‘Uses and Misuses of ‘Mutuality of Obligations’ and the Autonomy of Labour Law’

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Abstract

This paper critically reviews the way in which English judicial decisions have developed the labour law concept of ‘mutuality of obligations’. The paper suggests that the primary purpose of this concept, as originally developed by Mark Freedland, was intended to be that of bringing to the fore of labour contract law analysis some relational aspects of work contracts that traditional contract law elements, such as contractual consideration, had typically failed to acknowledge. It argues that subsequent English court judgments have instead used mutuality as both i) a synonymous term of contractual consideration and ii) a pre-requisite of contractual continuity (in a vast range of personal work relations) in a way that clearly defeats the purpose of the concept as originally intended and unduly and adversely affects workers in precarious and atypical employment relations.
‘Uses and Misuses of ‘Mutuality of Obligations’ and the Autonomy of Labour Law’

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‘Leggendo non cerchiamo idee nuove, ma pensieri già da noi pensati, che acquistano sulla pagina un suggello di conferma’

1. Introduction

This paper was originally conceived as a contribution to the conference held in Oxford in July 2013 on the topic ‘Labour Law in Oxford: Past, Present, Future’. The conference programme suggested that the event was organised ‘on the occasion of Professor Mark Freedland’s retirement from his tutorial fellowship’ to celebrate the discipline of labour law in general, and as shaped by Oxford labour lawyers in particular. The contribution of Oxford legal scholars to British labour law has been, and continues to be, distinguished and comprehensive, as that conference testified. Mark Freedland’s crucial role in the development and flourishing of this schola studiorum is destined to be remembered as uniquely multidimensional and rich, as well as characteristically selfless and committed. While his research work has spanned across various legal fields, juridical institutions, and legal systems, I think that it would not be inaccurate to suggest that his name is destined to be more closely associated with his ground-breaking work on the contract of employment in English law. Throughout a long and fruitful (and ongoing) career, Mark Freedland has developed and coined - and generously shared with his contemporaries and with the next generations of labour lawyers - a goldmine of legal concepts, analytical devices, critical frameworks, and normative arguments that have

* Reader in Law, University College London, Faculty of Laws. An earlier version of this paper was presented in Oxford on 25 July 2013, at the Conference ‘Labour Law in Oxford: Past, Present, Future’. I am particularly grateful to the organisers of the conference, and to Alan Bogg, Anne Davies, and Mark Freedland in particular, for comments on earlier drafts of this paper, and to Paul Mitchell for enlightening conversations on the idea of ‘legal tests’ in English jurisprudence. This paper will now appear as a chapter in A. Bogg, C. Costello, A. C. L. Davies, and J. Prasrl (eds), The Autonomy of Labour Law (Hart, 2014).

1 C. Pavese, Il Mestiere di Vivere (Einaudi, 1962), p. 134. Loosely translated as ‘When reading we are not looking for new ideas, but [for] thoughts we have already thought of, that acquire a seal of confirmation on the [printed] page’.
simultaneously and seamlessly shaped both the orthodox English law concept of contract of employment and our individual (and sometimes more heterodox and critical) understandings of the contract of employment. In particular, his original work on the concept of ‘mutuality of obligations’ in the labour law context has been acknowledged by his peers as perhaps one of the most important contributions to the modern understanding of the contract of employment.²

This paper seeks to provide a critical reconstruction of how the original intuitions made by Mark Freedland in respect of the contribution of the ‘mutuality’ concept to the understanding of work relationships in general, and precarious work relations in particular, have been subject over the years to a long series of judicial transformations that have essentially distorted the original rationale that the author attached to the idea of ‘mutuality of obligations’, while at the same time distancing it from the mischief that his work was trying to address. That original mischief emerges clearly from the early pages of his seminal 1976 monograph The Contract of Employment, where the author, having briefly introduced the ‘element of mutual obligations in respect of future services’, went on to state, in unequivocal terms that

‘it is, in the view of this writer, a confusion of ideas to deny the existence of a contract of employment merely because the employment is for a short term and precarious. Neither of those factors is inconsistent with the existence of the contract of employment’.³

The present paper seeks to elaborate on the (few) uses and (many) misuses of the concept of mutuality of obligations that English labour law has developed over the years, while linking this specific analysis to the broader question of the ‘Autonomy of Labour Law’. Often, and variably, referred to in case law as ‘an irreducible minimum … to create a contract of services’, ⁴ ‘an essential element of the contract of employment’ ⁵ but also ‘a necessary element in a “limb (b) contract” (or “worker” contract),⁶ or ‘the one important ingredient’ for a contract of service to exist,⁷ but also for any ‘contract at all’ or for ‘a contract in the employment field’ to exist,⁸ mutuality has enjoyed an insuperable popularity in judicial reasoning, partly because of its unique characteristic of being credited, at the same time, as a

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² There is virtually no labour law textbook that in analysing the concept of mutuality of obligation in the context of the contract of employment does not refer to Mark Freedland seminal work in The Contract of Employment (Clarendon, 1976).

³ M. R. Freedland, The Contract of Employment (Clarendon, 1976), 11. On a separate note, this may well be the first time a British legal author deploys the concept of precariousness in the labour law context, though it is arguable that, in his 1976 work, Freedland was predominantly referring to an idea of precariousness as equivalent to the casualisation inherent to the succession of very short term contracts of service, rather than to the employment status precariousness that we tend to associate to the post-O’Kelly labour markets.


⁵ Stringfellow Restaurants Ltd v Nadine Quashie [2012] EWCA Civ 1735, para [85]

⁶ Byrne Bros (Formwork) Ltd v Baird and Others [2002] ICR 667, 680.


legal ‘test … to found a contract [or] to found a contract of employment’ and as ‘an essential element’ of the structure of the contract of employment. Mutuality may well be the lapis philosophorum of English labour contract law, but the following pages will suggest that it is often used to turn gold into lead, rather than the other way round.

