WE'RE *MILES* APART – DISPROPORTIONATE DEDUCTIONS FROM WAGES, INDUSTRIAL ACTION, AND HUMAN RIGHTS

ABSTRACT

This article sets out a human rights-based critique of one aspect of the common law wage/work bargain: the rule that entitles employers to deduct an entire week's pay from those taking action short of strike, and who thereby perform most, but not all, of their contractual duties. It makes the case that that rule, established in *Miles v Wakefield MDC* and *Wiluszynski v Tower Hamlets* over 35 years ago, constitutes a disproportionate interference with an employee's right to strike and to take industrial action, under Article 11 of the ECHR. The article shows how such cases might be brought, depending on whether an employee is in the public sector or private, and iterates the argument for implying a duty of "rights-obedience" into the contract – either as a free-standing duty or as part of an expansion of the duty of mutual trust and confidence – as a corrective.

1. INTRODUCTION

Just over 35 years ago, the House of Lords decided that an employee has no right to be paid their salary for those days on which, as a result of taking industrial action, they did not work their contract in full.[1] In the intervening period, the traffic has all been one-way, either confirming or extending that rule. This article challenges that. It asserts that common law rules which favour employers to that extent, such that employees stand to lose significant amounts of pay for what are in reality relatively small reductions in work, might be construed as human rights violations. First, they might constitute disproportionate restrictions on the right freely to associate – to strike in pursuance of collectively agreed union goals – contrary to Article 11 of the ECHR, "brought home" in the Human Rights Act (HRA). Secondly, they might, depending on the form they take, constitute violations of an employee's right peacefully to enjoy possessions, their salary, in contravention of Article 1 of

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[1] *Miles v Wakefield Metropolitan District Council* [1987] AC 539, discussed contemporaneously G. Morris "Recent Cases: Industrial Conflict" (1987) 16 *Industrial Law Journal* 185 and J. McMullen "The Legality of Deductions from Workers' Wages" (1988) 51 *Modern Law Review* 234.

the First Protocol (A1P1). That would be so where an employer is in effect double counting deductions, by refusing to pay unless work is made up, but in situations for which pay has already been deducted.

The focus of this article is not on deductions of a day's pay for a day-long strike. The basic right of an employer there is both settled and unchallengeable. Instead, it is on one of three different scenarios, each a form of industrial action: [2]

1. A worker strikes for only part of the day, yet their employer nonetheless deducts a full day's pay on the basis that the day's work has not been performed properly and in full. As the right to pay accrues daily, a day is not divisible into paid and unpaid hours.
2. A worker on action short of strike (ASOS) refuses to do certain tasks while action is ongoing but performs all others. Pay is deducted because the employer considers that they are entitled not to accept partial performance in substitution for the whole. Having informed the employee, the work they then do perform is treated as voluntary.[3]

[2] Each of those three types of deduction strike at a core, direct union activity, rather than secondary and indirect (*Mercer v Alternative Futures Group Ltd* [2022] EWCA Civ 379 [63]) as they reduce (drastically) the effectiveness of strike action against one's own employer. They would therefore attract a narrower margin of appreciation.

[3] *Wiluszynski v London Borough of Tower Hamlets* [1989] ICR 493.

3. A worker returns to work after a strike but refuses to accede to the employer's demand, the managerial prerogative, to catch up on work that has backed up.[4] The employer does not pay unless and until that work is done – even though pay has already been deducted once, when the employee was on strike.

Of course, not all workers will ever be affected by these rules. It is likely to be of significance only to those with contracts without a specified, set number of working hours in the week. Instead, they specify a general duty to serve, requiring the assumption of such duties as appropriate to their appointment, and as assigned by their line manager.[5] They would also bite on those in many professions for whom there may well be backlog of work on return after a strike.

The article is in three main parts. The first makes good on the substantive human rights claim – that such deductions constitute a disproportionate

[4] UCU News "Strike ballot opens at Queen Mary University over 'brutal' attempt' to withhold 100% of staff pay" 3 March 2022 (available at https://www.ucu.org.uk/article/12151/Strike-ballot-opens-at-Queen-Mary-University-over-brutal-attempt-to-withhold-100-of-staff-pay, access on 12 December 2022).

[5] The national conditions for full time teachers, for example, require them to "be available to perform such duties at such times and such places as may be specified by the headteacher… those hours to be allocated reasonably throughout those days in the school year": Department for Education "School teachers' pay and conditions document 2022" September 2022, (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1110990/2022_STPCD.pdf, access on 12 December 2022).

interference with a worker's rights under either Article 11 or A1P1. The second demonstrates how that human rights claim might be given effect, depending on whether the employer is in the public or private sector. The latter leads into the third part, which analyses the arguments for implying a duty of "rights-obedience" into the contract. Before we embark on those three discussions, this next part traverses the current domestic position at common law.

2. DEDUCTIONS FROM PAY AT COMMON LAW, FOLLOWING INDUSTRIAL ACTION

We need here to distinguish a worker on day's/week's strike and a worker taking ASOS for example failing to cover for a colleague, or not performing one aspect of a multi-task role.

A. Pay deductions resulting from a strike

At common law, the position for those workers taking full strike action – that is, full withdrawal of labour – is straightforward: they will not be entitled to be

paid for as long as they strike. The entitlement to pay depends on performance of the conditions of the employment contract. An "employee who sues for remuneration under a contract of employment must aver and prove that he was ready and willing to discharge his own obligation [under it]"[6], that is "the full duties which can be required of him under the contract". Unless a worker is ready and willing to work, they are not entitled to pay.[7] Since striking evinces an unwillingness to work, an employer is entitled to withhold pay. This is clear from the House of Lords decision in *Miles* in 1987.[8] Whether A is paid an hourly, daily or weekly wage or salary for a pre-defined 37-hour week, the result is the same: a worker has no entitlement to be paid for the time they were on strike. Thirty years later, the Supreme Court in *Hartley v King Edward VI College* aligned hourly-waged earners, weekly-salaried earners and professional employees, such as in the instant case teachers, paid a yearly salary in exchange for an open-ended duty to serve.[9] There is no question that such deductions would be lawful in Convention terms.[10] Deductions from pay following a strike are not the concern of this article.

[6] *Wiluszynski* above n3, 498.
[7] *Henthorn and Taylor v CEGB* [1980] IRLR 361, 363 Lawton LJ. See generally Z. Adams "'Wage' 'salary' and 'remuneration': a genealogical exploration of juridical terms and their significance for the employer's power to make deductions from wages" (2019) 48 *Industrial Law Journal* 34.
[8] Above n1.
[9] *Hartley v King Edward VI College* [2017] UKSC 39.
[10] On which, see A. Bogg and M. Ford QC "Striking, Pay Deductions, and Reasonable Orders: A Legal Analysis" *UK Labour Law Blog* 6 October 2022 (available here

B. Pay deductions resulting from ASOS

Where however a worker is engaged on ASOS, by working to rule or by undertaking only certain duties and not others, case law again provides the answer, albeit replacing crystal clarity with conceptual confusion. Common law orthodoxy on discharge and performance is that where B deliberately refuses to perform any part of the contract – a repudiatory breach – A may elect to (i) terminate and claim damages for any loss; (ii) affirm the contract, accept B's defective (partial) performance, and render their own performance in full, while claiming for damages for any loss; or (iii) reject the defective (partial) performance and withhold their own performance.

