers. The initial wave of academic commentary subjected the decision to trenchant criticism on the basis that it left the common law in a confused and unsatisfactory state.[2] More recently, however, a second wave of literature has emerged which mounts a cautious defence of the decision on constitutional grounds.[3] These arguments undoubtedly have considerable force and are yet to be adequately addressed by scholars who are critical of the decision in *Johnson*. This chapter contributes to the ongoing debate by pushing back against the view that the uncertainty, inconsistency, and incoherence in the common law resulting from *Johnson* is required out of respect for constitutional principle.

The first part sets out the legal position regarding mutual trust and confidence and implied terms in the contract of employment prior to *Johnson*. The second focuses on the case itself and the reasoning of the House of Lords. The following parts then examine the

---

[1] *Johnson v Unysis Ltd* [2001] UKHL 13, [2003] 1 AC 518.

[2] As listed by Lord Steyn in *Eastwood & Williams v Magnox and McCabe v Cornwall County Council* [2004] UKHL 35, [2005] 1 AC 503 [43].

[3] C Barnard and L Merrett, 'Winners and Losers: Edwards and the Unfair Law of Dismissal' (2013) 72 *Cambridge Law Journal* 313; A Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 *Current Legal Problems* 67; ACL Davies, 'The Relationship between Contract of Employment and Statute' in M Freedland and others (eds), *The Contract of Employment* (Oxford, Oxford University Press, 2016).

problematic legacy of the decision before considering whether the pre-emption of the common law was nevertheless justified. The chapter concludes by identifying and highlighting an important exception to *Johnson's* exclusion of the common law, the scope and extent of which appears to have been so far overlooked.

II. Implied Terms and the Contract of Employment

To understand the significance of *Johnson* it is necessary to first detail two prior legal developments relating to implied terms in the contract of employment, which set the scene and provide important context for the litigation.

A. The Emergence of Trust and Confidence

The default position at common law is, and remains, that an employer may dismiss an employee 'at any time and for any reason or none' provided adequate notice is given,[4] and that no remedy is available for the manner of dismissal or reputational harm flowing from it (known as stigma damages).[5] Where an employer is in repudiatory breach of the contract, most often but not exclusively the contractual notice period, an employee may accept this breach and bring a common law action for wrongful dismissal.[6] However, damages will generally be limited to the contractual benefits that would have accrued during the notice period,[7] as it is assumed that the employer would perform the contract in the way most favourable to themselves, and so limit their liability by immediately dismissing the employee with notice. Changing societal understandings of employment and the breakdown of collective industrial relations as an effective means of regulating job security led to dissatisfaction with this position.[8] The perceived inadequacy of the common law coupled with the need to maintain industrial peace

---

[4] *Ridge v Baldwin* [1963] 2 All ER 66 (HL).

[5] *Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

[6] Wrongful dismissal is taken here as 'effectively synonymous' with wrongful termination of the employment contract as per A Bogg and M Freedland, 'The Wrongful Termination of the Contract of Employment' in M Freedland and others (eds), *The Contract of Employment* (Oxford, Oxford University Press, 2016) 537.

[7] With the possible extension to include benefits accruing during the period it would have taken to complete a contractually required disciplinary process, *Gunton v Richmond Upon Thames* [1980] ICR 755 (CA). Damages will also be reduced to account for the duty to mitigate losses and any amounts received through social security payments or other employment.

[8] M Freedland, 'Constructing Fairness in Employment Contracts' (2007) 36 *Industrial Law Journal* 136, 136.

led to the introduction of protections against unfair dismissal in the Industrial Relations Act 1971,[9] following the recommendation of the Donovan review in 1968.[10]

Somewhat ironically, it was the legislative framework of unfair dismissal that provided the catalyst for the development of the implied term of mutual trust and confidence, which was then itself rejected as a source of common law protection against dismissal in *Johnson*.[11] In 1974 the Union and Labour Relations Act introduced protection against constructive dismissal, where an employee resigns 'in circumstances in which [the employee] is entitled to terminate without notice by reason of the employer's conduct'.[12] In *Western Excavating v Sharp* the Court of Appeal interpreted constructive dismissals as involving the employee resigning in response to a repudiatory breach of contract by the employer, rather than other unreasonable treatment that did not amount to breach of contract.[13] This contractual approach to constructive dismissal in turn led to the emergence of the implied term of term of trust and confidence as a means of avoiding unduly narrowing the scope of constructive unfair dismissal.

In its canonical formulation, the term requires that both parties must not 'without reasonable and proper cause, conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.[14] It provides 'a general behavioural standard for judging whether the conduct of one of the parties had left an employment relationship in a condition of viable continuance or placed it in a state of breakdown'.[15] The threshold for breach of the duty of trust and confidence is not simply one of unreasonable behaviour, but the stricter one of whether the necessary conditions for a functioning employment relationship have been undermined without good reason. Initially implied 'in fact' into contracts on an individual basis,[16] the term became regarded as being implied 'in law' as a default rule in all employment contracts,[17] and was

---

[9] See P Davies and M Freedland, *Labour Legislation and Public Policy* (Oxford, Clarendon Press, 1993) 195–204.

[10] Royal Commission on Trade Unions and Employers Associations 1965-1968, *Report* (Cmnd 3623, 1968).

[11] For further discussion of this process, see ch 11 in this volume.

[12] Now contained in the Employment Rights Act 1996, s 95(1)(c).

[13] *Western Excavating Ltd v Sharp* [1978] QB 761 (CA).

[14] *Woods v WM Car Services* [1981] ICR 666 (EAT) 670.

[15] M Freedland, *The Personal Employment Contract* (Oxford, Oxford University Press, 2003) 156.

[16] *Courtaulds Northern Textiles Ltd v Andrew* 8 [1979] IRLR 84 (EAT).

[17] On this distinction, see *Scally v Southern Health and Social Services Board* [1991] IRLR 522 (HL).

confirmed at the highest level in *Malik v Bank of Credit and Commerce International SA (in liq)* (*Malik*).[18]

The scope and content of the implied term of trust and confidence are notoriously hard to pin down, as it applies in 'the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited'.[19] In short, employers must not exercise their contractual 'rights and powers' in a way that is likely to undermine the employment relationship, unless they have good and proper reason for their actions.[20] An employers' conduct will breach the term where 'its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it'.[21] As well as active mistreatment or mismanagement, trust and confidence may be breached by an employers' failure to act, for example in not investigating grievances or providing important information to an employee.[22] Subject to the establishment of the 'exclusion zone' discussed below, the term applies to constrain the exercise of employers' express contractual powers,[23] as well as their more general prerogative to manage workers and production processes conferred by the employment contract.[24]

B. Implied Terms and Managerial Power

The emergence of trust and confidence radically transformed the common law duties of employers,[25] with Freedland famously describing it as 'the most powerful engine of movement in the modern law of employment contracts'.[26] However, the application of trust and

---

[18] *Malik v Bank of Credit and Commerce International SA (in liq)*[1998] AC 20 (HL).

[19] ibid 46 (Lord Steyn).

[20] *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 524 (Ch) 533.

[21] *Woods* (n 14). For an overview of the operation of trust and confidence, see S Deakin, G Morris and A Adams, *Labour Law* (Cambridge, Cambridge University Press, 2021), 3.76–3.78.

[22] *Visa International v Paul* [2004] IRLR 42 (EAT).

[23] As in *Gogay v Hertfordshire County Council* [2001] FLR 280 (CA); *United Bank Ltd v Akhtar* [1989] IRLR 507 (EAT).

[24] As in *Transco Plc v O'Brien* [2002] EWCA Civ 379, [2002] ICR 721; *French v Barclays Bank plc* [1998] IRLR 646 (CA). *cf* the limits of the term in respect of employees reputation and economic wellbeing in the context of litigation *James-Bowen v Commission of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021.

[25] Although the term applies to both parties the range of other implied terms that employees are subject to has meant the impact of the term has largely been on the duties owed by employers.

[26] Freedland (n 15) 166.

confidence to limit employers' contractual powers is an instance of a broader category of cases where implied terms have been used as a means of regulating managerial power.[27] In these cases implied terms function as a form of judicial review of managerial decision-making,[28] and provide a 'prism … through which to evaluate whether there has been respect for the implicit behavioural commitments made by entry into, and continuance in, working relationships'.[29]

The primary example of this aside from trust and confidence is employers' implied duty of care, which also operates as a default term in all employment contracts.[30] For example, in *Johnstone v Bloomsbury Health Authority* the employers' contractual discretion to require employees to work up to 48 hours of overtime was found to be subject to their implied duty of care.[31] The application of the implied duty of care to constrain employers' express managerial powers is also supported by the Unfair Contract Terms Act 1977, which prevents liability for personal injury in negligence from being excluded by express terms that appear to provide employers with absolute discretion.[32] The term also conditions the general authority conferred on employers by the contract of employment to govern the workplace and production processes as they see fit. Employers have a duty to not act in an objectively unreasonable manner when exercising their managerial prerogative over matters such as hiring and supervising the workforce,[33] or the organisation of the workplace and performance of work.[34] Notwithstanding the limits to implied terms as a mechanism for governing managerial power imposed in

---

[27] It has been suggested that trust and confidence might operate as an umbrella term under which these more concrete terms might operate, but the better approach is to view them as distinct obligations, D Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' (2005) 34 *Industrial Law Journal* 284.