The present paper is composed of four main sections. The following section briefly explores the concept of ‘Autonomy of Labour Law’, identifies its three main components, and links them to the analysis of ‘mutuality of obligations’. The third section begins by tracing the origins and subsequent development of ‘mutuality of obligations’ in English labour law, both from a doctrinal and from a jurisprudential perspective. This analysis explores the emergence of mutuality as a descriptive structural element of the contract of employment, but also its progressive transformation into a series of increasingly prescriptive and ubiquitous requirements or tests for identifying (and, by the same token, excluding) other elements of the contract of employment - and increasingly of contracts for personal work and services at large - such as contractuality, continuity, personality, bilaterality, and even (albeit in a more nuanced manner) subordination. In the following fourth section, the paper moves on to investigate the spread of the concept(s) of mutuality into other, mostly common law, jurisdictions with some brief references to European law. This part concludes by advancing the suggestion that while some particular manifestations of ‘mutuality of obligations’ appear to have transferred (or metastasised) to other legal systems, a number of the jurisdictions explored appear to have developed a certain resistance, if not outright immunity, to some or all of the more prescriptive and aggressive transmutations of the original, English law version, ‘mutuality of obligations’. The subsequent fifth part queries whether the English law approach to ‘mutuality’ in the construction of personal work contracts is tenable and desirable from the point of view of conceptual clarity and heuristic viability, and in particular by reference to the idea of the ‘Autonomy of Labour Law’. In conclusion, this paper tentatively suggests that by saying too much, mutuality is really saying too little to help our understanding of the structure of personal work contracts in general, and of the contract of employment in particular.

But before engaging in this analysis, it may be valuable briefly to discuss why ‘mutuality’ may be a valuable locus to explore the key questions underlying the present edited collection: is labour law autonomous and, if so, in what sense?

2. The autonomy of labour law

Autonomy is a complex term that deserves some clarification. Taken literally the term may suggest a total separation of an area of law from any other legal discipline. But as remarked by Lord Wedderburn, ‘no branch of law can be “completely autonomous, within the body of

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the juridical order as a whole". Fortress labour law, like Fortress Wapping, cannot survive in total isolation. It is well accepted that labour law, both in Britain and in the rest of Europe, has relied heavily on contract and private law to shape fundamental building blocks of its edifice, and cornerstones such as the contract of employment. However, in most European systems, the original inner core of private law concepts has been progressively covered with several thick coats of self-standing philosophical rationales and legislative, collective and judicial intervention such as to emancipate this particular institution, and arguably labour law as a whole, from its original private law vestiges, albeit without removing its influences altogether. Self-standing as they may have been, it is also worth noting that these rationales were very much inspired by other legal and social disciplines, including the study of industrial relations and the sociology of law, that bolstered the ‘worker protective’ claims advanced by labour law. Paul Durand, speaking in respect of French labour law, captured the essence of this process when noting the progressive emergence of labour law worker protective principles and rules tasked with ‘ne laisser au droit commun qu’une place subordonnée’.

Labour law can thus be seen as entitled to make a rather credible and simultaneous claim to both active borrowing and autonomy, though it goes without saying that different legal traditions tend to strike different balances between the common law elements and the more properly understood labour law components of our discipline. What is clear however is that labour law has certainly never embraced an idea of autonomy amounting to ‘isolation’. As put by Collins ‘[a]lthough some fields of law such as contract and crime are marked by the quest of coherence according to a small set of principles, Labour Law, like other contextual fields such as Family Law, has never aspired to such conceptual unity’. A contract of employment, in most legal systems, is both a ‘contract’, and a ‘contract of employment’, with the latter formulation usually factoring in a series of normatively laden elements that serve to distance its formation, structure, and functioning from a contract tout court.

With these caveats in mind, one could go on to suggest that the three main structural elements against which the autonomy of a discipline such as Labour Law ought to be evaluated are a) the presence of a set of legal institutions regulating a coherently identifiable social phenomenon or set of phenomena, b) the presence of a set of original regulatory

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13 Ibid.
17 The term ‘institutions’ is used in the broad sense explored in M. Freedland and N. Kountouris, ‘Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe’ (2008) ILJ, 49, 51-53, where it was argued that the contract of employment was a central institution in labour law, functioning as both an analytical and a normative category.
techniques and governance mechanisms, and c) the existence of an original ideology underpinning the normative action and development of the discipline.\(^{18}\)

In this context, ‘mutuality of obligations’, as it should become apparent in the following pages, is a useful concept to explore. As already noted by Anne Davies, properly understood ‘mutuality of obligations is … an employment law requirement, not a contract law requirement’\(^{19}\) and as such it could be seen as an original regulatory device deployed to structure the contract of employment, itself one of the key legal institutions of labour law. However the following pages will also reveal the extent to which both contractual law principles and contract law reasoning have shaped and continue to shape the development of ‘mutuality’, and force the English notion of contract of employment, and to a certain extent English labour law as a whole, to gravitate much more closely to its common contract law ideological nucleus than equivalent notions in other jurisdictions do, in a way that seriously detracts from a fully-fledged claim to autonomy, that both mutuality and the contract of employment would otherwise be entitled to.

3. Mutuality of Obligations in English (Labour) Law

a. The origins

The introductory section of this paper noted the relevance that modern judicial reasoning places on the concept and test of ‘mutuality of obligations’ in the construction of mainly but not exclusively - contracts of employment. The present section attempts to reconstruct the origins of the concept, both in doctrinal and jurisprudential terms, but also to trace and map-out its evolutionary trajectory, mostly by reference to case-law development.