A worker taking ASOS is in repudiatory breach. An employer would at common law be free to terminate, that is dismiss and seek damages. Our concern is not with that but with pay deductions, that is (ii) or (iii) above. *Sim* is best seen as an affirmation case.[11] There, various teachers who were taking industrial action refused requests from their headteacher to cover for absent

https://uklabourlawblog.com/2022/10/06/striking-pay-deductions-and-reasonable-orders-a-legal-analysis-by-alan-bogg-and-michael-ford-kc/ access on 12 December 2022) and *Mercer* above n2 [57].

[11] *Sim v Rotherham MBC* [1987] Ch 216, on which see V. Shrubshall "Industrial action: limited industrial action and entitlement to pay" (1989) 18 *Industrial Law Journal* 241, 243.

colleagues, in accordance with an NUT instruction employees faced small, almost nominal deductions. Each council made deductions from pay of between £2 and £3.37 for each cover class that the teachers refused. Scott J held that providing cover came within the headteacher's reasonable directions for proper administration of the school, and teachers were thus under a contractual obligation to comply. The deductions by way of equitable set-off were lawful as they represented the amount calculated to represent the financial loss incurred (and had been accepted as such by the teachers), that is they represented damages. The courts have not always been vigilant to the idea that an employer should both prove (and quantify[12]) loss in order lawfully to be able to make deductions from salary by way damages. In *Royle*, the court accepted a 5/36 deduction in pay after a teacher refused to allow a further five pupils into class without putting the local authority employer to proof of, for example, needing to pay for a supply teacher.[13] It is hard to conceive of such a juristic lack of rigour outside the employment sphere.

C. The right to reject partial performance

[12] *Cooper v Isle of Wight College* [2007] EWHC 2831 QB
[13] *Royle v Trafford MBC* [1984] IRLR 1984.

An employer is entitled "to refuse to accept any partial performance."[14] If an employer makes clear that they want all the duties performed or none at all (and has not resiled or conducted herself inconsistently with her stated position[15]), then where a worker takes ASOS and so does not perform in full the contractual demands their employer is entitled to make of them, they are exposed to greater deduction in pay. How much will depend on whether the part performance can be attributed to a single day, a few days or to the whole duration.

In *Miles*, the House of Lords sanctioned a three-hour deduction in weekly pay for the duration of the whole 15-month dispute.[16] Mr Miles was a Registrar of Births Deaths and Marriages. He had made clear his refusal to perform marriages during his three-hour Saturday morning shift. He undertook other tasks in the office instead. His local authority employer by letter made clear their position: those who were not prepared to undertake the full range of Saturday duties were not required to attend at all and would not be paid. It was entirely a matter for Registrars if they chose to attend.[17]

[14] *Miles* above n1, 551 Lord Bridge.
[15] *Miles*, above n1, 505, perhaps by giving other work to be done?
[16] *Miles*, above n1.
[17] The dispute started in August 1981 and the letter was sent in October. No point seems to have been taken that Mr Miles might have been entitled to pay in the two-month period before his employer made clear its rejection of partial performance. The employer has had the benefit of the other work done on Saturdays, on which see f/n69 on possible unjust enrichment claims.

The House of Lords accepted that his employer, the local council, could deduct the full three hours' salary even though he was present at work for the whole of that time, so it was lawful to pay him 34/37 of his salary. The operation of the Apportionment Act 1870 meant that salary had accrued Monday to Friday, and so had to be paid in full for those days.

Where pay cannot be apportioned like that, that is where ASOS is not day-specific or is spread randomly across many over a period, an employee is exposed to long term deduction for the duration. The doctrine of partial performance means, where industrial action cannot be apportioned to any one day, there is no bar to an employer not simply deducting a fraction of pay for those days when work was not performed in full – in effect, treating the contract as divisible – but deducting in full for the entirety of the dispute, irrespective of its length or the minimal impact on the business or organisation. This is the effect of *Wiluszynski v Tower Hamlets LBC.*[18] There, a local government official refused to respond to queries from the public for the duration of industrial action. Clearing the backlog once it was over took only a few hours, yet the Court of Appeal held that it was lawful for the employer

[18] Above n3, and also *Henthorn and Taylor* above n7.

council to withhold payment in full for the duration of the dispute. The principle in *Miles* was "applicable to the present case".[19]

The more recent case of *Spackman* only sows greater confusion.[20] A university was entitled to deduct 30% of salary where a lecturer undertook an assessment boycott as part of an industrial dispute. Not only did Ms Spackman's employment contract include a clause expressly stating that the university would not accept partial performance and that her entitlement to remuneration would cease if she did not perform her full duties, the university wrote to all staff prior to the industrial action informing them that if they took part they would suffer deductions from wages as the university would not accept partial performance. Yet, it did not deduct in full. The payment of 70% of salary – if *Wiluszynski* holds good – can only be seen as an ex gratia payment to maintain good industrial relations (!) rather than because it was owed.

The only constraint is that the employer must make clear in advance their intentions. An employer is not to be treated as having resiled and thus waived any right not to pay simply because she takes no physical steps to

[19] Above n3, 498
[20] *Spackman v London Guildhall University* County Court [2007] IRLR 744.

prevent workers coming into work, or ejecting them once there.[21] Assuming that the employer's pronouncements are genuine, and that the employee could not reasonably be confused or misled, the mere fact that an employer benefits from the continued part-work, there can be no question of waiver.[22]

In neither *Miles* nor *Wiluszynski*, was the employer put to proof of loss. Indeed, Lord Templeman conceived of *Sim* differently – as a teacher refusing to work "in his free hours".[23] So, "when a worker in breach of contract declines to work in accordance with the contract, but claims payment for wages, it is unnecessary for the employer to rely on the defences of abatement or equitable set-off."[24] Lord Oliver approached it similarly: "where the employee declines to work at all for a particular period [and here His Lordship concluded this was a withholding of services on Saturdays], then…I see no ground upon which the employee who declines to perform that condition upon which payment depends can successfully sue for the remuneration which is dependent on performance."[25]

D. Time for a new approach?

[21] *Wiluszynski* above n3, 504 Nicholls LJ.
[22] Ibid 505.
[23] *Miles* above n1, 564.
[24] Ibid 565.
[25] Ibid 570.

While we might distinguish on one hand *Sim* from *Miles*, *Wiluszynski* and *Spackman* on the other by whether or not a court could properly view the worker's action as going to the heart of their contractual duties – not performing in full the very task(s) they were employed to do, "a deliberate refusal in advance to perform the contract as intended"[26] – that is not how contract doctrine views them. The distinction in doctrine is simply whether the employer affirms or rejects, and then whether pay can be apportioned. This leaves workers who wish to take industrial action in order to pursue collective grievances or goals in a very precarious position at common law. They are exposed ex ante to the threat and likely knowledge that they will not be paid and afterwards face perhaps significantly smaller pay packets. In either situation, this article will argue, this constitutes at least (either?) a chill on or an actual interference with the exercise of the union's (and their individual) right in Article 11.

[26] Z. Adams et al (eds) *Deakin and Morris' Labour Law* 7th ed (Oxford: Hart, 2021) 303. So much here would depend on how the essence of the contract were conceptualised. Was the contractual duty of Mrs Sim to teach her allotted classes and pupils (only) or more widely to help teach those in the school who needed teaching?