[28] See J Morgan, 'Against Judicial Review of Discretionary Contractual Powers' [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230; T Daintith 'Contractual Discretion and Administrative Discretion: A Unified Analysis' (2005) 68 *MLR* 554.

[29] L Barmes, 'Common Law Implied Terms and Behavioural Standards at Work' (2007) 36 *Industrial Law Journal* 35, 41.

[30] *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 (HL). Another example, which overlaps to at least some extent with trust and confidence, is the implied term requiring that employers not act in an arbitrary manner when awarding discretionary benefits, D Cabrelli, *Employment Law in Context* (Oxford, Oxford University Press, 2020) 202–07.

[31] *Johnstone v Bloomsbury Health Authority* [1992] QB 333 (CA).

[32] Unfair Contract Terms Act 1977, s 2. See, also, L Barmes, 'The Continuing Conceptual Crisis in the Common Law of the Contract of Employment' (2004) 67 *MLR* 435, 442–43.

[33] *Hudson v Ridge Manufacturing Co* [1957] 2 All ER 229 (Assizes).

[34] *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 (HL); *Speed v Thomas Swift & Co Ltd* [1943] KB 557 (CA); *Sutherland v Hatton* [2002] EWCA Civ 76, [2002] 2 All ER 1.

Johnson they continue to develop and play an important role in regulating employer discretion.[35]

Implied terms have even been used to constrain employers' power of dismissal in some circumstances. These cases generally involve courts implying terms limiting employers' freedom to terminate where the effect of this would be to deny an employees' entitlement to health insurance payments or some other contractual benefit.[36] *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* is an example of this, where a term was implied preventing the employer from dismissing other than for good reason, as this was necessary to prevent contractual entitlement to incapacity benefits under a permanent health insurance scheme.[37] While these cases seem to involve terms being implied 'in fact' on the basis that they are necessary and obvious in the specific circumstances, they can also be formulated as instances of a more general principle that an 'anti avoidance' term will be implied constraining employers' freedom to terminate without good reason where doing so would deprive the worker of some benefit they have contracted for.[38]

These developments in the common law frame the central question addressed in *Johnson*, of whether the implied term of trust and confidence applies to constrain an employers' freedom to dismiss. Given the discussion above, this might appear a natural and incremental way for the law to proceed. Writing shortly before *Johnson* Ford argued 'there is every reason why [trust and confidence] should apply to the exercise of an express right to terminate a contract' given the central importance of the term to the employment relationship.[39] This seems to make sense as a matter of principle, because it is artificial to distinguish between implied terms as a valid constraint on some express contractual powers but not on an employers' decision to exercise a notice clause or otherwise terminate the contract. As articulated by Leggatt J in the commercial context, the exercise of termination and non-termination powers

---

[35] *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661. See, also, A Sanders, 'Fairness in the Contract of Employment' (2017) 46 *Industrial Law Journal* 508.

[36] See, also, *Hill v General Accident Fire and Life Assurance Co plc* [1998] IRLR 641 (CSOH).

[37] *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521 (QB). For a recent example, see *Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd* [2022] EWHC 201 (QB).

[38] Cabrelli, *Employment Law in Context* (n 30) 207.

[39] M Ford, 'Rethinking the Notice Rule' (1998) 27 *Industrial Law Journal* 220, 228.

both involve circumstances where 'one party to the contract has a decision to make on a matter which affects the interests of the other party to the contract whose interests are not the same'.[40]

However, the implications of finding that mutual trust and confidence applies to the termination of employment contracts should not be underplayed. Taking this step would create a common law action for damages where a dismissal is carried out in a manner incompatible with the duty of trust and confidence. It would still be relatively easy for employers to dismiss without breaching the term by having a good and proper reason for their actions, albeit that more detailed guidance would need to be provided by the courts on what amounts to these reasons. But the longstanding position that there is no common law remedy for the manner of dismissal would be reversed. Moreover, recovery for wrongful dismissal would be extended significantly beyond the current standard of the employees' notice period, irrespective of whether the claim involved a breach of trust and confidence or another term such as an express notice clause. Damages for lost earnings would have to be calculated based on the estimated length of time the contract would have continued before the employer would have been able to terminate without breaching trust and confidence. An employee dismissed in breach of contract who would otherwise have continued to work for the employer for several years would therefore be entitled to lost wages for that period. Awards could be even more extensive where a dismissal in breach of contract prevented the employee from working again due to psychiatric injury. Recovery would of course be limited by the normal rules of causation and remoteness, as well as the employees' duty to mitigate losses, but there would nevertheless be the prospect of substantial common law damages following dismissal.

III. The Case

A. Facts

Mr Johnson began working for Unisys Ltd in 1971 at the age of 23 and remained there for 16 years before being made redundant. During this period, he had time off for work-related stress issues, was prescribed anti-depressants, and offered counselling by his employer. After three

[40] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283, [2015] All ER (Comm) 614 [97]. Despite the persuasiveness of this reasoning, the courts have been unwilling to regard termination as an exercise of contractual discretion that is subject to implied duties, see *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm), [2017] All ER (Comm) 1009 [261].

years away from the company Mr Johnson was re-employed in 1990 and became a company director in 1992 until the dismissal in 1994 which forms the basis of the litigation in question.

In January 1994 Mr Johnson was informed that there had been complaints made against him relating to his conduct. He was called to a disciplinary meeting at which he was not told the substance or specifics of the allegations and was summarily dismissed later the same day with four weeks wages in lieu of his notice. An internal appeal was rejected, and his dismissal confirmed on 3 March 1994. The circumstances of his dismissal caused Mr Johnson to suffer a major psychiatric illness, which included hospitalisation from March to August 1994. Following his dismissal and resulting psychiatric injury Mr Johnson brought a successful claim for unfair dismissal. The industrial tribunal found the dismissal process had been procedurally unfair, and in July 1995 awarded him the statutory maximum allowed compensation at the time of £11,691.[41]

After claiming for unfair dismissal, however, Mr Johnson continued to suffer from serious psychiatric issues which required ongoing psychotherapy and treatment via antidepressants and twice led to his re-admittance to hospital. Three years after his dismissal, and now in his late forties, he found himself still unable to find employment. It was at this point, in August 1997, that he brought a claim alleging his treatment during the dismissal amounted to a breach by Unisys of the implied terms in their contract, including mutual trust and confidence and their duty of care. These were alleged to have been breached by the failure to follow internal disciplinary processes, and not informing him of the allegations against him or providing an opportunity to defend himself. Mr Johnson further claimed these breaches caused his psychiatric breakdown and subsequent inability to find work, which was said to be foreseeable given his personal history of stress-related absence from work, and sought special damages of £400,000 to compensate for lost earnings.

This claim was struck out in both the County Court and Court of Appeal. The Court of Appeal decided the case based on the rule in *Addis*, that no compensation is available for losses due to an inability to find employment caused by the manner of dismissal.[42] Lord Woolf distinguished the case of *Malik v BCCI*,[43] where the House of Lords had found that employees

Commented [CH1]: Is there a case name for the footnote citation?

Commented [JA2R1]: Added.

[41] The cap was increased to £50,000 and linked to inflation by the Employment Relations Act 1999, s 34. As of April 2021, the maximum compensation for unfair dismissal is the lesser amount of £89,493 or 52 weeks' pay.

[42] *Johnson v Unisys Ltd* [1999] 1 All ER 854 (CA).

[43] *Malik v BCCI* (n 18).

can in principle claim for financial losses due to an inability to find future employment caused by a breach of trust and confidence,[44] on the grounds that *Malik* related to anterior breaches of contract rather than being about the manner of dismissal as in *Johnson*.

B. Johnson in the House of Lords

The claim was also rejected in the House of Lords. The majority decision declining to extend the term of trust and confidence to dismissal was given by Lord Hoffman, with Lords Bingham and Millet agreeing and Lord Nicholls deciding the case on analogous grounds. Lord Steyn dissented on the reasoning, finding that the term of trust and confidence should apply to constrain dismissal, but concluded that the claim in *Johnson* failed on remoteness grounds.

Lord Hoffman identified two problems with extending the implied term of trust and confidence to fetter dismissal. The first was based in general contract law reasoning and the need for implied terms to be consistent with the parties' express agreement, while the second was grounded in constitutional principle and parliamentary intent.[45] Beginning with the common law reasoning, Lord Hoffman believed the express term permitting Unisys to terminate with notice presented a significant barrier to Mr Johnson's claim.[46] He reasoned this was difficult to reconcile with an implied term restricting how this power was exercised, as the notice clause was likely to displace any implied term. In contrast, Lord Steyn in his judgment emphasised that trust and confidence was 'an overarching obligation implied by law as an incident of the contract of employment', and believed express and implied terms regarding dismissal could 'live together'.[47] Lord Hoffman also doubted whether the implied term of trust and confidence could apply to the act of dismissal because it is concerned with continuing employment relationships, and trust and confidence would necessarily be lost in the circumstances surrounding dismissal.[48] For this reason, he thought a distinct term would have to be implied in order for the claim to succeed, such one requiring good faith in dismissal, rather than being based in trust and confidence. Lord Steyn again dissented on this point. In his view, the 'obligation aims to ensure fair dealing between employer and employee, and that is

---

[44] See ch 11 in this volume.