Many labour lawyers are likely to associate the emergence of ‘mutuality of obligations’ with the seminal work by Mark Freedland \textit{The Contract of Employment}\(^{20}\) of 1976 and the 1980s cases of \textit{O’Kelly}\(^{21}\) and \textit{Nethermere}.\(^{22}\) Typically, most labour lawyers would also recognise that in the original work by Freedland mutuality had ‘appeared with very different intentions’\(^{23}\) to the ones later developed by English courts. It is sometimes suggested that Freedland’s seminal work looked at mutuality, or more precisely at the parties to a contract of employment’s ‘exchange of mutual obligations for future performance’,\(^{24}\) for the specific

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\(^{18}\) I have sought to engage with the concept of autonomy of European Labour Law in N. Countouris, ‘European Social Law as an Autonomous Legal Discipline’ (2009), YEL, 95-122, on which this section partly draws.


\(^{22}\) \textit{Nethermere (St Neots) Ltd v Gardiner And Another} [1984] ICR 612.


\(^{24}\) M. R. Freedland, \textit{The Contract of Employment} (Clarendon, 1976), 20. Note that Freedland was also
reason of identifying an additional contractual element of the contract of employment that went beyond the mere ‘exchange... of service against remuneration’.\footnote{At the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance.}{25}

Freedland did, in fact, famously identify a ‘two tiered structure’\footnote{S. Deakin and G. Morris, Labour Law (Hart, 2012), 164}{26} for the contract of employment. But his main purpose was not that of introducing a second structural limb – certainly not a second hurdle - for a work relation to be classified as a contract of employment at its formation stage. His true intentions were apparent, in the view of the present author, from the pages of his 1976 book immediately preceding the famous ‘two level structure’ passage. In these pages Freedland noted some important conceptual lacunae in existing legal writings, still unduly anchoring the understanding of the contract of employment to general contract and commercial law principles, with ‘neither judicial nor academic authorities [having] examined at all fully the structure of the mutual obligations of the contract of employment’.\footnote{Ibid., 19.}{27} From this observation he insisted on developing ‘a theory dealing with [the structure of the contract of employment] in order to explain why there is a cause of action for wrongful dismissal or wrongful departure of by the employee…’,\footnote{Ibid.}{28} and adding that ‘This ... is necessary to the explanation of much of the law concerning breach of that contract’.\footnote{Ibid. 20. In this sense see also the concluding line in the first paragraph of page 21 of the monograph.}{29} So the rationale for developing the ‘two tiered structure’ theory of the contract of employment, with the second tier amounting to an ‘exchange of mutual obligations for future performance’, had much more to do with providing a sound conceptual basis for understanding the (changing) law on the breach and termination of the contract of employment, rather than the law on the formation of the contract of employment.

The reason why a labour lawyer in the 1970s would have been genuinely concerned with the way the (hitherto underexplored) structure of the contract of employment affected or shaped the understanding of the law on the breach and termination of this type of contract is that, around that time, English labour law was indeed going through an important evolutionary passage when it came to these aspects of the law, something that The Contract of Employment clearly reflected. For instance, the introduction of statutory notice periods in 1963,\footnote{With the Contract of Employment Act 1963.}{30} of redundancy compensation in 1965,\footnote{Redundancy Payments Act 1965.}{31} of the first unfair dismissal protections with IRA 1971, which were retained in 1974 and extended further the following year,\footnote{Trade Union and Labour Relations Act 1974, Sch. 1}{32} were clearly pushing English labour law away from both its more traditional voluntarist matrix but also from the ‘employment (quasi) at will’ paradigm that existed until then and that collective laissez-faire had at best masked and mitigated.\footnote{There is a fascinating analysis of these underlying developments in the opening pages of Chapter 4 of}{33} In other words, between 1963 and 1976 the
standard employment relationship had entered a process that was progressively leading to a
certain degree of (no doubt incomplete) stabilization and continuity. As later noted by
Freedland and Davies, ‘[i]t may well be that the twenty years from 1963 to 1983 will in
retrospect be regarded as the two decades which saw the rise of the idea of job property in
our labour law – and also perhaps, its partial or complete fall’. 34 In the mid-1970s, this was a
process that labour law was still failing fully to comprehend, and that Freedland’s The
Contract of Employment first sought to depict through novel legal concepts, including a
concept of mutuality which could wrap together successive sequences of short-term
assignments into a single and continuous contract of employment protected by the recently
emerging law of unfair dismissal.

So to sum up this initial part of this section, the first steps of ‘mutuality’, at least in Freedland’s
work, were mostly those of a descriptive/analytical construct that was building on earlier
contractual doctrines, such as the doctrine of consideration, which clearly informed the ‘first
tier’ of ‘exchange … of service against remuneration’ 35 and which – by 1976 - were already
recognised by English courts, as the 1968 dictum by Mackenna J. in Ready Mixed that ‘There
must be a wage or other remuneration. Otherwise there will be no consideration, and without
consideration no contract of any kind’, 36 demonstrates. These existing pre-modern contractual
elements were built upon by the introduction of the famous ‘second tier’ of mutuality for the
sake of providing a more precise and lucid understanding of the slow but quite visible
transformation of the employment contract into a more relational, continuous and open ended
one, and from there to understand the emerging new law of wrongful and, increasingly, unfair
dismissal. So, if this reconstruction is correct, it would be right to say that in Freedland’s work
mutuality had nothing to do with the creation of a new hurdle for identifying contracts of
employment (or with the creation of a new legal test), little to do with the formation of the
contract of employment (even though for systematic reasons it was, perhaps inevitably,
discussed in the chapter of his book dealing with ‘Formation and Structure’) and merely
advanced the analytical suggestion that the emergence (through the development of wrongful
and unfair dismissal law) of continuous employment relationships could be better understood
by identifying a new supporting legal element in the construction of - increasingly relational-
contracts of employment, i.e. that ‘second tier’ of mutuality of obligations we have eventually
become accustomed with. This element, as noted in the citation reproduced in the

Their treatise of the treatment of fixed-term contracts is also particularly significant, pp. 446-448. To
a certain extent, 19th and early 20th century trade unions had contributed to the spread of ‘minute
contracts’ in certain industries as a means to circumvent the criminal and civil liabilities arising from
the duty to give notice in the context of strikes, see S. M. Jacoby, ‘The Duration of Indefinite
Employment Contracts in the United States and England: An Historical Analysis’ (1982),
Comparative Labor Law, 85, 98.