The case will be made that it is time to revisit, and reject, that line of cases, headed by *Wiluszynski*, because, following a strike or during ASOS, they allow employers to make deductions from pay that cannot be seen as commensurate with any harm or loss. The principle those cases establish constitutes a disproportionate and thus unlawful interference with the right to strike and take organised action implicit in the right to associate.[27] This is so whether it is a deduction in full for the whole duration of ASOS, a full-day deduction for a part-day strike, or a failure to pay unless a worker catches up with work that was lost while on strike. A part work, part pay rule that allows employers to make deductions for demonstrable loss and harm – and here we should prefer *Sim* over *Royle* – offers a far more defensible position. Doing so requires consideration of how those statutory Convention rights interact with existing common law contractual rules and principles. First though, we need to establish the protective scope of Article 11, and of A1P1.

[27] This is not to decry the opportunity for doctrinal common law challenges to that position. As the current authors of *Deakin and Morris' Labour Law* observe, perhaps it is the employment cases that are the heterodoxy: "It is not clear that [they] can readily be justified by contract law doctrine, however. It is odd that an employer can apparently suspend the operation of payment while the other aspects of the contract remain in force…The issue is whether the employer should go on receiving the substantial benefit of performance in return for nothing, simply by virtue of a unilateral declaration to the effect that it was not 'accepting' part performance." *Deakin and Morris* above n26, 302.

3. THE HUMAN RIGHTS DIMENSION

There are two possible human rights claims. Any employee who faces a deduction from wages that represents (far) more than the time lost to strike or industrial action could argue that it constitutes a violation of their (and the union's) right to associate and organise, under Article 11. Furthermore, some employees – those facing further, possibly continuing, deductions if they fail to make up work already lost to strike – might have a separate human rights claim under A1P1. They might be able to argue that having pay docked in effect twice constitutes an interference with their right to undisturbed enjoyment of their possessions, their salary.[28] In reality, if a worker can make good on the first, it is unlikely that a court will entertain the second. Since they overlap, in that for both, the key factor will be an assessment of the proportionality of the deduction, the second adds little. It is hard to conceive of a worker succeeding under A1P1 without also succeeding under Article 11 but for completeness, this article traverses the case for both.

A. The right to strike, and to take industrial action, and Article 11

[28] A third possibility is that an employee has no effective remedy for the putative human rights under Article 13 given the onus of making the claim, as damages or debt, falls on them rather than on employers, being required to pay and then recoup for losses or damages.

Article 11 of the ECHR guarantees protection for the right to associate, and thus lays the ground for the right of workers to form unions. How then is a deduction of pay during or following industrial action an attack on, an interference (in human rights terms) with that right? We need here to make good on three limbs: that the right to strike falls within the protective scope of Article 11; that deductions from pay constitute an interference with its exercise; and that that (some) such deductions would be disproportionate

On the first, there is now a sufficiently strong strand of Strasbourg and domestic case law that implicit in that primary right to organise is the right to take industrial action. We can trace a line from the recognition in *Demir and Baykara v Turkey* of the implicit right to bargain collectively[29], and the consequent instrumentality of withdrawing one's labour so as to achieve that, leading, in 2014, to the European Court declaring that "strike action is clearly protected by Article 11".[30] In domestic law, we have yet to see such a clear declaration. Indeed, we see a vacillation from almost a right to merely the absence of liability through immunities, an evolving and piecemeal right.[31]

[29] (2009) 48 EHRR 54.
[30] *RMT v UK* (2015) 60 EHRR 10 [84].
[31] A. Bogg and R. Dukes "Statutory interpretation and the limits of a human rights approach: Royal Mail Group Ltd v Communication Workers Union" (2020) 49 *Industrial Law Journal* 477.

Cases like *Metrobus v Unite the Union*[32], *RMT v Serco*[33], *Royal Mail v CWU*[34] all demonstrate that the court conducts proportionality analysis of the procedural requirements imposed on unions, usually relating to holding a ballot, and contained in primary legislation. More recently, it is implicit (there is no express holding) in the Court of Appeal judgment in *Mercer* that Article 11 extends to a guarantee of a right to take industrial action.[35]

Secondly, that line of cases from *Metrobus* onwards clearly tells us that ex ante restrictions on a union are capable of interfering with the exercise of the right. A deduction from pay operates *ex post*, but is it an interference in law with an individual's right? It both constitutes a penalty for having exercised the right and is capable of chilling the future exercise by that worker or indeed by others. A combination of *Straume v Latvia* and *Ognevenko v Russia* would probably secure the claim.[36] In *Straume*, subjecting a union official to a range of sanctions including disciplinary investigation and suspension, revocation of pay and dismissal for lesser activity than striking – writing a letter to management outlining grievances – was considered an interference. In *Ognevenko*, a union member who was dismissed from work

[32] [2009] EWCA Civ 829.
[33] [2011] EWCA Civ 226.
[34] [2019] EWCA Civ 2150.
[35] *Mercer* above n2.
[36] *Straume v Latvia* App 59402/14, 2 June 2022 [92] and *Ognevenko v Russia* (2019) 69 EHRR 9 [62].

after having taken part in a strike was able to bring a claim. Imposing civil liability for the losses incurred when toll-booth operators left their posts as part of an ongoing union dispute was an interference (and disproportionate).[37] A lesser penalty – a reprimand for having gone on strike – given its capacity to deter trade union members from legitimately participating in strikes or actions to defend the interests of their members was sufficient to constitute an interference in *Karaçay v Turkey*.[38] In the light of that, it is very hard not to see deduction of an individual's wages as also constituting an interference with the exercise of their rights (and the unions). Domestically too, the logic of *Mercer* bears that out.[39] Both the Court of Appeal, and the EAT before it, were open to the suggestion that subjecting a striking UNISON official to disciplinary proceedings and suspension two weeks into a three-month industrial action engaged Article 11 (for the purposes of s.146 TULR(C)A 1992). There is no good reason to treat an interference through pay deduction differently. Thus, an employer who has deducted pay that does not simply represent "no work, no pay" has interfered with their employee's right to associate in Article 11.

[37] *Satılmış and Others v Turkey* Apps 74611/01, 26876/06 and 27628/02, 17 July 2007.
[38] 6615/03 27 March 2007.
[39] *Mercer* above n2 esp [70]-[71].

The third and final analytical step is to consider whether or not deductions from pay that represent a sum (far) in excess of lost work can be justified as proportionate under Article 11(2) on the standard *Bank Mellat* test:[40]

(i) a sufficiently important objective

(ii) a rational connection;

(iii) less intrusive measures?

(iv) overall fair balance between an individual's right and community interests .

Mercer here is helpful. The whole thrust of the case was a quite legitimate concern about requiring employers to pay workers in full despite their being totally non-productive through striking. But in our scenarios, the employer is getting the benefit of work, just not all that has been contracted to perform.

Before the EAT, it was not in dispute that withholding a day's pay for day's strike would be a necessary and proportionate interference under Article 11(2).[41] That was also the case under ILO rules. The legislative objective of "reliev[ing] employers of the need to pay workers who, by participating in

[40] *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 13 [20] Lord Sumption.