[45] *Johnson* (n 1) [37].

[46] ibid [42].

[47] ibid [24].

[48] ibid [46]. See, also, Lord Millet at [78].

as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship'.[49]

Notwithstanding these issues, Lord Hoffman thought that it would be 'jurisprudentially possible' as a matter of contract law to imply a term restricting the exercise of dismissal power and giving a remedy in this case.[50] But he questioned whether 'it would necessarily be wise to do so', due to the risks of 'disproportionate' and open-ended liability for employers, as well as difficulties of causation and identifying the relevant damage,[51] which meant it would be a substantial rather than incremental development of the law which might therefore be best left to Parliament. As a result, the question of whether to imply a term was 'finely balanced'.[52]

Given these statements it is unclear whether, if approached purely as a matter of contract law reasoning, Lord Hoffman would have been willing to develop an implied term constraining employers' power of dismissal. He was spared from adopting a conclusive position on this question, however, as he regarded the presence of the statutory unfair dismissal framework as determinative in barring the free development of the common law in this area. It would 'go contrary to the evident intention of Parliament' for implied terms to fetter dismissal, as this would 'develop the common law to give a parallel remedy' to unfair dismissal that was not subject to the limits on liability contained in the legislation.[53] The unfair dismissal framework was said to represent 'an attempt to balance fairness to employees against the general economic interests of the community' by Parliament.[54] The imperative for the common law to 'be consistent with legislative policy' and 'proceed in harmony with Parliament' therefore made it impermissible to imply any terms circumventing the statutory limits on unfair dismissal liability.[55]

Two further aspects of Lord Hoffman's judgment are worth highlighting. First, parliamentary intent and the legislative context was found to equally exclude claims for

[49] ibid [26].

[50] ibid [47].

[51] ibid [47]–[49].

[52] ibid [50].

[53] ibid [56]–[58].

[54] ibid [54].

[55] ibid [37].

breaches of duty of care in the context of dismissal.[56] Second, he also commented obiter that express contractual disciplinary procedures would be unlikely to give rise to damages at common law. It was 'impossible' to think that Parliament had intended that the inclusion of disciplinary rules in the statements of particulars required under the Employment Rights Act 1996 would 'give rise to a common law action in damages … circumventing the restrictions and limits' placed on unfair dismissal claims.[57] The statutory background also meant the parties themselves would be unlikely to intend any express disciplinary procedures to 'create contractual duties which are independently actionable'.[58]

The other majority judgments closely echoed the reasoning adopted by Lord Hoffman. In his concurring judgment Lord Millet noted that had unfair dismissal framework not existed the courts might have developed a similar common law remedy to reflect 'changing perceptions of the community',[59] but that 'the creation of the statutory right has made any such development of the common law both unnecessary and undesirable'.[60] It would be unnecessary to imply a term that merely replicated claims for unfair dismissal, and 'inconsistent with the declared policy of Parliament' to imply a term that extended beyond the statutory scheme.[61] In addition, the co-existence of two systems with different rules and routes to enforcement would be 'a recipe for chaos'.[62] Lord Nicholls similarly believed that developing the common law would 'defeat the intention of Parliament' that claims for the manner of dismissal should be subject to prescribed limits and decided by specialist tribunals.[63] The unfair dismissal framework therefore presented an 'insurmountable obstacle' to developing the common law as an implied term limiting the power of dismissal 'cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed'.[64]

Lord Steyn was unpersuaded by both the common law and constitutional reasoning of the majority. He began by questioning whether on close analysis the ratio of *Addis* did in fact

---

[56] ibid [59].

[57] ibid [66].

[58] ibid [66].

[59] ibid [77].

[60] ibid [80].

[61] ibid.

[62] ibid.

[63] ibid.

[64] ibid [2].

rule out pecuniary damages for loss of employment prospects following breach.[65] But even if this were true, he would have been willing to depart from this approach.[66] In addition to finding Lord Hoffman's reasoning on express terms and the limited scope of trust and confidence unconvincing, Lord Steyn rejected the finding that the common law had been pre-empted by statute. In his view it was 'unrealistic' to think Parliament would have assumed (much less intended) that the common law be set in stone when introducing legislation on unfair dismissal.[67] Ultimately, however, he concluded that the claim must fail on the facts, as there was no prospect of success due to the remoteness of the alleged damages and level of foresight that could be expected of the employer.

IV. The Legacy of *Johnson*

This section explores the troubling legacy of *Johnson*, and sets out the uncertainty, inconsistency, and incoherence created by the decision. The analysis focusses on the pre-emption finding as this was determinative in the House of Lords, but the contract law reasoning has also been subject to thorough and persuasive critiques.[68]

A. Parliamentary Intent

The reliance on parliamentary intention as a key basis of the pre-emption finding in *Johnson* is, with respect, somewhat unsatisfactory. We should be wary about deploying parliamentary intent in this way given its existence, meaning, and role in questions of legal interpretation are all contested.[69] Even allowing that it is conceptually possible for an institution constituted by

---

[65] ibid [15]-[16].

[66] ibid [17]-[20].

[67] ibid [23].

[68] See, eg, Barmes, (n 32); A Bogg and H Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*' in P Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Oxford, Hart Publishing, 2015).

[69] For a sample of these debates see J Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999) 119–46; R Ekins, *The Nature of Legislative Intent* (Oxford, Oxford University Press, 2012); J Goldsworthy, 'Legislative Intention Vindicated?' (2013) 33 *OJLS* 821; R Dworkin, *Law's Empire* (Cambridge Massachusetts, Harvard University Press, 1986) ch 9; P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge, Cambridge University Press, 2015) 125–27; J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, Oxford University Press, 2009) ch 11; A Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge, Cambridge University Press, 2018) 13–21.

a multitude of individuals to have a single intention,[70] it is difficult to identify in practice.[71] Barmes rightly points out that these difficulties are especially acute for employment legislation given the constantly evolving and 'internally contradictory' nature of the policy environment.[72]

It can also be questioned whether parliamentary intent should bar otherwise legitimate common law developments given the intention 'of the majority of the members of the legislature … does not have legal significance' under the UK's constitutional settlement.[73] What matters instead is the statutory text, and while this is usually interpreted 'in line with the intention reasonably to be attributed to Parliament in using the language'[74] the hypothetical nature of this intent means legislation need not necessarily be construed in line with the actual intentions of those who enacted it.

These general concerns about parliamentary intent are evident in *Johnson* itself, where it is far from clear what Parliament's intention was in respect of the unfair dismissal legislation, or how this intent should be identified. Hepple's analysis of the Donovan Commission demonstrates the intent when introducing unfair dismissal was to preserve the common law, and that there is 'no reason to believe' the Commissioners 'thought that the common law they were preserving would stand still'.[75] Indeed, shortly after the introduction of unfair dismissal the Court in *Norton Tool v Tewson* regarded unfair dismissal as a distinct framework for redress, stating that damages for wrongful dismissal were 'quite unaffected by the [1971] Act which created an entirely new cause of action'.[76] The malleable nature of parliamentary intent is also apparent in *Johnson*, where it could just as well be argued that the silence of the legislation in respect of the common law indicates that 'Parliament was content to let the courts develop it in the usual way'.[77]

In truth, it is likely that Parliament simply did not have any specific intent regarding the future development of the common law when legislating for unfair dismissal. References to

---

[70] R Ekins, 'The Intention of Parliament' [2010] *Public Law* 709.

[71] Dworkin (n 69) 313–37; J Steyn, '*Pepper v Hart*: A Re-Examination' (2001) 21 *OJLS* 59.

[72] Barmes (n 32) 451.

[73] Steyn (n 71) 61.

[74] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [30] (Lord Nicholls).

[75] B Hepple, *Rights at Work: Global, European and British Perspectives* (London, Sweet & Maxwell, 2005) 47–49.

[76] *Norton Tool v Tewson* [1972] ICR 501 (NIRC) [14].

[77] B Hepple and G Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 *Industrial Law Journal* 245, 253.

parliamentary intent in *Johnson* must therefore be to intentions attributed to Parliament rather than any actual existing intent. Not only does this make reliance on the concept 'more than slightly artificial',[78] but if parliamentary intention merely refers to an intent attributed to the legislature by the court for some other independent reasons the concept is doing little of the normative work in justifying pre-emption of the common law. In which case it would be preferable for the courts to have addressed these free-standing reasons supporting pre-emption directly.[79]

Given these critiques, defences of *Johnson* have understandably taken references to parliamentary intent as a placeholder for other considerations. Alan Bogg, for example, believes parliamentary intent can 'charitably' be read as 'shorthand' for more persuasive arguments.[80] This possibility is considered below. But even if the pre-emption in *Johnson* could ultimately be justified on other grounds it is problematic from a rule of law perspective for these reasons to have been obscured by the notion of parliamentary intent.