See the opening line of Chapter 4 of P. Davies and M. Freedland, Labour Law (2nd ed, Weidenfeld
and Nicolson, 1984), at 428. Emphasis added.


Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] QB
497, 515.
introduction,\textsuperscript{37} was not to act as a pre-requisite, or test, excluding short term and precarious work from the protections of labour law, but rather it was to emerge as the \textit{necessary implication} of increasingly more stable contractual employment relations. But soon case law developments were going to turn this analysis on its head.

b. The emergence of a mutuality ‘test’

While the Court of Appeal judgments in \textit{O’Kelly}\textsuperscript{38} and \textit{Nethermere}\textsuperscript{39} are rightly perceived, for different reasons and in different ways, as the starting point of the judicial development of mutuality as a legal test, it is probably at the 1982 Employment Appeal Tribunal judgment in \textit{Nethermere}\textsuperscript{40} that one would have to look at in order to identify the missing link between the pre-modern notions of ‘obligation … to accept offers of work’,\textsuperscript{41} which was already stigmatized by Atiyah as a strong indication of there not being a contract of service (but one whose absence was, in cases involving daily labourers, ‘of no particular significance’\textsuperscript{42}) and the emergence of the 1980s concept of ‘mutuality’ as an element and test for the contract of employment. In the EAT judgment of \textit{Nethermere} we can see, at the same time, a reference to this \textit{retrospective} idea of mutual performance of obligations (i.e. that work performed over a period of time will be seen as performed under a contract of service) that can be found in earlier cases such as \textit{Airfix Footwear},\textsuperscript{43} and its contestation in the form of a claim by the employer’s counsel that ‘the industrial tribunal misunderstood the ratio of the decision in \textit{Airfix Footwear}’ and that the ‘analysis of the judgment shows that the case [of \textit{Airfix}] did not decide that work performed consistently over a long period of time with an absence of mutual obligations could constitute a contract of service: a true analysis of the case shows that where the same quantity of work is accepted and performed over a long period, the proper inference is that there may be a mutual obligation to provide and perform it’,\textsuperscript{44}

The employer’s side contestation ultimately suggested, as already noted by McGaughey,\textsuperscript{45} that ‘mutuality’ ought to be understood as ‘continuity’ in the specific sense that ‘mutual obligations are a crucial pre-requisite of a contract of service [and] that the reason for such a pre-condition is that a contract of service is a continuing relationship between employer and

\textsuperscript{37} See above ft n. 3.
\textsuperscript{38} \textit{O’Kelly v Trusthouse Forte plc} [1983] ICR 728.
\textsuperscript{39} \textit{Nethermere (St Neots) Ltd v Gardiner And Another} [1984] ICR 612.
\textsuperscript{40} \textit{Nethermere (St. Neots) Ltd. v Gardiner And Another} [1983] ICR 319.
\textsuperscript{41} \textit{Market Investigations Ltd. v Minister of Social Security} [1969] 2 Q.B. 173; \textit{Airfix Footwear Ltd. v Cope} [1978] ICR 1210, should probably be seen as such too.
\textsuperscript{42} P. S. Atiyah, \textit{Vicarious Liability in the Law of Torts} (Butterworths, 1967), at 66, by reference to what Atiyah defined as ‘the obligation to work’ in the case of \textit{O’ Donnel v Clare County Council} (Ct. of Sess.) (1912), 47 ILT 41.
\textsuperscript{43} The EAT in \textit{Nethermere} quoting ‘where work is done consistently over a substantial period a tribunal would be entitled to reach the conclusion that a contract of employment had been created between the parties’ \textit{Nethermere (St. Neots) Ltd. v Gardiner And Another} [1983] I.C.R. 323
\textsuperscript{44} Ibid. 326.
employee and that intermittent performance of work is ‘inconsistent with the continuing obligations’.  

We know from the EAT judgment that, ultimately, the workers interests were vindicated and this novel ‘mutuality as a pre-requisite’ argument dismissed, by only by majority and thanks to ‘the lay members’ relying on the ‘business in own account’ risk test. But the minority opinion – by Tudor Evans J - was willing to embrace the new legal argument that ‘There was, briefly stated, no obligation upon the applicants to provide themselves to serve’, and therefore no contract of service due to a lack of mutuality.

When Nethermere reached the Court of Appeal in 1984, the majority of the Lord Justices (with Kerr LJ, as he then was, dissenting) eventually concluded that the homeworkers involved in the dispute could be legitimately categorised as ‘employees’, as the industrial tribunal had done to begin with. But when considering this appeal, the CA had also before its eyes its earlier decision in O’Kelly, taken in 1983 just after the EAT Nethermere judgment, and which drew upon that judgment in an extremely creative way, that effectively lent much more credit to the minority view of Tudor Evans J than to the majority decision itself. In O’Kelly, the CA had no hesitation to refer to ‘mutuality of obligation’ as ‘the one important ingredient’ for there being a contract of employment. This one important ingredient, in effect a test in everything but its name, was used to endorse the industrial tribunal finding that O’Kelly and the other ‘regular casual’ waiters involved in the case were operating under ‘a purely commercial transaction for the supply and purchase of services for specific events, because there was no obligation for the company to provide further work and no obligation for the applicants to offer their further services’.

This reasoning was used both to defeat the existence of an ‘umbrella contract’ and to defeat the classification of each individual arrangement as a ‘contract of service’.