[41] *Mercer v Alternative Futures Group Ltd* [2021] IRLR 620 [60] EAT. The Court of Appeal said this: "It is agreed by all parties to this case that if an employee is on strike he or she does not have to be paid for the time whilst on strike. It is not suggested that this approach…would fall foul of Article 11" (above n2, at [57]).

industrial action, withhold their labour in breach of contract" could be met by tailoring the rule in s.146 TULR(C)A 1992 to exclude such deductions from being a construed as a disciplinary detriment. It does not follow from that that all strike-based deductions should be so excluded, as had been urged by counsel for the Secretary of State – or be seen as proportionate responses. Furthermore, the "accepted position of the ILO [was that] additional deductions going beyond that were [objectionable]".[42] The implication of the EAT decision must be that permitting an employer to penalise striking workers to any greater degree than the loss of wages equating to the time lost could not be conceived of as a sufficiently important legislative objective.[43] None of these were gainsaid by the Court of Appeal. Arguments by employers that their business needs required tolerance of deductions greater than a day's wages in order for example to hasten the return to previous productivity or to meet a backlog in orders might, if framed in that way, meet (i) and (ii) above – though that would not apply to all the scenarios under our microscope. It is very hard to see how a court would be satisfied on (iii) and (iv).

To be able to deduct a whole day's pay despite having had, say, the value of five hours productive work – for a two-hour strike – does not strike a fair

[42] Ibid [61].
[43] Ibid [62].

balance between employer and the employee's right to take industrial action. That must hold good for ASOS such as in *Wiluszynski* where open-ended, long-term deductions were made despite the employer only suffering a partial 'hit' on work-value, and where the employer makes a double (or double-plus) deduction, not paying for everyday that a worker refuses to make up lost work. While it is obviously difficult to quantify an employer's loss – so as to assess the proportionality of any deduction – we might start by making a reasonable assessment of how long it might take (or indeed took) to make good the lost work, or long it had previously taken. It is hard to think of a situation where an employer could deduct more than a notional amount – either in pounds or as a percentage of salary – and successfully defend that as proportionate. Taking as one example, an assessment boycott by lecturers, marking might take maybe half-a-dozen days in May. At all other times, academics would be performing their duties, and being productive, by conducting research or teaching prep for the following year. For the common law to allow a deduction of the whole salary for May, maybe two if the action persists, for what is a failure to work for about a week is grossly disproportionate.

It is true that in *Spackman*, the County Court judge (Recorder Jan Luba QC) specifically addressed proportionality and rejected its application. His conclusions show he did not approach it through the lens suggested here. He does not conceive of the case as being a human rights claim (and we must assume, it was not argued that way despite it post-dating the HRA). Instead, for him it is simply a matter of contract:

> It is impossible to see how concepts of 'proportionality' enter the frame here. This is a private law, not a public law claim. If …the claim is advanced only as a matter of contract, the obligation to pay a proportionate salary must be found in either an express or implied term. I have rejected the possibility of both.[44]

The analysis he adopts is internally consistent and doctrinally sound as a matter of pure common law but is far too narrow an authority. *Spackman* does not properly illuminate the interplay between human rights proportionality and contractual provisions, the former operating as a limiter to the latter.

B. The right to peaceful enjoyment of possessions under A1P1

[44] *Spackman* n20 [48].

There is a strong case that an employer who makes wage deductions for every day that work is not made up – in the university sector, say, where classes are not rescheduled (scenario 3 above) – might have committed an actionable breach of A1P1. Employees are losing twice for the same action, or same harm to the employer; once when they strike and have pay deducted and then when they are not paid for however long they refuse to make up lost work.

While there are no Strasbourg cases in which the Court has held that wages or salary constitutes a possession, we can deduce from cases on future income generally that the Court would so hold for wages already earned. The basis for the Court's admissibility decision in *Ian Edgar*, concerning the introduction in the UK of ban on the sale of handguns in 1997 was that future income constituted a "possession" only if the income had been earned or where an enforceable claim to it existed.[45] *A fortiori*, earned wages must constitute a possession. Similarly, state benefits have long been held to fall within A1P1, including (more recently) non-contributory work-related welfare benefits paid from general taxation rather than from NICs such as Reduced

[45] *Ian Edgar (Liverpool) Ltd v UK* App 37683/97 ECtHR 25th January 2000, and *Batelaan and Huiges v Netherlands* App 10438/83 Admissibility decision of 3rd October 1984 involving the withdrawal of a licence to dispense medicines.

Earnings Allowance, paid after suffering a work-related injury.[46] There is no good reason to distinguish salaries earned from employment.

While A1P1 does not assist a worker recover the pay that was docked for the strike day, as that has not been earned, when thereafter they are docked full or part pay as well, despite returning to work as normal bar the failure to make up the lost work, that deduction effects removal of post-strike money that has been earnt. As under Article 11 (see below), this too would come down to a question of proportionality.[47] As the Grand Chamber put it in *Broniowski v Poland*, the test is whether or not "the person concerned had to bear a disproportionate and excessive burden."[48] It is impossible to see how a case can be made that suffering a double loss of pay for the same 'harm' can be anything but disproportionate. The post-strike loss might well be far in excess of a doubling. In extremis, it might be continuous and indeterminate no matter how much work is actually done, if the employer consistently refuses to accept partial performance, instead insisting, contractually, that work is made up or there will be no pay.[49] Any legitimate interest served by

[46] *Stec v UK* (2006) 43 EHRR 47.
[47] *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 [69].
[48] (2006) 43 EHRR 1 [150].
[49] Query when this might become a de facto lock-out.

deducting pay for industrial action cannot sustain a case for doubling or more than doubling the penalty.

The proposition herein is two-fold. We must recognise that the absolute right at common law to deduct from pay, and its nadir in *Wiluszynski*, is in law tempered by human rights norms of proportionality. That in turn suggests, requires even, a reversion in judicial approach much more in line with *Sim* – with deductions either limited by actual loss sustained or modest, representing almost nominal losses. To make good on all that, we need first to see how such human rights claims might be brought.

4. HOW MIGHT AN EMPLOYEE MAKE GOOD THEIR CLAIM?

The route open to employees who have suffered disproportionate deductions from pay to maintain a human rights claim depends on whether they are in public sector or private sector employment. Those working for state employers can mount a direct public law claim using their employer's public authority status under s.6 HRA, premised on a breach of the state's negative obligation, itself not to breach the rights of its citizens. Those in the private

sector must rely on the indirect horizontal effect of the HRA, premised on the status of the court as a public authority under s.6. At ECHR level, this would be framed as breach of the positive obligation on the state: failing through law to protect a union (member) against sanction for exercising their right to take industrial action, striking at the core of trade union activity.[50] In essence, while they both require an assessment of proportionality, the difference is that here the fair balancing required – proportionality – "between the competing interests of the individual and of the community as a whole"[51] occurs earlier – to determine the engagement of the right, rather than the proportionality of any interference. The private sector employee's argument here would be that in order to comply with the state's positive obligation on the international plane, a domestic court must revisit employment contract law and develop it in line with those human rights principles and rules infused into the common law. This part adverts briefly to the first, public sector employment, while the next part tackles the development of (employment) contractual doctrine in more detail.

A. Public sector employees

[50] On which, see *Mercer* above n2 [70].
[51] *Sindicatul Pastoral Cel Bun v Romania* [2014] 58 EHRR 10.

Employees of what are termed 'core' public authorities (generally taken to encompass employees of central government, local government, police and the army) will have a direct challenge to all decisions that concern their employment.[52] 'Core' public authorities, as a matter of both normative analysis[53] and positive law,[54] have no private side. They are always public, and so any employment decisions will expose employers to an individual (or representative unions) bringing a public law judicial review challenge under s.7(1)(a) HRA.