B. The Exclusion Zone

There is considerable uncertainty and arbitrariness regarding the extent and operation of the 'exclusion zone' established by *Johnson*. In the immediate aftermath of the decision, it was feared that trust and confidence would also be barred from governing the termination of employment contracts in circumstances involving constructive dismissal,[81] and thus significantly reduce the protection available against unfair dismissal. Alternately, if the common law applied to employer conduct away from direct dismissals, it was unclear where the boundaries of the exclusion zone lay and when claims in contract would be available for breaches of trust and confidence by employers. If the implied term continued to apply outside the context of dismissal the decision in *Johnson* also appeared to give rise to what Barmes called 'the liability problem'.[82] Namely, that an employees' claim in contract following a breach of trust and confidence would rest on their response to the employers' repudiatory

---

[78] Freedland (n 15) 304.

[79] TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford, Oxford University Press, 2013) 192.

[80] Bogg (n 3) 77.

[81] M Freedland, 'Claim for Unfair Dismissal' (2001) 30 *Industrial Law Journal* 309; Barmes (n 32) 452–53.

[82] Barmes (n 32).

breach; with those accepting the breach by resigning seeming to bring their claim within the exclusion zone.

The scope of the exclusion zone was clarified to some extent by the House of Lords in the joined cases of *Eastwood v Magnox Electric plc* and *McCabe v Cornwall County Council*.[83] Both involved claims for psychiatric injury allegedly caused by breaches of the implied terms of trust and confidence and duty of care. In *Eastwood* the employees had been subjected to a persecutory campaign at work involving allegedly false accusations of sexual harassment and an unfair disciplinary process that ultimately led to their dismissal. *McCabe* involved a claim on the basis that the employer had breached trust and confidence in suspending him and failing to investigate allegations of misconduct prior to dismissal. Giving the majority judgment, Lord Nicholls asserted:

> [T]he boundary of the '*Johnson* exclusion area' … is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom.[84]

Following this, it was found that all three employees' claims could proceed to trial, as on the alleged facts their claims had arisen before dismissal.

The 'liability problem' identified by Barmes was therefore avoided in *Eastwood*, as the availability of an employees' claim for breach of contract that exists independently of dismissal does not depend on whether they choose to accept the repudiatory breach. However, Lord Nicholls also made clear that where a common law claim exists prior to dismissal, whether for breach of trust and confidence or otherwise, recovery cannot include any losses flowing from the dismissal itself.[85] As this includes losses resulting from constructive dismissals, any loss flowing from an employees' acceptance of the repudiatory breach by resigning will fall within the exclusion zone.[86]

Defining the exclusion zone in this way considerably weakens the practical significance of common law claims for breach of trust and confidence, as it means employees who resign

---

[83] *Eastwood* (n 2).

[84] ibid [27].

[85] ibid [28].

[86] ibid [31].

following a breach of an implied term cannot claim for lost earnings during their notice period. Breaches of trust and confidence unrelated to dismissal will therefore not give rise to claims for damages in most cases. Substantial recovery will only be available in exceptional circumstances where pre-dismissal breaches cause psychiatric injury,[87] or demonstrable economic loss through damage to reputation.[88] The effect of this is to significantly curtail the protection (and deterrence) provided by the common law of wrongful dismissal against abuses of managerial power and unfair treatment within the employment relationship.

Despite the assurances of Lord Nicholls in *Eastwood*, the scope and effect of the exclusion zone remain deeply uncertain. First, where a breach of trust and confidence is independent from dismissal it will frequently be difficult to determine what can be recovered at common law. Indeed, it may be impossible to demarcate with any degree of accuracy the harms and losses caused by a prior breach of duty rather than resulting from the employees' acceptance by resignation. Second, and more fundamentally, it will often be unclear whether an employers' conduct is sufficiently independent from dismissal to fall outside the exclusion zone, and for common law duties in contract and tort to therefore apply. It is challenging to draw any bright lines in this area, as the implied term of trust and confidence can apply to disciplinary processes and suspension decisions leading up to a dismissal as well as to redundancy selection processes.[89] Disciplinary processes may therefore 'have to be chopped artificially into separate pieces',[90] with a somewhat arbitrary line being drawn where the court considers the employers' actions can no longer be regarded as sufficiently independent from the dismissal.

The boundaries of the exclusion zone are to be determined by tribunals as a question of fact, and it is difficult to predict where the line will be drawn. A striking example of trust and confidence being found to apply in circumstances that intuitively seem inextricably linked to dismissal is *Rawlinson v Brightside Group,* where the employer was held to have breached the implied term by giving the employee a false reason for their dismissal.[91] The uncertainty

---

[87] See *Gogay* (n 23).

[88] *Malik* (n 18).

[89] *Gogay* (n 23); *Stevens v University of Birmingham* [2015] EWHC 2300 (QB), [2015] IRLR 899; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] IRLR 112; *Gebremariam v Ethiopian Airlines Enterprise* [2014] IRLR 354 (EAT).

[90] *Eastwood* (n 2) [31] (Lord Nicholls).

[91] *Rawlinson v Brightside Group Ltd* [2018] IRLR 180 (EAT).

regarding this boundary is also demonstrated by *Monk v Cann Hall*, where an employee who was working out her notice after being made redundant was publicly escorted out of the workplace, and subsequently claimed this treatment had breached the duty of trust and confidence and caused psychiatric injury.[92] The Court of Appeal thought that if escorting the employee out of the workplace constituted a dismissal the claim would be covered by the exclusion zone, but as the dismissal did not in fact take place until a later date the treatment fell outside the exclusion zone. It is troubling for the availability of common law claims in contract and tort to turn on margins such as these.

The confusion surrounding the exclusion zone was further compounded by the Supreme Court in the linked cases of *Edwards v Chesterfield* and *Botham v Ministry of Defence*.[93] With the seven-member judicial panel giving five separate judgments adopting an array of different reasoning, the true ratio of the case is hard to identify, if one exists at all.[94] *Edwards* confirmed the exclusion zone applies to implied terms as set out in *Eastwood*.[95] However, it appears a majority also concluded the *Johnson* exclusion zone should be extended to some express terms, with Lords Dyson, Mance, and Walker finding the legislation on unfair dismissal meant that breaches of disciplinary processes incorporated into employment contracts would not ordinarily give rise to common law claims for damages.[96] Drawing on Hoffman's comments in *Johnson*, the legislative context of unfair dismissal was said to mean that contractual disciplinary procedures cannot be regarded as 'ordinary contractual terms agreed by parties to a contract in the usual way'.[97] So while potentially enforceable through injunctions, they will not give rise to damages claims unless expressly stated in the contract.[98]

While a full analysis of *Edwards* lies beyond the scope of this chapter it is notable that, in contrast to *Johnson*, labour lawyers have been united in opposition to the decision. Key criticisms include that the Supreme Court erred in thinking that the constitutional concerns

---

[92] *Monk v Cann Hall* [2013] EWCA Civ 826, [2013] IRLR 732.

[93] *Edwards v Chesterfield* and *Botham v Ministry of Defence* [2011] UKSC 58, [2012] 2 AC 22.

[94] Doubted in L Barmes, 'Judicial Influence and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust & Botham v Ministry of Defence'* (2013) 42 *Industrial Law Journal* 192.

[95] *Eastwood* (n 2).

[96] While the judgment of Lord Phillips was principally based in *Addis's* case rather than this reasoning he also stated that it would undermine the decisions in *Johnson* and *Eastwood* to allow common law claims for breach of contractual disciplinary procedures, see *Edwards* (n 93) [87].

[97] ibid [38] (Lord Dyson).

[98] ibid [44].

present in *Johnson* should apply equally to exclude express terms;[99] wrongly treated employment legislation as a ceiling rather than floor of rights on which the parties can agree to go beyond;[100] adopted an unprincipled and anomalous approach to remedies for breach of contract;[101] created further uncertainty over the class of express terms which fall within the exclusion zone;[102] and overlooked earlier cases that awarded damages for breach of express disciplinary procedures.[103]

It is therefore understandable that supporters of *Johnson* have sought to argue that *Edwards* represents an unprincipled extension of the pre-emption finding and 'should not be regarded as the legitimate progeny of *Johnson*'.[104] It is certainly true that a distinction could and should have been made in *Edwards* between the pre-emption of implied terms and express terms. But although it might not inexorably follow from the decision, *Edwards* is undoubtedly part of *Johnson*'s legacy given it was clearly inspired by the judgment and reasoning of Lord Hoffman. That the result in *Edwards* represents 'a perfectly possible sequel'[105] to *Johnson* is sufficiently damning of the earlier decision.

C. Apparent Inconsistency

Another feature of *Johnson's* legacy are the apparent inconsistencies it creates in the relationship between common law and statute in the employment sphere. One element of this being that it is hard to reconcile the decision in *Johnson* with instances where the common law does regulate the manner of dismissal. First, it seems that the common law continues to restrict employers' right to dismiss through the law of implied terms in cases involving attempts to deny employees health insurance or other contractual entitlements.[106] In *Briscoe v Lubrizol*, for

---

[99] Barnard and Merrett (n 3) 327–29; Bogg and Collins (n 68) 209–11; Davies (n 3) 92.

[100] Bogg and Collins (n 68) 211–12.

[101] A Bogg, 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court (2015) 131 *LQR* 15; Davies (n 3) 94.

[102] Barmes (n 94); D Cabrelli, 'Liability and Remedies for Breach of the Contract of Employment at Common Law: Some Recent Developments' (2016) 45 *Industrial Law Journal* 207, 217.