When considering Nethermere, the CA built on its previous decision in O’Kelly to further distance itself from the pre-modern notion of mutual obligations exemplified in Airfix and to further embrace (and entrench) the newly emerged O’Kelly’s mutuality test. Stephenson LJ expressly noted that the Airfix interpretation given in the earlier tribunal judgement in Nethermere was a ‘conclusion… open to criticism’ and expressing words of condemnation.

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46 Nethermere (St. Neots) Ltd. v Gardiner And Another [1983] ICR 326
48 Ibid., 327.
49 Ibid. 328.
50 Stephenson LJ is quite explicit when he opines that ‘we have to decide, in the light of this court’s decision in O’Kelly v. Trusthouse Forte Plc., the difficult question whether, in agreement with the minority opinion of Tudor Evans J. in the appeal tribunal but contrary to the opinion of all the other members of both tribunals, the preliminary issue [in favour of the applicants, Mrs. Taverna and Mrs. Gardiner, that they were both employees of the employer company]’ O’Kelly And Others v Trusthouse Forte P.L.C. [1983] I.C.R. 616-617.
52 Ibid, 744.
53 Ibid, 762, 763, per Sir John Donaldson MR.
54 Nethermere (St Neots Ltd v Gardiner And Another [1984] ICR 612, 619.
for ‘the error made by the appeal tribunal of deciding that no … mutual obligations were necessary and that the Market Investigators Ltd … test provided a contract of service when there were no such obligations’.\textsuperscript{55} So basically in Nethermere the CA dismissed the appeal ‘but for the [new] reasons … given, which are not those of the appeal tribunal but are those required by the majority judgments in O’Kelly v Trusthouse Forte Plc’.\textsuperscript{56} It is also worth noting that in this decision the CA first referred to McKenna J’s view (that ‘there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract’) as ‘mutual obligations’,\textsuperscript{57} thus effectively using the same label of mutuality to address both ‘consideration’ and the new ‘essential ingredient’ of mutuality as ‘continuity’. The absence of either limb would result in a failure to identify the relationship as one regulated by a contract of employment.

Fast forward these important developments by a number of years and, in the case of Carmichael, we can see the House of Lords explicitly endorsing the idea that mutuality is a ‘rock’ on which workers’ claim to a ‘contractual relationship of any kind’ ‘founders’,\textsuperscript{58} and an understanding that Nethermere introduced a requirement for an ‘irreducible minimum of mutual obligation necessary to create a contract of service’\textsuperscript{59} an expression that was only used in Nethermere in Lord Kerr’s dissenting opinion, mentioned above, and that was now somewhat being ‘upgraded’. What is also relevant is that in Carmichael mutuality – or rather the lack of it – was deployed to defeat the claim that an ‘umbrella contract’ could be established for the purposes of creating continuity between various successive contracts (on the status of which their Lordships maintained an open, if agnostic, mind).\textsuperscript{60}

Within a matter of years English courts had remoulded and completely transformed a concept that, in its early doctrinal elaborations, was meant to provide an analytical insight into an increasingly continuous and stable notion of contract of employment. Now it was being used as a prescriptive element, and as a test, to assess the presence of a contract of employment, and this was being done at the time in which – for various reasons that are outside the scope of this paper -arrangements for the provision of work and services in certain sectors of the labour markets were again becoming more and more fragmented and precarious.

c. The many faces of ‘mutuality’

In the previous subsection we noted how a doctrinal device coined to provide a more accurate understanding of the implications of the increased stability in the provision of personal work, was eventually developed, re-moulded, and applied in a completely different context to the detriment of what, by then, was a growing number of precarious and short term workers. This subsection seeks to offer an overview of the ways in which, in more recent years, mutuality

\textsuperscript{55} Ibid, 624.
\textsuperscript{56} O’Kelly And Others v Trusthouse Forte P.L.C. [1983] ICR 728.
\textsuperscript{57} Nethermere (St Neots) Ltd v Gardiner And Another [1984] ICR 612, 623.
\textsuperscript{60} With Lord Irvine of Lairg L.C. emphasising ‘I repeat that no issue arises as to their status when actually working as guides’, ibid. 1231
has been used as a multi-tool to defeat various other claims pertaining to the establishment of contracts of employment or other workers’ contracts. A good starting point is arguably the EAT decision in James v Greenwich, where Elias J, as he then was, provided a much more elaborate matrix of the impact that mutuality has on the fates of the contract of employment and on employment status. At paragraph 16 of his judgment, Elias J opined

"16. The authorities do not speak with one voice as to precisely what mutual obligations must be established. The relevant cases were analysed carefully by Langstaff J in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, paras 19–23. As he points out, sometimes the employer's duty is said to be to offer work, sometimes to provide pay. The critical feature, it seems to us, is that the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as Carmichael v National Power plc [1999] ICR 1226 makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment."

In short, to paraphrase this paragraph of the judgment in James v Greenwich, mutuality can impact on an employment status claim in at least three separate, but interlinked, ways. Firstly, the absence of a 'mutual irreducible minimal obligation' can defeat any attempts to establish that the relationship is contractual, presumably on the basis of the conflation between 'mutuality' and 'consideration' discussed in the previous sub-section. Secondly, 'the nature of those mutual obligations must be such as to give rise to a contract in the employment field' that is to say that if there is no mutuality, presumably in the form of mutual obligations for future performance, then the contract will not be seen as a contract for personal work. Thirdly, we are told that if the previous two limbs of mutuality exist, ‘the issue of control determines whether that contract is a contract of employment or not’, but even this small reassurance is suddenly removed from us, by the Court of Appeal in the recent case of Stringfellow Restaurants Ltd v Quashie now clarifying that

"On reflection, it is clear that the last sentence ... is too sweeping. Control is not the only issue. Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement. O'Kelly and Ready Mixed provide examples."