Those who work for other public sector employers – such as universities, NHS hospitals, state schools, the BBC[55] – (in HRA language) 'hybrid' authorities will also have that direct, public law claim provided – and this is the key – the act of the headteacher, the NHS manager, the university vice-chancellor in deducting pay is better conceived as a public act, under s.6(5).[56]To state it thus evinces the problem. Both depend on open-ended and undefined notions of

[52] *Parochial Church Council of the Parish of Aston Cantlow, Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37 [7], Lord Nicholls.
[53] D. Oliver "The Frontiers of the State: public authorities and public functions under the Human Rights Act" [2000] *Public Law* 476; "The Human Rights Act and public law/private law divides" [2000] *European Human Rights Law Review* 343.
[54] *Aston Cantlow* above n52, [7] Lord Nicholls.
[55] The same questions arise for those now working in former state sector employment such as state utilities or next step agencies like the DVLA or the Prison Service, or regulatory bodies such as OFSTED.
[56] This assumes the employer has some public functions, under s.6(3(b).

publicness, and by contrast privateness. It thus becomes a normative legal question of locating the appropriate boundary of the political state.

We can sketch this briefly. There are pre- and post-HRA decisions that appear to hold that employment decisions are 'private': we might posit *Malloch* – that "employment by a public authority does not per se inject any element of public law"[57] – *Walsh*[58] and *Owen v National Maritime Museum Tribunal* in 2003.[59] That said, the common law test for determining amenability to the supervisory jurisdiction under Ord 53 is not necessarily the same as that set out in s.6(3). Further, the statutory framework in s.6 envisages two types of public body – not a singular one under the common law test. Whether the court in *Walsh* would have reached that same decision were there different 'flavours' of publicness, we cannot know. There is now case law that strongly suggests that an employee has human rights against their public sector employer, such as *Mattu* and *Kulkarni*.[60] Both concerned the compliance of internal disciplinary processes with rights to a fair hearing under Article 6. We might add into that mixture the Supreme Court decision

[57] *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1596.
[58] *R v East Berkshire HA ex p Walsh* [1985] QB 152.
[59] [2003] 2 WLUK 738, EAT 24 February 2003.
[60] *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641; *Kulkarni v Milton Keynes Hospital NHS Trus*t [2009] EWCA Civ 789. In *Ben Dor v University of Southampton* [2016] EWHC 953 Admin, an academic brought a claim against his own university's decision to revoke permission for an academic conference (on Israel), arguing that it constituted an interference with his free speech. It is not entirely clear if the case was decided on grounds of common law free speech.

in *R (oao G) v Governors of X School* in 2011.[61] None was disposed of by the easier route of holding that while employer X is a public authority, its employment decisions were private acts so there was nothing on which the s.6 duty could bite. That aligns with the position taken by Gillian Morris, again in the very early days of the HRA, and her analysis of Strasbourg jurisprudence.[62]

Normatively, Dawn Oliver's analysis, developed over several years at the start of the 2000s, supports the view that employment is a 'private' act.[63] By defining 'publicness' as the possession of unique powers, we consequentially limit its scope: if a private individual like me can perform act X, it cannot descriptively and ascriptively be a public act. Since I can employ people – to clean my house, to drive me to work – the act of employment is per se private irrespective of who is the employer. But if we reframe it as this – "why is a university or school or hospital employing people?" – we elicit a different response.[64] The answer is surely "To perform its various public tasks – educating students paid for from the public purse, operating on patients free

[61] [2011] UKSC 30.
[62] G. Morris "The Human Rights Act and the Public/Private Divide in Employment Law" (1998) 27 *Industrial Law Journal* 293.
[63] Oliver above n53.
[64] This is derived from and builds on Lord Scott's dissent (on this point) in *Aston Cantlow* above n52, [131]-[132].

at the point of delivery"? So closely enmeshed then is employment in that, that we might consider it to be a public act.[65] That conceptual approach very much accords with the Court of Appeal in *Weaver*.[66] There, the termination of a tenancy – an act we can all perform – by a social housing trust was held to have a sufficient element of 'publicness' as to render the trust's decision subject to human rights norms.

It is certainly very arguable that any public sector employee who suffered a disproportionate deduction of pay following a strike would now have their own direct, public law claim under the HRA for breach of Article 11. If not, they would be in the same position as all other private sector employees.

B. Private sector employees

The means by which Convention rights are given traction in the private sphere is primarily through the vehicle of the court as a public authority. A court is under a free-standing duty to comply with the convention, that is to act compatibly with the rights of the parties before it in any litigation. This indirect

[65] This leaves open questions of the employment status under the HRA of those in more ancillary roles in schools, hospitals etc. Presumably (to take just two) payroll and maintaining the premises would be so enmeshed in the primary public task of treating people as to be indistinguishable.
[66] *R (oao Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587.

horizontal effect does not confer human rights protection directly on employees against their private sector employers. Claims must be brought within existing doctrine but the court is asked either to mould or develop private law doctrine into a more Convention compatible rule, so as better to align both parties' relative rights and obligations with the ECHR.[67] We should acknowledge though the dangers of simply overlaying a Convention right onto existing doctrine with, perhaps, different rationales or conflicting principles.[68]

The employee's argument would be that the common law rule established *Miles, Wiluszynski* and *Spackman* does not properly protect their right to take industrial action. Instead, the court would be urged to revert to a position much closely aligned with to *Sim*, recasting the rule as one permitting only a proportionate deduction. That would reflect the 'true' loss through withholding part of one's labour. In many situations, this would likely to bring deductions down to negligible levels. There are two possible ways to effect this. Both lead to the same result. The first is to invite the court to interpret the contractual provisions more favourably, that is to imply a term into the contract of what we shall call rights-obedience, or less expansively to

[67] Probably the best-known example is the development of equitable breach of confidence in media intrusion cases: *Campbell v MGN* [2004] UKHL 22.
[68] *Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 [91].

adapt the duty of mutual trust and confidence. The other is a restitutionary claim in unjust enrichment. Space precludes an expansive treatment of that latter.[69]

5. THE CONTRACTUAL ISSUES

The three scenarios on the first page involve an employee conferring a benefit on their employer – the performance of a work-related task – for which they are not going to be paid. The previous part established that making such a disproportionate deduction from pay would constitute a violation of Article 11 (and on occasion A1P1). This part outlines the case that doing so risks an employer being exposed to a claim for breach of contract, specifically that they have breached an implied term not to do so. This part outlines how that assertion can be made good. Before doing so, we will briefly advert to two further possibilities that might afford striking employees a measure of protection.

[69] It is hard to see what a claim in unjust enrichment (UE) would add. Using Lord Steyn's fourfold framework outlined in *Banque Financiere de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 an employee's UE claim will either add nothing to the existing contractual claim, based on breach of the implied term, or would fail for the same reason, that the employer is contractually entitled to deduct disproportionate wages. Undoubtedly, the employer has been enriched (1) at the expense of the employee (2) and there are no defences (4). The battleground will be (3) – was the enrichment unjust? In *Miles*, above n1, Lords Brightman and Templeman were prepared to accept the possibility of a restitutionary quantum meruit claim, Lord Bridge was not, and Lords Brandon and Oliver reserved their position.