[103] *Barber v Manchester Regional Hospital Board* [1958] 1 WLR 181 (QB), as discussed in K Costello, '*Edwards v Chesterfield Royal Hospital* – Parliamentary Intention and Damages Caused by Maladministration of a Contractual Dismissal Procedure' (2013) 76 *MLR* 134. See, also, *Deadman v Bristol CC* [2007] EWCA Civ 822, [2008] PIQR P2.

[104] Bogg and Collins (n 68) 211.

[105] Bogg and Freedland (n 6) 557.

[106] Barmes (n 32) 461–62. See, also, *Jewvey v Australian Broadcasting Co* [2002] EWHC 927 (QB), [2003] ICR 79.

example, the Court of Appeal found that where dismissal would deny an entitlement to PHI benefits there was an implied term that the employer would not terminate other than for good cause.[107] The recent Privy Council case of *Ali v Petroleum Company of Trinidad and Tobago* similarly found an implied term preventing the employer from dismissing without good reason where this would deny the employee from being entitled to have a loan written off.[108]

Second, the common law also protects against the manner of dismissal through the judicial review of decisions to remove individuals from positions or offices created by statute.[109] This discrepancy might be explained by the established nature and limited distributional consequences of judicial review,[110] as well as the courts' greater willingness to scrutinise administrative decision-making than that of employers.[111] But it is hard to justify as a matter of principle given that there is often now little practical difference between office holders and employees,[112] and that the courts have recently included office holders within the protective scope of some employment law statutes.[113]

Another area of inconsistency is that the common law may provide remedies that extend beyond those available for unfair dismissal, contrary to the underlying logic of the *Johnson* exclusion zone. One example of this is that injunctions are sometimes available to prevent employers from breaching expressly incorporated disciplinary processes,[114] or breaching the implied term of trust and confidence in a disciplinary process.[115] In these circumstances the common law provides a pre-emptive remedy against attempted unfair dismissals and therefore offers better protection to employees than that available under statute, where claims must be brought on a retrospective basis and there is usually little prospect of reinstatement.

---

[107] ***Briscoe v Lubrizol*** [2002] EWCA Civ 508, [2002] IRLR 607 [107].

[108] *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531 [11].

[109] *R (Shoesmith) v OFSTED* [2011] EWCA Civ 642, [2011] IRLR 679.

[110] Bogg (n 3) 84.

[111] ACL Davies, 'Judicial Self Restraint in Labour Law' 38 *Industrial Law Journal* 278.

[112] Ford (n 39) 233.

[113] *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] WLR 5905.

[114] *McMillan v Airedale NHS Foundation Trust* [2014] EWCA Civ 1031, [2015] ICR 747*; Mezey v South West London & St. George's Mental Health NHS Trust* [2010] EWCA Civ 293, [2010] IRLR 512. For discussion see Cabrelli (n 102) 214–17.

[115] *Chhabra v West London Mental Health NHS Trust* [2013] UKSC 80, [2014] 1 All ER 943.

A further example is that employees who have claims for constructive unfair dismissal may sometimes recover significantly more in compensation for wrongful dismissal. Where a highly paid employee has a long notice period or large bonus entitlement and their employer is in repudiatory breach of an express term of the contract the employee can accept this breach and recover lost wages and benefits for their notice period that vastly exceed the statutory cap for unfair dismissal.[116] The same is true for breaches of express terms in high-value, fixed-term employment contracts that do not contain a break clause. The ex-Newcastle United manager Kevin Keegan, for example, was awarded £2 million in lost earnings under his fixed-term contract for constructive wrongful dismissal, after he resigned in response to a repudiatory breach of an express term providing that he had final say over transfer decisions.[117] Cases such as these conflict with the underlying reasoning in *Johnson*, that the common law should not circumvent the remedies Parliament has provided for situations of unfair dismissal.

A final element of inconsistency created by *Johnson* is that the decision appears to adopt a markedly different approach towards the relationship between common law and statute than is in operation elsewhere in employment law. Notably, the implied term of reasonable notice for dismissal continues to be inserted into indefinite employment contracts that do not contain express notice clauses despite the existence of statutory minimum notice periods.[118] This discrepancy is no doubt due to the more established nature of the implied notice term, which is based on a general common law principle that such a term will be implied into contracts of indefinite duration.[119] However, it is nevertheless striking that legislation regulating one aspect of the manner of dismissal (fairness) displaces the common law while another statute also regulating the manner of dismissal (notice) does not.

Furthermore, and in contrast to the result in *Johnson*, the implied term of trust and confidence continues to run in parallel with a range of employment legislation away from the dismissal context. This includes statutes protecting trade union rights and against discrimination among others. In *Stevens v University of Birmingham*, for example, the term provided a right to be accompanied in an investigatory meeting, which extended beyond the

---

[116] Eg, *Horkulak v Cantor FitzGerald International* [2004] EWCA Civ 1287, [2005] ICR 402.

[117] *Keegan v Newcastle United Football Co Ltd* [2010] IRLR 94 (Premier League Manager's Arbitration Tribunal).

[118] *McCelland v Northern Ireland General Health Service Board* [1957] 1 WLR 594 (HL); *Clark v Clark Construction Initiatives Ltd* [2008] IRLR 364 (EAT). For recent discussion of this issue in the Australian context, see *McAlister v Yara Australia Pty Ltd* [2021] FCCA 1409.

[119] See *Martin-Baker Aircraft Co v Canadian Flight Equipment* [1955] 2 QB 556 (QB).

rights provided by the Trade Unions Relations (Consolidation) Act 1992 (TULRCA).[120] Similarly, an employer who offers employees inducements not to join a union is likely to breach both the implied term and section 145A of TULRCA.[121] There is also a significant degree of overlap between common law implied terms and the Equality Act 2010, as employer conduct amounting to direct discrimination or harassment under the Act is likely to also breach trust and confidence and the employers' duty of care.[122]

Indeed, it is interesting to contrast the fate of trust and confidence in the context of discrimination with that of dismissal given the similarities between them. In both contexts the implied term often overlaps with the protection provided by statute but remains a distinct behavioural standard.[123] In addition, as with unfair dismissal the implied term may sometimes provide more extensive protection against discrimination than the legislation. For instance, unlike statutory claims for discrimination or harassment, the term of trust and confidence may protect against arbitrary or discriminatory treatment by employers without needing to be linked to a protected characteristic,[124] and common law claims can be brought outside the time limits imposed by the Equality Act.

There are no doubt other examples of common law and statute happily co-existing that contrast with the finding of pre-emption in *Johnson*.[125] The diverse circumstances where common law and employment legislation operate in parallel mean they cannot easily be dismissed as 'red herrings' or 'remote statutory analogies'.[126] Rather, they are in genuine tension with the vision of the relationship between common law and statute endorsed in *Johnson*. Why must the implied term of trust and confidence be pre-empted by the unfair dismissal legislation but allowed to co-exist with statutory protections against discrimination and trade union rights among others? It might be possible to justify these apparent

---

[120] *Stevens v University of Birmingham* [2015] EWHC 2300, [2016] All ER 258.

[121] D Brodie, 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37 *Industrial Law Journal* 329, 334–35.

[122] *Weathersfield Ltd v Sargent* [1999] IRLR 94 (CA); *Waters v Commissioner of Police of the Metropolis* [2000] 1 WLR 1607 (HL). This was left open in *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170 (CA).

[123] *Amnesty International v Ahmed* [2009] IRLR 884 (EAT).

[124] See *Manchester Passenger Transport Executive v Sands* EAT (11 January 2001); *Johnson v The Governing Body of Coopers Lane Primary School* (EAT, 1 December 2009).

[125] Such as the overlap between employers' duty of care and the Health and Safety at Work Act 1974, or the Workman's Compensation Act 1897, see Bogg and Collins (n 68) 193.

[126] Bogg (n 3) 77.

inconsistencies by reference to legislative context,[127] but at the very least they show the need for a more fully developed and nuanced approach to pre-emption than is evident in *Johnson*.

D. Legal Incoherence

The *Johnson* exclusion zone has created incoherence and anomalies in the common law remedies available for breach of the employment contract, and absurd legal consequences for the statutory unfair dismissal framework.

In respect of common law remedial rules, the position can be summed up as follows. An employee may accept an employer's repudiatory breach of an express term and claim damages for lost earnings during their notice period in an action for wrongful dismissal. But damages will not normally be available if the breach is of an express term incorporating disciplinary procedures, and possibly other express terms relating to dismissal. In such cases damages will only be available if expressly provided for in the contract, and injunctions must instead be used to enforce these terms; a position that is 'surely unique' in the common law of contract.[128] In addition, an employers' breach of the implied term of reasonable notice may be accepted by an employee and give rise to damages for lost earnings during the notice period, whereas breaches of other implied terms such as trust and confidence or duty of care that are similarly accepted by an employee will not ground a claim for lost earnings during the notice period.

These varying results can be observed despite the basic legal position being the same in all situations: namely that there has been a repudiatory breach of contract, accepted by an employee who is claiming for breach of contract. The absurdity of the current position is illustrated by the fact that an employer who is in repudiatory breach of an express term will necessarily also breach the implied term of trust and confidence,[129] meaning that the same actions of an employer may ground a claim for breach of contract including lost earnings during the notice period if the action is brought as a breach of the express term, but no such recovery will be available if the claim is brought for breach of the implied term.