Other cases clearly suggest that 'it is necessary for a contract of employment to contain an obligation on the part of the employee to provide his services personally. Without such an

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62 Stringfellow Restaurants Ltd v Quashie [2012] EWCA Civ 1735.
irreducible minimum of obligation, it cannot be said that the contract is one of service, thus juxtaposing, if not conflating mutuality with 'personality'. And this while, according to the Court of Appeal in Muschett, the lack of mutuality (and at this stage it is difficult to understand which limb the authorities are referring to) is said not to necessarily exclude the establishment of 'a contract 'personally to execute any work or labour' (i.e. ... a contract for services)' with a user in a trilateral work arrangement, while - at the same time - the fact 'that [the worker] was under no obligation to ... work for [the user] and could terminate his engagement with [the user] at any time by giving notice to [the agency]' means that no personal work contact can be established between the worker and the user for the purposes of gaining protection from anti-discrimination legislation. Just to make even clearer how much recent judgments are willing to read into the test and the elements of mutuality, one may add that mutuality is also understood as a necessary element for a "limb (b) contract" or 'worker' contract to exist, so that its absence will exclude workers from being covered by legislations such as the Minimum Wage Act 1998 or the Working Time Regulations.

This rather long section has explored the evolution, development, and fragmentation of the concepts of 'mutuality of obligation'. The analysis has both verified and questioned the understanding of mutuality as an 'employment law requirement'. Its inception was clearly inspired by a pressing need to move beyond the analytical strictures provided by contract law reasoning in respect of 'untypical agreements'. But its evolution has been influenced by both contractual principles and contract law reasoning, and has no doubt failed in terms of delivering on its analytical potential (in that by saying too much about the contract of employment, it ends up saying too little) and has hindered the deployment of English employment protection legislation to the wider range of personal work relations present in modern labour markets.


Can a single test, or even contractual element, perform so many functions? Has it become too laden and does it retain any purpose and conceptual coherence when it can be deployed

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64 Muschett v HM Prison Service [2010] EWCA Civ 25, with para 36 suggesting that ‘such mutuality is not a condition of a contract for services’.
66 Byrne Bros (Formwork) Ltd v Baird and Others [2002] ICR 667, 680.
67 To this effect see the majority judgment in A D Bly Construction Ltd v Mr A T Cochrane (Appeal No. UKEAT/0243/05/MAA), where at paragraph [40] it was held that ‘the Claimant was not a worker on the footing that under the contract, the Respondent was not obliged to offer work and the Claimant was not obliged to do the work if offered. The finding of fact by the Tribunal at paragraph 7(4) of their Reasons that clause 23 of the contract reflected the true position precludes the Claimant from asserting that under the contract, he undertook to do or perform work or services. That, in our judgment, is fatal to his being classified as a “limb (b) worker”.
in so many different ways (all typically resulting in added hurdles for atypical and precarious workers to prove employment status)? One could of course probe these questions in many different ways, but this section seeks to shed some light on them by exploring the approaches taken by other jurisdictions in respect of their uses of ‘mutuality’ or of other functionally equivalent concepts. We will begin by assessing the approach adopted by some common law jurisdictions and move on to elaborate on the approach taken by European law.

The Australian approach is quite clear and can be summarised as follows. Australia does recognise the concept of ‘mutuality’ in the construction of contracts of employment and academic authorities of the calibre of Stewart and Owens link it to the judgment in *Dietrich v Dare* (1980) 54 ALJR 388. But in their more recent work they also note that ‘the Australian understanding of this has never been as rigid as that in the United Kingdom’. In advancing this claim they rely on the authority of *Forstaff v Chief Commissioner of State Revenue* (2004) 144 IR 1, where

‘Justice McDougall preferred to distinguish the British cases and express the Australian requirement of mutuality ‘not as an obligation on the one side to provide and on the other to perform work, but as an obligation on the one side to perform work (or provide service) and on the other side to pay’. This was considered to be more consistent with the way in which the ‘wage-work bargain’ had been analysed in cases such as *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435. This is certainly a far cry from the fragmented and multifaceted concept of mutuality discussed in the previous section.

South African labour law also offers an interesting benchmark for assessing the English law understanding of ‘mutuality’, not just because of the shared common law origin of the two systems, but also because of the influence that English doctrinal elaborations have had, over the years, on its development. In 2004, Benjamin noted that a ‘seminal article written by Sir Otto-Kahn Freund, persuaded [South African courts] to reject the ‘control’ test and adopt the approach that an employee is someone who is part of the employer’s business... usually referred to as the ‘organization’ or ‘integration’ test’. As a consequence of this, ever since *Smit v Workmen’s Compensation Commissioner*, South African jurisprudence in this area of

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labour law had been effectively dominated by the so-called ‘dominant impression’ test\textsuperscript{73} inviting adjudicators to consider all aspects of the contract, without limiting themselves to ascertaining the existence of a right of supervision or control, that was not seen as the conclusive element of the employee relationship. This test was strongly criticized by a number of academic authors, including Benjamin\textsuperscript{74} and Brassey.\textsuperscript{75} More recent court decisions engaged with this line of scholarship with the Labor Court of Appeal expressly endorsing Benjamin’s critical analysis\textsuperscript{76} and suggesting that:

’[12] … when a court determines the question of an employment relationship, it must work with three primary criteria:

1. An employer’s right to supervision and control;
2. Whether the employee forms an integral part of the organisation with the employer; and
3. The extent to which the employee was economically dependent upon the employer’.\textsuperscript{77}

But this is pretty much it. South African labour law is blissfully oblivious to our English Law vagaries of ‘mutuality of obligations’.