A. A statutory route

An employee who has suffered a disproportionate deduction following ASOS might consider bringing a statutory claim. Section 14(5) of the Employment Rights Act 1996 appears to preclude a claim for unlawful deduction from wages. Section 3 of the HRA could be utilised to add the words "…provided the deduction is not one that disproportionately interferes with the right to take industrial action, protected within Article 11 of the ECHR" or some such. Perhaps instead it might be linked it to loss: "…save insofar as the deduction represents loss to the employer that can be attributed to the industrial action." Whether either can be said to go with the grain, the issue in *Mercer*, is obviously open to question.[70]

Mercer itself shut the door on the efficacy of another statutory claim: that a deduction from pay subjects a worker to a detriment for taking part in the activities of an independent trade union, contrary to s.146 TULR(C)A 1992. The problem facing a claimant is not so much that a deduction is outwith the scope of detriment. The Court of Appeal was prepared to countenance striking

[70] *Mercer* above n2.

employees being sued for loss of profits and being suspended without pay on return as a "detriment", as well as being disciplined (the instant case), and so the provision would undoubtedly catch deductions from pay that do not represent no work, no pay.[71] It is that the Court did not consider a s.4 declaration of incompatibility would be appropriate in such a case as here "where there is a lacuna in the law rather than a specific statutory provision which is incompatible".[72]

B. Other contractual remedies

An employee might also have remedies in contract aside from the claim that making a disproportionate deduction – that is, a deduction that does not reflect the employer's limited loss – puts the employer in breach of an implied term.[73] Each lays claim to the court's status under s.6 HRA. First, an employee might argue that the court should revisit the requirements of the wage/work bargain, that is the contractual duty to pay wages. It might be urged to interpret it as one that debars disproportionate deductions[74] or urged to

[71] *Mercer* above n2 [69].
[72] *Mercer* above n2 [87].
[73] On the difference between an employee claiming that the unpaid disproportionate deduction represents a claim in debt on one hand and damages for breach of contract on the other, see *Deakin and Morris* above n26, 298.
[74] I am grateful to the referee for this observation.

expand the doctrine of substantial performance so as to rule out many but not all disproportionate deductions.[75] Substantial performance mitigates the harshness of the common law rule in *Cutter v Powell:*[76] where the contract is for entire performance, A must perform her duties entirely in order to claim any money due under the contract. The Court of Appeal in *Wiluszynski* was very clear that the instant case "was not concerned with entire contracts."[77] This marks a departure from the orthodox view that an employment contract is divisible rather than entire; *Cutter* for example has a very different set of facts, a contract to work a single transatlantic trip. The position being suggested here is that either the Court erred in so holding or it erred in its failure to accept that Mr Wiluszynski had substantially performed the contract. Relatedly, an employee might invoke the words of Lord Reid in *White and Carter*, stressing the need for the innocent party to have a legitimate interest in performing the contract rather than claiming damages.[78] He continued: "Parliament has on many occasions relieved parties from certain kinds of improvident or oppressive contracts, but the common law can only do that in very limited circumstances." Parliament could certainly be understood as having done so again in 1998.

[75] *Hoenig v Isaacs* [1952] 2 All ER 176
[76] *Cutter v Powell* (1795) 6 Term Rep 320
[77] *Wiluszynski* above n3, 499.
[78] *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 431.

Alternatively, an employee might press upon the court that it should now conceive of the Convention as a constraint upon the managerial prerogative, which otherwise confers considerable latitude on employers to run their business and make demands of employees. This would empower employees to disobey rights-violating instructions, such as a requirement to work, or to reschedule missed work, without pay as unreasonable.[79] Thirdly, employees might invite the court to tighten what the common law requires of employers before they can demonstrate they do not accept part-performance. Again, in *Wiluszynski*, the Court said this: "I do not think the Council could be expected physically to take action" to prevent strikers entering council premises, for the good reason that it would be hard to distinguish working employees from those taking ASOS.[80] In 2023, it is no longer necessary to prevent physical access. Should the law continue to sanction employers who allow remote IT access, all the while reaping the benefit of their employees' work product (bar that subject to ASOS) yet with no intention of paying them, relying perhaps on a single email at the outset warning that any work done will be considered voluntarily? Lastly, an employee might suggest that the court should apply the rule in *Hochster v de la Tour* equally to both parties.[81] There, where an

[79] Deakin and Morris (above n26, 1053).
[80] *Wiluszynski* above n3, 500.
[81] 118 ER 922 (1853).

employer repudiated the contract – despite having reached agreement, they refused to take someone on as a courier for three months – Lord Campbell suggested that if the employee did not accept the repudiation, then if they later chose to wait and sue for debt at the conclusion of the three months, they would be barred for having failed to mitigate their loss.

C. Implying a new term… or expanding the duty of mutual trust and confidence?

Let us assume that the contract will not contain an express term debarring the employer from breaching an employee's Convention rights or, and lesser, from imposing disproportionate sanctions on employees following industrial action. We need then to consider the possibility of a term being implied. In order to comply with its s.6 duty (discussed above), a claimant might prevail upon the court to develop the common law, and to imply into the contract of employment a term in law, the effect of which would permit an employer only to make proportionate deductions.

At its widest, that would impose a general duty to act proportionately, a duty that would operate whether or not an employee's human rights were in

play. This is buttressed by developments in the common law, imposing a duty not to act perversely, irrationally, or (grossly) disproportionately, to which we might also add arbitrarily.[82] All act as constraints on an employer's otherwise lawfully and contractually permissible decision. Less expansively, and the focus of this article, that would involve either an expansion of the implied, *Malik* duty of trust and confidence – the obligation on the employer not "without reasonable and proper cause [to] conduct [herself] in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"[83] – as to encompass Convention protection or the implication of a new term, a duty of rights-obedience. [84] In either case, the outcome would subject employers to a duty to act proportionately, given the qualified nature of most employment-based ECHR protection (under Article 11, or privacy under Article 8 or to religious freedom under Article 9). In our instant case the result is the same: employers would be in breach of contract if, during or following a strike or as part of ASOS, they make deductions from pay that were disproportionate.

[82] *Clark v Nomura International* [2000] IRLR 766 at [40] and *BBC v Beckett* [1983] IRLR 43, 46. See too *Braganza v BP Shipping Ltd* [2015] UKSC 17, and the implication of rationality into the operation of general contract terms.
[83] *Malik v BCCI* [1998] AC 20 [54].
[84] More targeted still, the implied term would place employers under a duty not to make disproportionate deductions from pay following industrial action, to tackle the instant problem.