---

[127] As Bogg seeks to do in respect of workmen's compensation legislation, ibid 78.

[128] Bogg and Collins (n 68) 196.

[129] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2013] IRLR 86; *Mostyn v S&P Casuals Ltd* (EAT, 22 February 2018).

There is also little justification as a matter of common law principle for distinguishing between the implied term of trust and confidence as valid constraint on the exercise of employers' express and implied managerial powers other than their ability to terminate the contract. As Collins argues, it makes no sense doctrinally for the availability of a claim in contract to turn on whether an employers' breach of trust and confidence takes place the day before a dismissal or the same day.[130] This distinction also leads to the counterintuitive result that Parliament's decision to establish protections against unfair dismissal has ultimately resulted in *less* protection being offered by the common law in this context than other areas of managerial decision-making.

Another paradoxical outcome of *Johnson* is that in some circumstances the exclusion zone provides an incentive for employers to dismiss employees without full and fair procedures. The implied term of trust and confidence applies leading up to dismissal, so unfair disciplinary processes could potentially lead to employees recovering for psychiatric injury or economic losses caused by breaches of the term without being subject to the cap on compensation for unfair dismissal. Employers might therefore be better off, and avoid any such uncapped liability, by pre-emptively dismissing the employee rather than suspending them or undertaking thorough disciplinary processes. However unlikely this is to regularly occur in practice, it is perverse for the introduction of unfair dismissal to have the result of incentivising dismissal without due process in a manner which is diametrically opposed to the legislation's underlying goals.

V. A Compelling Constitutional Vision?

The preceding analysis demonstrates the 'awkward and unfortunate consequences' of *Johnson*,[131] and it is difficult to maintain that the courts have managed to avoid the 'recipe for chaos' that Lord Millet believed would result from developing the common law in the area of dismissal.[132] In spite of the problems created by *Johnson*, it might nevertheless be possible to justify the conclusion of the House of Lords that the normal application and development of the common law must be precluded by the statutory framework of unfair dismissal.

---

[130] Bogg and Collins (n 68) 197.

[131] *Eastwood* (n 2) [31] (Lord Nicholls).

[132] *Johnson* (n 1) [80].

At the time of *Eastwood* Lord Steyn was able to refer to an impressive array of labour law scholarship and conclude that 'there is apparently no support for the analysis adopted in *Johnson*'.[133] This is no longer the case. More recently, a second wave of literature has emerged, with several leading labour lawyers mounting a cautious defence of the decision on grounds of constitutional principle.[134] These scholars largely acknowledge the problems with *Johnson* outlined above but view them as the necessary price for maintaining constitutional propriety. There are undoubtedly legitimate and weighty concerns about developing the common law in an area regulated by statute that were not fully accounted for in the original critiques of *Johnson*. However, this section seeks to push back against the view that *Johnson* represents a 'compelling constitutional vision of the interaction between common law and legislation' in the employment sphere.[135] While there are certainly plausible arguments in favour of pre-emption, and the question is finely balanced, it is argued that constitutional considerations did not necessitate the pre-emption of the common law in *Johnson*.

A. Coherence of Common Law and Statute

One argument made by Anne Davies in support of pre-emption in *Johnson* is that it promotes 'the overall coherence of the law'.[136] There are two key elements of this claim. First, that courts should seek to 'develop a coherent body of employment law in which statute and common law work together effectively',[137] including by developing the common law by 'considering its fit with statute'.[138] Second, that despite the doctrinal incoherence created by *Johnson*, pre-emption was necessary to achieve coherence at the more macro level between common law and statute. But while the first of these seems entirely correct, it is less clear that the pursuit of coherence necessitated pre-emption in *Johnson*.

It is certainly welcome that the House of Lords in *Johnson* departed from the traditional 'oil and water' view of the relationship between common law and statute, which characterises them as distinct sources of law that flow beside each other through the legal system but do not

---

[133] *Eastwood* (n 2) [43].

[134] Barnard and Merrett (n 3); Davies (n 3); Bogg (n 3).

[135] Bogg (n 3) 68.

[136] Davies (n 3) 86.

[137] ibid 75.

[138] ibid 89.

comingle.[139] This approach tends to coincide with a belief that legislation represents an unprincipled intervention into the common law as the primary source of law,[140] epitomised by the statement that 'Parliament generally changes law for the worst … the business of the judges is to keep the mischief of its interference within the narrowest bounds'.[141]

The oil and water view of common law and statute is not tenable in the context of labour law. Employment legislation can no longer be seen as isolated interventions within the common law and is now an equally (or more) important source of regulation. Moreover, it is wrong to characterise common law and statute as separate bodies of law given that the common law is used to give meaning to legislation,[142] and legislation frequently triggers developments in the common law. As a result, a 'kind of legal partnership' exists between common law and statute.[143] This is certainly true for employment law. Not only does Parliament often choose to 'graft statutory protections on to the stem of the common law contract'[144] but, as Freedland states, the common law 'has evolved, in an intricate symbiosis with employment legislation and various adjacent kinds of legislation … so that it should be regarded as ultimately if not immediately inseparable from that large body of legislation'.[145]

Rather than treating them as oil and water, therefore, courts should aim for the 'emulsification' of common law and statute in employment cases. Emulsification occurs where two initially separate and immiscible liquids are combined to create a new substance. The process generally requires the use of a third substance, known as an emulsifier, in order for the two liquids to form a stable compound. Under this approach, rather than flowing through the legal system side-by-side, common law and statute should undergo a process of emulsification whereby these two distinct sources of law are rendered into a single stable compound by the courts, with the Rule of Law and other constitutional principles acting as the emulsifying agent.

Given this, it is welcome that the House of Lords in *Johnson* were sensitive to the legislative context and did not view common law and statute as oil and water. It is not clear,

---

[139] J Beatson, 'Has the Common Law a Future?' (1997) 56 *CLJ* 291, 308.

[140] ibid 299.

[141] F Pollock, *Essays in Jurisprudence and Ethics* (London, Macmillan, 1882) 85.

[142] Burrows (n 69) 58.

[143] P Atiyah, 'Common Law and Statute Law' (1985) 48 *MLR* 1, 6.

[144] *Buckland v Bournemouth University Higher Education Co* [2010] EWCA Civ 121, [2011] QB 323 [19] (Sedley LJ).

[145] M Freedland, 'The Legal Structure of the Contract of Employment' in M Freedland and others (eds), *The Contract of Employment* (Oxford, Oxford University Press, 2016) 34.

however, that pre-emption was required in pursuit of coherence between common law and statute. The emulsification of common law and statute can be achieved in various ways, and pre-emption of the common law will not be necessary in every instance where Parliament has legislated.[146] For example, the process of emulsification might sometimes instead be best achieved by interpreting legislation in line with common law principles,[147] developing the common law by analogy to legislation,[148] or in a manner which best achieves the purposes of the legislation.[149] In any given context the courts must therefore decide which mode of interaction between common law and statute is most appropriate.

In *Johnson* itself the emulsification of common law and statute could arguably have been better achieved by developing the common law in a way that furthers the underlying goals of unfair dismissal, of providing justice and security for subordinate and dependent workers.[150] This would represent a deeper integration of the two, with the legislation being used as a source of principle for developing the common law.[151] Moreover, the finding of pre-emption damages the coherence of common law and statute, because it has the paradoxical result of legislation introduced to protect workers against unfair dismissal causing the common law to offer less protection in this context than other abuses of managerial power.

B. Legislative Finality

The most powerful arguments for pre-emption in *Johnson* are rooted in concerns that developing the common law would be contrary to democratic principle because it would undermine the finality of the unfair dismissal legislation enacted by a democratically legitimate Parliament.[152] The core idea is that Parliament has considered and answered the question of

---

[146] On the various modes of interaction between common law and statute, see R Pound, 'Common Law and Legislation' (1907) 21 *Harvard Law Review* 383; Atiyah (n 143); Beatson (n 139); J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *LQR* 247; A Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232; Davies (n 3); Bogg (n 3); Burrows (n 69).

[147] For examples of this in employment law, see Davies (n 3) 75–80.

[148] As in *Barber v RJB Mining (UK) Ltd* [1999] ICR 679 [QB].

[149] Eg, the departure from the standard postal rule in *Gisda Cyf v Barratt* [2010] UKSC 41, [2010] 4 All ER 851.

[150] On the goals of unfair dismissal and employment legislation, see H Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford, Oxford University Press, 1992) ch 1; G Davidov, *A Purposive Approach to Labour Law* (Oxford, Oxford University Press, 2016) 98–112.

[151] For discussion of this see Pound (n 146).

[152] Bogg (n 3) 79–80.

what remedy employees should have for unfair dismissal, and the courts should not undermine this framework by developing a common law remedy that extends beyond it.