As for Indian labour law, in 2010 the Supreme Court endorsed the view, attributed to its former Justice Kuttyil Kurien Mathew, that

‘From the contractual principle of mutuality of obligation, it was reasoned that if the employee can quit his job at will, then so too must the employer have the right to terminate the relationship for any or no reason. And there are a number of cases in which even contracts for permanent employment, i.e. for indefinite terms, have been held unenforceable on the ground that they lack mutuality of obligation. But these cases demonstrate that mutuality is a high-sounding phrase of little use as an analytical tool and it would seem clear that mutuality of obligation is not an inexorable requirement and that lack of mutuality is simply, as many courts have come to recognize, an imperfect way of referring to the real obstacle to enforcing any kind of contractual limitation on the employer’s right of discharge, i.e. lack of consideration.’\textsuperscript{78}

\textsuperscript{73} Smit v Workmen’s Compensation Commissioner 1979 (1) SA 51 (A), more recently considered in SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) and Somerset West Society for the Aged v Democratic Nursing Organisation of SA & others (2001) 22 ILJ 919 (LC).


\textsuperscript{76} State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2008) ILJ, 2234 (LAC), paragraphs [10]-[11].

\textsuperscript{77} Ibid., paragraph [12].

\textsuperscript{78} Harjinder Singh v. Punjab State Warehousing Corporation (Civil Appeal No. 587 of 2010), 2010 (1) SCR 591, paragraph 21. Emphasis added.
Common law legal systems aside, it may be worth considering how other systems approach the element of continuity in employment relationships, and whether continuity in performance is seen as a strict pre-requisite for a contract of employment to exist.

An interesting comparative angle is provided by the Italian notion of ‘continuità ideale’ a concept that ‘deploys its effects on a teleological, rather than temporal level, and is therefore different from the continuous or periodical execution of the performance, that is to say from the mere distribution over time of the fulfilment to the obligation’; continuity in the context of subordinate employment ‘has to be understood not in its material sense but in the theoretical (ideale) one, as dependence or functional availability’ of the worker ‘in someone else’s enterprise’. These doctrinal insights are confirmed by the Italian Supreme Court explicitly accepting that the casual and intermittent nature of performance does not exclude that the work relation in question can be one of subordinate employment. A position not altogether different from the one developed, in recent years, by Freedland noting that

‘although when I get into my taxi, neither I nor the taxi-driver necessarily expect that the taxi-meter rates will be held for longer than during the present journey to the station, when I take somebody into my employment under a contract of employment, that worker will have some sort of expectation that I will hold the agreed wage rates for some defined period or on some defined conditions.’

Finally it may be useful to assess our domestic notions of mutuality by reference to the benchmark of EU law. In this respect, one cannot fail to note that in the case of Allonby, the ECJ came very close to explicitly suggesting that ‘mutuality of obligations’ play no role in its assessment of who is a worker for the purposes of EU law. The Court held that

The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

In the case of teachers who are, vis-à-vis an intermediary undertaking, under an obligation to undertake an assignment at a college, it is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.

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80 Ghera, Ibid, emphasis original.
81 Cass. Civ. Sezione Lavoro, 10 luglio 1999, n. 7304
83 Case C-256/01, *Allonby v Accrington and Rossendale Community College* [2004] ECR I-873, paragraphs [71]-[72].
In the earlier case of Preston the Court was equally dismissive of the relevance attributed in English court to the circumstance that ‘after the completion of any contract, there is no obligation on either party to enter into further such contracts’, resulting in the absence of an ‘umbrella contract’ as long as the workers could be held to be in ‘a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment’.

Before indulging into the faux pas of misusing the comparative method in an unduly prescriptive way, it may be appropriate to draw some provisional conclusions in respect of the relevance and meaning of this set of comparative considerations. Although the examples discussed above clearly suggest that the legal construction of contracts of employment is not inextricably linked to any of the English notions of mutuality of obligations, this should not be seen as necessarily prescribing the demise of mutuality of obligations in English labour law. However these comparative observations may lend themselves to assisting us in reaching three significant, and no less radical and problematic, sets of provisional conclusions on ‘mutuality’ and on its contribution to Labour law’s autonomy that are discussed in the following, and final, section of this paper.

5. Conclusions. Mutuality of obligations and the contested autonomy of labour law

The second section of this paper acknowledged that mutuality, properly understood, ought to be seen as an employment law requirement, rather than a contract law one. Its primary purpose is (or was intended to be) that of bringing to the fore in a meaningful way the relational aspects of the employment relationship that traditional contract law elements, such as contractual consideration, failed to acknowledge in any significant manner or shape. As noted in the opening paragraphs of section 3, there is little doubt that this is how ‘the second tier’ of the ‘two-tiered structure’ coined by Freedland in The Contract of Employment was intended to operate. In his 2003 monograph The Personal Employment Contract, Freedland further clarified that, in his view, ‘the two level analysis should be regarded as applying to personal employment contracts generally and not just to contracts of employment strictly so called. […] Semi-dependent workers’ contracts are more likely to be of very short duration, but that is no reason to deny them a relational dimension’.

However the analysis carried out in the second and third parts of section 3 identified a number of uses of the concept of mutuality that are hardly reconcilable with the autonomous function and rationale that was originally attached to the concept. On the contrary, mutuality

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84 Case C-78/98, Preston v Wolverhampton Healthcare NHS Trust and Others, para 30 and para 65.
85 Ibid., para 72.
has been used both i) as a synonymous term of contractual consideration and ii) as a pre-requisite of contractual continuity (in a vast range of personal work relations) in a way that clearly defeats the purpose of the concept of mutuality as originally intended. This latter observation provides an interesting angle to enrich and question our appreciation of English Labour Law as an Autonomous discipline (even with all the caveats and qualifications introduced in respect of the idea of ‘autonomy’ in section 2 above). Clearly the contract of employment can be seen as an original legal institution regulating a coherently identifiable social phenomenon or set of phenomena, and mutuality is obviously capable of being understood as an original regulatory techniques and governance mechanisms serving this original institution. However the emphasis that English legal reasoning continues to place on the contractual arrangements underpinning personal work relations significantly diminishes the claim to autonomy that mutuality, the contract of employment, and UK Labour Law as a whole could potentially advance.