In all likelihood, if a judge were minded to accept the premise first of the 'bite' of Article 11 and then of that s.6 duty to mould the common law, given the current juristic status of the *Malik* duty, it is hard to see counsel persuading a judge of the need to create a new route to the same destination. There is a ready-made solution in expanding the existing implied term. That approach was floated in the embryonic days of the HRA, in 1998, by Bob Hepple. It seemed legitimate and strongly arguable, he thought, that "since the court must act compatibly with convention rights, the duty of trust and confidence also embodies a duty to respect the Convention rights of an employee."[85] He did not develop that fairly bare assertion any further. Then just as the HRA came into force, Gillian Morris suggested that it was "strongly arguable that conduct which breaches some Convention rights … should be regarded as a breach of the implied duty of trust and confidence."[86]

We can nonetheless accept the probability that a court would 'simply' expand the duty of trust and confidence while also making a case for the separate development of a free-standing implied term. Joe Atkinson has

[85] B. Hepple "Human Rights and Employment Law" (1998) 8 Amicus Curiae 19, 22-23, and also M. Boyle "The Relational Principle of Trust and Confidence" (2007) 27 *Oxford Journal of Legal Studies* 633, 642.
[86] G. Morris "Fundamental rights: exclusion by agreement?" (2001) 30 *Industrial Law Journal* 49, 50-51. The authors of *Chitty on Contract* dedicate several pages to the discussion and certainly do not rule out the possibility, even if they do note it is hedged with concerns: H. Beale, *Chitty on Contracts,* 34th ed (London: Sweet & Maxwell, 2021) 3.128 – 3.134.

developed a convincing normative case, based on two identified shortcomings of the former route that render it an insecure mechanism.[87] First, it offers only partial protection in terms of scope and reach – not covering all Convention rights and indeed in some cases confounding them.[88] Secondly, the Convention imposes a higher standard – proportionality – on employers who seek to excuse themselves than the common law test of "reasonable and proper cause" at its heart.[89] His favoured solution is for a free-standing term to be implied by law.[90] It would

> allow the term of trust and confidence to continue in its current form as a distinct and general normative standard, one that aims to introduce 'a norm of civility in managerial activities'. A new term would also avoid the baggage of trust and confidence, as well as any uncertainty over its future. Finally, implying a specific human rights term may be more straightforward than adapting trust and confidence to protect Convention rights.[91]

[87] J. Atkinson "Implied terms and human rights in the contract of employment" (2019) 48 *Industrial Law Journal* 515, 532.
[88] While Article 10 might protect an employee communicating confidential information, that would certainly conflict with and be in breach of the employee's implied duty: ibid 532.
[89] Ibid 532, drawing on *Malik*, above n83.
[90] We can discount a court implying a term in fact, as it would likely not meet either the business efficacy test or officious bystander/obviousness test, long accepted by the courts to be the touchstones. As Lizzie Barmes put it, such "terms are meant to do justice between the parties by giving effect to intentions they plainly had but were not stated or reduced to writing": L. Barmes "The continuing conceptual crisis in the common law of the contract of employment" (2004) 67 *Modern Law Review* 435, 436. Terms implied by law are, she continues, "implied as necessary legal incidents of a class of contracts" such as an employment contract. They do not therefore depend on intention or reasonableness.
[91] Atkinson above n87, 536.

We might add that doing so would also allay concerns that the scope of the duty of trust and confidence is becoming an overloaded catch-all, not sufficiently tethered to any conceptual mooring … or at least would not add to that.[92] Furthermore, a free-standing term derived from the HRA would signify the importance of protecting human rights in the workplace – underscoring that notion that workers do not leave their rights at the factory door. It would denote its separate statutory origins, so avoiding doctrinal confusion and/or what is called in other contexts, "mission creep". Finally, it would orientate the term away from the mutuality at the heart of trust and confidence. While of course it is true that employers have human rights, constituting the implied term separately indicates not only those statutory origins but the judicial intention to forge a new relationship very obviously premised on the unequal bargaining power, and the appropriateness of rebalancing the relative sharing of contractual risk.

D. <u>The case for implying a term into the contract</u>

[92] On which, see D. Cabrelli "Receding confidence in trust and confidence? (2019) 23 *Edinburgh Law Review* 411, 416 and his discussion of *James-Bowen v Commissioner of Police for the Metropolis* [2018] UKSC 40.

Here, we consider the normative and positive case either (and more creatively) for the implication into the employment contract of a duty of "rights-obedience" or, less provocatively, for expanding the existing duty of mutual trust and confidence.

Critically but unsurprisingly, there is no authority holding that a duty of "rights-obedience" is an implied term of the employment contract, but neither is there a case holding it not to be. The closest is probably *Smith v Carillion*, a blacklisting case in which the Court of Appeal upheld the finding of EAT, albeit that it did so on a different ground, the temporal 'bite' of the HRA.[93] The issue was whether or the HRA should make any difference to the common law rules that dictated the coming into existence of a contract between an agency worker and end-user. It was not the construction of an extant contract. The EAT held that the HRA did not require or permit the implication of a contract in circumstances in which domestic law would not even where, as counsel had argued, Convention rights were at stake.[94] That that argument fell on stony ground tells us nothing about the task facing a court or tribunal in circumstances such as ours.

[93] [2015] EWCA Civ 209.

[94] [2014] 1 WLUK 321, EAT, 17th January 2014. It was alleged that Articles 8 and 11 were engaged by the collecting and use of private date to enable detrimental treatment of individuals for their trade union activities.

Recent shifts in the way that courts have been analysing and conceptualising their approach to contractual interpretation denote a more supportive environment for the contention that common law doctrine should be more attuned to rights-claims. We might think of two linked developments. First is the more purposive, interpretative approach taken in *Uber*, with one eye on what statutory rights or benefits would or might be lost or gained depending on contractual meaning X or contractual meaning Y.[95] Second is the notion that the employment relationship is less contractual *strictu sensu* and as much or at least partly a status.[96]

The more purposive approach taken in *Uber* – to the existence of a contract rather than its terms, admittedly – evinces a greater preparedness to read employment contracts more protectively.[97] Our instant situation involves a lesser redistribution of rights and responsibilities through judicial intervention. The employer already knows they are bound to their employee.

[95] *Uber BV v Aslam* [2021] USKC 5.
[96] This dates back to R. Rideout "The Contract of Employment" (1966) *Current Legal Problems* 111, and we can see echoes in the speech of Lord Steyn (at least) in *Johnson v Unisys Ltd* [2001] UKHL 13, [20]: "It is no longer right to equate a contract of employment with commercial contracts."
[97] *Uber* above n95. The early to mid 1990s marked a similar judicial shift by the House of Lords in relation to an employer's contractual powers: *Scally v Southern Health Board* [1992] 1 AC 294, *Spring v Guardian Assurance* [1995] 2 AC 296, and *Malik* above n83.

The only issue is the extent, not the predicate issue; matters of (un)certainty and exposure are fewer and have less traction.

At first blush, *Uber* and say *Kostal* appear not to help us for two reasons.[98] The primary task of the court there was to interpret a statutory section, term, or word, whereas, in our case, it is the interpretation of the contract that is the key. The opposite in other words. Yet Lord Leggatt, explaining the underlying approach, and speaking to the more fluid, co-dependency of contract and statute, identifies the very problem: some "features of work relations …give rise to a situation in which such relations cannot safely be left to contractual regulation."[99] More broadly, the new, purposive approach responds to these twin imperatives: recognition of both the disparity in bargaining power[100], and the vulnerability of the employee.[101]

Secondly, their focus is on interpreting a contract purposively in order to bring a worker within the reach of statutory protection.[102] That seems not to

[98] *Kostal Ltd v Dunkley* [2021] UKSC 47.
[99] *Uber* above n95, [75].
[100] *Autoclenz Ltd v Belcher* [2011] UKSC 41 [35]. Orthodox contract doctrine has also started to take account of inequalities in bargaining, for example in continued adherence to the long-standing *contra proferentem* rule, which is otherwise on the wane: see eg *Persimmon Homes Ltd v Ove Arup and Partners* [2017] EWCA Civ 373 [52] Jackson LJ; *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372 [20] Moore-Bick LJ.
[101] *Malik* above n83, [8] Lord Nicholls.
[102] So, in *Kostal* above n98, for example, this was the right not to be made a detrimental offer in order to undermine collective bargaining, in s.145B of TULR(C)A 1992.

be the case here. What extant statutory right will be rendered non-existent or far less valuable unless we adopt a different interpretation of the contractual power to make deductions from wages following industrial action? Yet viewing a disproportionate deduction as a breach of an employee's Convention rights means that, unless the contract is construed more favourably (that is, unless the implied term is read in), they will be denied the statutory protection of the HRA for the exercise of their Article 11 rights, and that line of ECHR cases which includes the right to strike. Furthermore, while the Court of Appeal decision in *Mercer* casts doubt on the argument that they might be denied individual union-related rights,[103] seeing the right to bargain collectively as a union-right instrumentalised through employee strength certainly has support in the cases. Lord Leggatt in *Kostal* refers to the "right to be represented by the union and for the union to be heard in discussions or negotiations with the employer".[104] Disciplinary or detrimental action – deductions of wages – against members, whether realised or 'merely' threatened, weakens the union's position as collective guarantor of workplace protection, whether in terms of improved wages or greater safety on the factory floor. To that extent, action against one is action against all and against the union.