Alan Bogg suggests the finding of pre-emption is also justified due to the polycentric nature of the issue in *Johnson* and the significant resource allocation implications of developing the common law.[153] These are certainly reasons for cautious incrementalism when developing the common law, and may heighten democratic concerns about the co-existence of common law and statute. But they are not, in themselves, sufficient to demand pre-emption of the common law. Polycentric questions involving the distribution of resources are pervasive in private law and so should not be equated with non-justiciability,[154] with employment law being no exception to this. For example, the application of the implied term of trust and confidence to balance the interests of employers and employees raises similar issues of polycentricity and resource allocation outside of dismissal, and it is only the additional concern of legislative finality that potentially justifies pre-emption in that context.Similarly, judicial determinations about which rights and interests can be vindicated in court necessarily have distributive impacts.[155] This includes the orthodox common law rule giving employers' freedom to dismiss, which places the allocative impacts of termination firmly on employees.[156] To regard these factors as sufficient to pre-empt the common law would represent a regressive level of judicial restraint, and signal a limited role for the common law in regulating employment that is out of step with the existing 'discrete body of worker-protective common law norms, which constitute a distinctive common law of the personal employment contract'.[157]

Commented [JA3]: Please remove this line break and merge with next paragraph.

Considerations of democratic principle and legislative finality are therefore central to the constitutional propriety of developing the common law in an area regulated by statute. The key question is when will the legislative sovereignty and democratic legitimacy of Parliament make it inappropriate for the common law to apply and develop in its usual manner. This is most obviously the case where the statute *expressly* replaces or excludes the common law. But there will also be circumstances where legislation must be taken as *impliedly* pre-empting the

---

[153] ibid 80–83.

[154] J King, 'The Pervasiveness of Polycentricity' [2008] *Public Law* 101; J King, 'The Justiciability of Resource Allocation' (2007) 70 *MLR* 197.

[155] J Gardner, 'What Is Tort Law for? Part 2. The Place of Distributive Justice' in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford, Oxford University Press, 2013).

[156] As well as the state to some extent, via the social security system.

[157] A Bogg and M Freedland, 'Pensions Law, *IBM v Dalgleish* and the Public/Private Divide' in S Agnew, P Davies, and C Mitchell (eds), *Pensions: Law, Policy and Practice* (Oxford, Hart, 2020) 230.

common law in the absence of any explicit statement to this effect. This should not happen too readily, as the common law's authority is independent of Parliament and the courts provide an important forum for representation and participation.[158] But if the doctrine of implied repeal can operate to displace legislation enacted by a sovereign Parliament it must also be possible for statutes to impliedly displace or freeze the common law. While it there is not space here to explore this issue fully, or attempt to develop a theory of when legislation should impliedly pre-empt the common law, at least three such instances can be identified.

The first is where Parliament has introduced a comprehensive code of regulation in a particular area, and thereby 'occupied the field'.[159] This was the justification given for the *Johnson* exclusion zone by Lord Nicholls in *Eastwood*,[160] which has also been endorsed by academic commentators.[161] However, the statutory unfair dismissal scheme is not an exhaustive source of rules or remedies for dismissal. Not only are claims for wrongful dismissal still available (with remedies that overlap and may extend beyond unfair dismissal), but the courts use injunctions and implied terms to prevent unfair dismissals in some circumstances. The legislation is therefore not a complete code of remedies in the context of dismissal. It also seems unnecessary to regard the legislation as occupying the 'field' of employers' duties in contract and tort given that these are conceptually distinct from the statutory protections provided against unfair dismissal. No comprehensive scheme has been introduced to regulate trust and confidence or employers' duty of care within the employment relationship, and unfair dismissal no more occupies the field in respect of these duties than other legislation that happily co-exists with them, such as the Equality Act 2010. Finally, we should not be too quick to assume legislation occupies the field, because if Parliament has indicated the common law is unsatisfactory it may be appropriate for courts to be receptive to further readjustments.[162]

Second, implied pre-emption will be necessary where the common law would leave the legislation dead letter. This would effectively amount to the courts repealing the law, contrary

---

[158] R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572; P Pettit, 'Representation, Responsive and Indicative' (2010) 17 *Constellations* 426; J Waldron, *Political Political Theory* (Cambridge, MA, Harvard University Press 2016) 158–62.

[159] M Lee, 'Occupying the Field: Tort and the Pre-Emptive Statute' in TT Arvind and J Steele (eds), *Tort law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart, 2012); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15.

[160] *Eastwood* (n 2) [14].

[161] Davies (n 3) 89; Bogg (n 3) 79.

[162] Atiyah (n 143); Beatson (n 139) 311.

to the core tenet of parliamentary sovereignty that only Parliament can set aside legislation.[163] It is not the case, however, that applying common law implied terms to constrain employers' power of dismissal would leave the law of unfair dismissal dead letter. The statutory framework would continue to exist and operate as before, and the availability of any common law claim would not prevent employees from relying on their statutory right not to be unfairly dismissed. Many employees would no doubt continue to bring claims for unfair dismissal even if a common law claim were also available, given the relatively user-friendly nature of tribunals compared to the procedural formalities of ordinary courts, the (theoretical at least) possibility of reinstatement, and that tribunals will not generally award costs against unsuccessful employees. In addition, there are benefits to having one's case determined by a specialist tribunal with lay members and judges who have a good understanding of the industrial relations context,[164] albeit these may now be more limited given the infrequent use of lay members and increased juridification of tribunals.[165]

Unfair dismissal would also remain an important source of redress and not be left dead letter because employees may well be able to bring successful claims in circumstances where the employer is not in breach of the implied term of trust and confidence. The inquiry into fairness, and particularly procedural unfairness, is likely to be more searching under the statutory framework than under the implied term, where the employer merely needs to demonstrate they have good and proper reason for their actions to avoid being in breach.[166]

The final category of cases where implied pre-emption might be necessary is where applying the common law does not threaten parliamentary sovereignty or leave the legislation dead letter but nevertheless undermines or frustrates the goals of legislation to a constitutionally inappropriate degree. This is the basis on which pre-emption in *Johnson* can most plausibly be justified. It is also an important point of distinction between the case and *Rookes v Barnard*, where developing the common law undoubtedly had the effect of undermining the protective purposes of the legislation.[167] Although developing the common law in *Johnson* would arguably further the underlying principles and normative goals of unfair dismissal protection,

---

[163] AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London, Macmillan, 1885) 36.

[164] KW Wedderburn, 'Change, Struggle and Ideology in British Labour Law' in KW Wedderburn (ed), *Labour Law and Freedom: Further Essays in Labour Law* (London, Lawrence and Wishart, 1995) 30–31.

[165] See S Corby, 'British Employment Tribunals: From the Side-Lines to Centre Stage' (2015) 56 *Labor History* 161.

[166] Ford (n 39) 231.

[167] *Rookes v Barnard* [1964] AC 1129 (HL).

allowing employees to claim for breaches of trust and confidence in the context of dismissal does appear to circumvent many of the limits Parliament has chosen to impose on recovery for unfair dismissal. This includes the statutory cap on compensation, the qualification period to be entitled to claim, and the three-month time limit for claims to be brought. It is for this reason that Barnard and Merrett conclude that developing the common law would 'undermine the statutory regime'.[168]

Rather than replicating the statutory framework, however, it can be argued that applying trust and confidence to employers' power of dismissal provides an entirely different action; namely one for breach of contract rather than the unfairness of dismissal. This seems convincing in relation to the implied duty of care, as recovery for personal injury seems quite different in nature and content than protection against unfair dismissal.[169] But the position is more difficult in relation to trust and confidence. The significant overlap and frequent co-existence of claims for breach of trust and confidence and unfair would not be overly problematic if there were a clear conceptual division between claims for breach of contract and the statutory framework. The two could then be regarded as concurrent but distinct actions. This line is blurred, however, because terms implied in law are often regarded as based on policy and efficiency considerations.[170] But if the term of trust and confidence is grounded in the same policy considerations as those underpinning the unfair dismissal legislation it seems inappropriate for the courts to provide a remedy for unfair treatment in dismissal that extends beyond the scheme that Parliament introduced in response to those same policy considerations.

One way this conclusion can be avoided and a sufficient conceptual distinction maintained between the common law and statutory claims is if implied terms in law, including the term of trust and confidence, are conceived as reflecting obligations of interpersonal justice between the parties,[171] which courts identify as intrinsically associated with the roles they are entering into when contracting. This proposed understanding of implied terms views them as legal embodiments of obligations of role morality, meaning those duties inherently linked to certain social roles such as being a parent, landlord or employer, which the parties undertake

---

[168] Barnard and Merrett (n 3) 324.

[169] Obiter comments along these lines were made by Underhill LJ in *Monk v Cann Hall* (n 92) [32].

[170] H Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297.

[171] On contract law and relational justice see H Dagan and A Dorfman, 'Justice in Contracts' (2022) 67 The American Journal of Jurisprudence 1.

when entering into these relationships.[172] This interpretation also fits with the courts treatment of implied terms in law as 'necessary incidents' of particular categories of contract,[173] and with the view of trust and confidence as representing a general behavioural standard that reflects moral and societal expectations of acceptable conduct within an employment relationship.[174] Seen in this revised light, common law actions in contract for breaches of trust and confidence are sufficiently conceptually distinct from the statutory action for unfair dismissal to co-exist satisfactorily. Given this, and considering the problems for the rule of law flowing from the uncertainty and arbitrariness created by the decision, developing the common law in *Johnson* would not have undermined the legislation to such an extent that pre-emption was necessary.