In this respect, the comparative enquiry of section 4 provided a number of insights on the contractual strictures just outlined. Firstly, it is quite apparent that the importance of recognising the elements of continuity and stability in employment relations is not inexorably connected with the English notion of ‘mutual obligations for future performance’. A number of other legal notions of employee or worker, including the emerging EU ‘worker’ concept, reveal that the descriptive (and normative) value that English law attaches to continuity and stability is in fact wasted and pushed into an endless catch-22 when turned on its head and transformed into a (contractual) pre-requisite for recognising the existence of a contract of employment. So ‘mutuality as a pre-condition for contractuality’ is a proposition that does not seem to attract much credit in most other jurisdictions.

Secondly, and perhaps more importantly, the idea of ‘mutuality as a pre-condition for relationality’ does not appear to withstand this kind of comparative scrutiny either. Several legal systems, including the EU legal system, are quite comfortable with the idea that a relationship in the employment field may well come to existence in the absence of a mutuality element, or in the presence of a ‘non-mutuality clause’, in individual contracts or in a succession of separate contracts. In fact, most foreign systems will go beyond this simple statement, and further accept the idea that, in cases of discrepancy between the contract and the relationship, the reality of the latter ought to prevail over the formality of the former. The relationship between contractual formality and relational reality is an aspect of English labour law that English courts are just beginning to extricate. In line with other legal systems, they have sought to recognise the prevalence of the reality of the employment relationship over the legal fiction of the contractual arrangement when both parties have conspired to shape a contractual arrangement aimed at circumventing a legal requirement, as suggested by the traditional English sham doctrine under Snook. But it is only in more recent times, with

87 Snook v London and West Riding Investments Ltd [1967] 2 QB 786.
cases such as Protectacoat\textsuperscript{88} and Autoclenz, that they have moved on to recognise that when one of the parties, typically the employer, has abused of its ‘relative bargaining power’ by unilaterally producing a written agreement that fails to reflect the ‘true agreement’, then ‘the reality of the relationship’ ought to prevail over the written documentation.\textsuperscript{89} There is however a third set of cases where a mismatch between the written agreement and the reality of the relationship can manifest itself without being attributed, strictly speaking, to either a conspiracy between the two parties of the contract to dissimulate their real arrangements, or to a unilateral abuse of power on the part of the employer dictating ‘what the written agreement will say and the contractor/employee must take it or leave it’,\textsuperscript{90} thus resulting in a ‘legal fiction’, to use the terminology used by AG Geelhoed in his Opinion in \textit{Allonby}.\textsuperscript{91} These are the cases where, to borrow once more the Court’s words in \textit{Allonby},\textsuperscript{92} the contractual structure of the relationship is simply ‘of no consequence’ to the relationship itself in its specific context, though this admittedly requires a contextual analysis of the law that English courts have been traditionally reluctant to engage with.\textsuperscript{93}

Bearing in mind these two points, a third provisional and highly normative conclusion may be tentatively put forward. The time might have come for English law to reassess the function of mutuality of obligations, as well as the fiction on which its current uses are premised. Arguably, the concept ought to embrace a more sober demeanour in which fewer, and arguably clearer, functions are assigned to it. And at the same time it ought to re-shape itself to fit our modern, diverse, and increasingly fragmented and precarious labour markets. Mutuality understood as a contractually evidenced continuous and bilateral relationship between employer and employee and as a \textit{pre-requisite} for a contract of service, postulates a labour market where employment relations develop along a paradigm of stability and subordination that is clearly increasingly challenged by the reality of contemporary human resource management arrangements. The time has arguably come for English labour law to recognise this and embrace a wider understanding of labour law as the law of personal work relations,\textsuperscript{94} although admittedly such a shift may well require a new conceptualisation of the third essential element of the concept of ‘autonomy’ embraced by this paper, that is to say of the ideology underpinning the normative action and development of Labour law itself.

\textsuperscript{88} Firthglow Ltd (t/a Protectacoat) v Szilagyi [2009] EWCA Civ 98.
\textsuperscript{89} See Autoclenz Ltd v Belcher and others [2011] UKSC 41, paras 22 and 35. On this line of cases see A. C. L. Davies, ‘Sensible Thinking About Sham Transactions Protectacoat Firthglow Ltd v Szilagyi’ (2009), ILJ, 318; A. Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) ILJ, 328.
\textsuperscript{90} Firthglow Ltd (t/a Protectacoat) v Szilagyi [2009] EWCA Civ 98, para 52.
\textsuperscript{91} Ibid. at para 49.
\textsuperscript{92} And here it may be worth noting that \textit{Allonby} was not decided on the assumption that the employer was unilaterally imposing some kind of ‘legal fiction’, to borrow the terminology used by AG Geelhoed in paragraph 49 of his Opinion (see also 37-38), but simply, as noted above, on the basis that ‘the fact that no obligation is imposed on [the workers] to accept an assignment is of no consequence in that context’.
\textsuperscript{93} An enlightening analysis of how specific contexts fail to be acknowledged by English courts can be found in E. Albin, ‘The case of Quashie: Between the Legalisation of sex Work and the Precariousness of Personal service Work’ (2013) ILJ, 180, especially 183-186. The construction sector, as the plight of the black-listed ‘self-employed’ workers has amply demonstrated, provides another interesting example. See Smith v Carillion (JM) Ltd & Anor UKEAT/0081/13/MC.
\textsuperscript{94} M. Freedland and N. Kountouris, \textit{The Legal Construction of Personal Work Relations} (OUP, 2011).