Whether one accepts this conclusion ultimately turns on deeper normative commitments regarding the autonomy and role of the common law, the legitimacy of judicial law-making, and the appropriate relationship between courts and Parliament. Given Lord Steyn's comments on parliamentary sovereignty in *R (Jackson) v Attorney General*[175] it is perhaps unsurprising that he was more willing to support a robust role for the common law than the more conservative approach to the judicial role adopted by Lord Hoffman and others. The relevance of these deeper commitments might also go some way to explaining the divide created among labour lawyers by *Johnson*, with scholars whose work emphasises the public law dimensions of the field perhaps being more receptive to the pre-emption finding than those who adopt an approach more grounded in private law.

VI. The Human Rights Exception

A final important issue in *Johnson* that is often overlooked is the 'human rights exception' that must be carved out of the exclusion zone. The principle of legality and the Human Rights Act 1998 respectively mean that courts should not interpret the legislation on unfair dismissal as pre-empting the common law where it protects either fundamental common law rights or those contained in the European Convention. Although the existence of this exception was acknowledged in *Johnson* itself, its extent and significance are yet to be fully recognised.

---

[172] M Hardimon, 'Role Obligations' (1994) 91 *The Journal of Philosophy* 333; J Andre, 'Role Morality as a Complex Instance of Ordinary Morality' (1991) 28 *American Philosophical Quarterly* 73.

[173] *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (HL).

[174] Barmes (n 29).

[175] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

The first dimension of the human rights exception flows from the principle of legality, which requires that legislation not be interpreted as removing the protection of fundamental common law rights unless expressly stated or strictly necessary.[176] In *R (Unison) v Lord Chancellor*, for example, the principle of legality meant that legislation providing for the introduction of employment tribunal fees was interpreted as not authorising the introduction of fees that would be contrary to the common law constitutional right of access to justice.[177] Although generally regarded as preventing the *removal* of existing protections of fundamental common law rights,[178] the principle of legality must logically also prevent legislation being interpreted as preventing the common law *developing* to protect these rights. Following this, because pre-emption in *Johnson* was not required by the express statutory text or necessary implication the principle of legality requires that the unfair dismissal framework not be interpreted as barring the protection of fundamental common law rights.

It is unclear, however, where if ever this aspect of the human rights exception to the *Johnson* exclusion zone will apply, as it seems fundamental common law rights will rarely be at stake in the context of dismissal. Certainly, the implied term of trust and confidence is not itself a fundamental common law right. One possibility is that freedom of contract might be regarded as a fundamental common law right that engages the principle of legality.[179] In which case, and contrary to the reasoning in *Edwards*, the unfair dismissal legislation should not be interpreted as pre-empting common law liability for breach of express contract terms that contain procedural or substantive restrictions on dismissal. Another possibility is that the exception to the exclusion zone demanded by the legality principle may become more significant as the courts come to recognise a wider range of common law constitutional rights, such as freedom of expression or association.[180] The exclusion zone would then not apply to dismissals where the common law of implied terms functions to protect these rights. The role of common law constitutional rights in the employment sphere may also become more

---

[176] *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB); *R v Home Secretary, ex p Simms* [2000] 2 AC 115 (HL).

[177] *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.

[178] As in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563. See Burrows (n 69) 68–73.

[179] Although the right to restitution was not regarded as fundamental in *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* (n 159~~160~~).

[180] See generally M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Oxford, Hart, 2020).

important if the Human Rights Act 1998 is repealed and replaced with legislation that makes it harder for arguments grounded in the ECHR to gain traction.

The second dimension of the human rights exception results from the Human Rights Act 1998 (HRA) and European Convention of Human Rights (ECHR). Section 3 of the HRA requires the legislation on unfair dismissal be interpreted in line with Convention rights so far as possible,[181] and the positive obligations imposed by the ECHR mean that this legislation must not be interpreted as barring the protection of Convention rights through the application of the implied term of trust and confidence.[182]

Under the ECHR, Member States have positive obligations to protect Convention rights, including to secure employees' rights against disproportionate interferences by employers.[183] As part of this, *Redfearn v UK* makes clear that legal protections are required against dismissals that interfere with Convention rights.[184] In *Redfearn* the UK was found to breach its positive obligations where an employee was dismissed for his association with a political party and could not bring a claim for unfair dismissal due to the qualifying period. The case involved Article 11 but the reasoning is equally applicable to other Convention rights.[185] Following this, if a dismissal interferes with a Convention right but falls outside the unfair dismissal framework it appears that there will be a breach of the state's positive obligations. In these circumstances, however, section 3 of the HRA requires that the unfair dismissal framework be interpreted consistently with the state's duty to secure Convention rights. The legislation must therefore not be interpreted as preventing the common law from protecting employees' Convention rights. As a result, the HRA requires that the *Johnson* exclusion zone must not be applied where Convention rights are not protected by unfair dismissal and the common law would function to fulfil the state's protective duties.[186]

---

[181] *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634.

[182] For discussion of the circumstances where the implied term protects Convention rights see J Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48 *Industrial Law Journal* 515.

[183] L Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Cambridge, Intersentia, 2016); V Mantouvalou, 'The Human Rights Act and Labour Law at 20' in A Bogg, A Young, and J Rowbottom (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Oxford, Hart, 2020) 20.

[184] *Redfearn v UK* (2013) 57 EHRR 2.

[185] H Collins and V Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 *MLR* 909.

[186] HRA 1998, s 6 also supports the application of trust and confidence in these circumstances, as it requires that courts apply and develop the common law in a manner compatible with the positive obligation to protect Convention rights. For discussion of this indirect horizontal effect see G Phillipson and A Williams, 'Horizontal

The fact that the exclusion zone applies 'subject to observance of fundamental rights' was acknowledged by Lord Hoffman in *Johnson* itself.[187] Despite this, the extent and implications of the human rights exception have so far largely gone unrecognised.[188] The HRA means that mutual trust and confidence should not be excluded where a dismissal interferes with a Convention right and a claim for unfair dismissal is not available. This exception to the exclusion zone encompasses a wide range of circumstances. Although *Redfearn* led to the removal of the qualifying period for unfair dismissal claims involving political association there continue to be many instances where dismissals interfere with Convention rights but nevertheless fall outside the unfair dismissal framework. This includes employees dismissed before the qualifying period because of how they have exercised their rights to freedom of expression, religion, and private life among others.[189] But the human rights exception created by the HRA extends beyond cases where the reason the employee is dismissed is how they have exercised their Convention rights, and also encompasses dismissals which interfere with the Article 8 right to private life because of the severe impact they have on an employees' ability to form relationships or work in their chosen sector or profession.[190]

The potential scope of the human rights exception based in the HRA is therefore substantial and deserves greater recognition. In future the courts should refrain from applying the *Johnson* exclusion zone in cases where dismissals engage Convention rights but fall outside the protective scope of unfair dismissal.[191] The exception to pre-emption created by the principle of legality is more limited, but may become significant over time if the jurisprudence on common law constitutional rights develops or the rights protections contained in the HRA are removed.

Effect and the Constitutional Constraint' (2011) 74 *MLR* 878; A Young, 'Mapping Horizontal Effect' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge, Cambridge University Press, 2011).

[187] *Johnson* (n 1) [37].

[188] Bogg and Collins (n 68) 208.

[189] As in, eg, *Barbulescu v Romania* [2017] IRLR 1032 (ECtHR); *Vogt v Germany* (1996) 21 EHRR 20; *Smith and Grady v UK* (1999) 29 EHRR 493; *Eweida v UK* (2013) 57 EHRR 8.

[190] *Denisov v Ukraine* App No 76639/11 (ECtHR, 25 September 2018). For discussion of when a dismissal may engage Convention rights see H Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' (2021) 50 *Industrial Law Journal* 36.

[191] Although not explored here, the exclusion zone should also not be applied if the unfair dismissal framework falls short of fulfilling the UK's positive obligations under the ECHR by failing to strike a fair balance between the competing rights and interests at stake.

VII. Conclusion

Writing at the turn of the century, Roger Rideout argued that labour lawyers should abandon their historical scepticism of the common law and recognise it was now capable of adequately regulating the employment relationship and defending workers' interests.[192] This might appear premature given what was to follow shortly in *Johnson*, where the common law was excluded from the vitally important area of dismissal and the House of Lords implicitly endorsed a subsidiary role for the common law in governing employment relations. However, the argument made in this chapter, that the pre-emption of the common law in *Johnson* was not required on constitutional grounds, supports the view that the common law can, and should, play a central role alongside legislation in protecting workers and securing fundamental rights.

The decision in *Johnson* will no doubt continue to divide opinion, with this divergence reflecting fundamental differences of opinion regarding the authority and legitimacy of the common law, the appropriate limits of the judicial role, and faith in the ability of Parliament to regulate employment relations. The uncertainty and apparent inconsistencies surrounding the case also illustrate a pressing need to develop a deeper and more nuanced understanding of when the common law will be pre-empted by legislation. We must do our best to live with the troubling legacy of *Johnson*, as there is little prospect of the decision being revisited or of statutory intervention. In addition to further work clarifying the boundaries of the exclusion zone and advancing our understanding of pre-emption, one promising way forward would be for the human rights exception to gain wider recognition and be applied by the courts.

[192] R Rideout, 'The Lack of Principles in Labour Law' (2000) 53 *Current Legal Problems* 409.