[103] *Mercer* above n2.
[104] *Kostal* above n98, [57] Lord Leggatt.

The second change in judicial thinking is the now plausible "body of case law in the context of employment contracts in which a different [contractual] approach has been taken."[105] There is a demonstrable trend of cases viewing the employment contract as not simply a bargain struck between the two parties, its terms determined solely by the agreement and intention at the time. A focus of judicial inquiry that is less fixated on negotiation, agreement and exchange allows us more readily to conceive employment contracts as *sui generis*. That is evident, for example, in that line of cases supporting the idea of a cumulative repudiatory breach, where the "last straw" does not itself even need to be blameworthy or unreasonable.[106] The premise of the employment contract as, or at least as shifting towards, in Hugh Collins' words, "justice in exchange" underscores the duty of mutual trust and confidence. Doing so offers up a greater expanse.[107] Counsel for the claimant in *Malik* put it this way: the argued-for term would serve a mediating function, balancing the employer's right to manage against the employee's right not to be unfairly exploited across a multitude of circumstances.[108] That was, in broad terms,

[105] *Autoclenz* above n100, [21] Lord Clarke.
[106] *Lewis v Motorworld Garages Ltd* [1986] ICR 157 (CA) and *Omilaju v Waltham Forest LBC No.2* [2004] EWCA Civ 1493.
[107] H. Collins *The Law of Contract* 4th ed (London: Butterworths, 2003).
[108] *Malik* above n83, 23-24.

accepted by Lord Steyn.[109] The implied term might be seen as part of a wider normative rebooting and rebalancing of the once skewed, one-sided employment relationship (such as the duty of fidelity on employees). As counsel again put it, the purpose of the implied term is to limit the employee's obligation to give loyal service to his employer.[110] He cannot be expected to give such service when the employer is improperly conducting itself in a manner which evinces an intention on their part not to observe the limits of the bargain. Putting it in those terms furnishes the necessary insight for our instant case, where an employee is being deprived of salary despite working and giving her employer the benefit of their work product or is being asked to work for free, which was not the bargain they struck.

In short, if the normative basis for forging and sustaining the duty of mutual trust and confidence is to ensure that objectively legitimate social values – fair dealing, fair treatment, and good faith – might be employed to moderate and constraint the exercise of contractual power,[111] it is not the greatest leap to aggregate those with the norms of human rights law. Indeed, while a contract could respond to those important social values by the parties

[109] Ibid 46.
[110] *Malik* above n83, 24.
[111] D. Brodie "Beyond Exchange: the New Contract of Employment" (1998) 27 *Industrial Law Journal* 79, 101.

agreeing, where they are not, they can as Boyle terms it, be 'imposed'.[112] In *Scally*, for example, the House of Lords decided that an employer was under a duty to inform an employee of the latter's right to purchase "extra years" pension[113], described by Brodie as the duty to "look out for the interests of the other side".[114]

There is emergent doctrinal support in wider, private law cases for the proposition that contractual rights ought to be read subject to human rights obligations contained in the ECHR. *Kulkarni* was an employment law case. The Court of Appeal was asked to construe a contractual term set out in the defendant NHS Trust's disciplinary policy entitling those asked to attend a disciplinary hearing to be accompanied by a companion who "may be legally qualified but he or she will not be acting in a legal capacity".[115] Of interest for us, in obiter, the Court considered that if a doctor were not a member of a defence organisation, and thus precluded under the contract from being legally represented, that would have constituted a breach of Article 6 despite the contract being clear on that point. In the wider commercial context, the

[112] Boyle above n85, 637.
[113] *Scally* above n97.
[114] Brodie above n111, 81.
[115] *Kulkarni* above n60. Properly construed, it permitted a medical practitioner to be represented by a legally qualified person, employed or retained or instructed by a defence organisation but was not permitted to bring a legally qualified person whom he had instructed or retained independently (at [59]).

issue in *Stretford v FA* was an arbitration clause in the FA rules, incorporated into the parties' contract, under which both sides waived their right to a hearing before the courts and to a public hearing.[116] The Court of Appeal interpreted that in line with the requirements of Article 6, and associated ECHR case law, and concluded that the proposed arbitration held under the contract was not incompatible with S's rights. Further back in time, *Shansal v Al-Kishtaini* featured a contractual claim by S for repayment of monies owed by A.[117] A pleaded the defence of illegality: S's own breach of UK rules proscribing any trading with Iraqi citizens. S's argument that such a defence, if successful, would defeat his own rights under A1P1 – the right to peaceful enjoyment of possessions – did not succeed. The Court held that illegality fell within the public interest exemption in A1P1.

All that wider reshaping of (employment) contract law doctrine creates a clear albeit, I would accept, not certain case to temper the current absolutism of the common law. It would lead to a generalised construction of employment contracts as subject to an overriding duty on an employer not to act inconsistently with their employee's Convention rights. Subjecting employers to such duties would give proper effect to the Convention rights of

[116] [2007] EWCA Civ 238.
[117] [2001] EWCA Civ 264.

striking employees by removing much of the discretion and power, in the hands of employers, to make disproportionate deductions from pay following a strike or industrial action.[118]

E. Contracting out

If we construe the contract as implying such a term, whether *Malik*-plus or a separate duty of "rights-obedience", we do leave one other matter open for resolution. Implied terms operate as default rules. Parties remain free to exclude or modify, as Lord Steyn opined in *Malik.*[119] We must countenance possible clashes between this implied term and any express countervailing terms, in effect a contractual waiver. Which should prevail, and why, depends on the specifics of the term that any employer managed to insert. A term declaring that "the employer is entitled to act contrary to any Convention rights conferred on the employee by the HRA" might well fall foul of the principle established in *Akhtar* that an employer is not entitled to exercise

[118] Concerns about using Convention rights to alter existing contractually agreed private law relationships can be met in one of two ways. First, this is all that occurred in, say, *Woods v WM Car Services (Peterborough) Ltd* [1982] IRLR 413. Employers and employees must always contract in knowledge that a court might later interpret the contract differently. Second, it is not novel. There is existing warrant for such an approach. In *Ghodin-Mendoza v Ghaidan* [2004] UKHL 30, admittedly under the guise of interpreting the Rent Act 1977 using s.3 of the HRA, the courts imposed on a landlord an entirely different set of obligations – furnishing the surviving same-sex partner with an assured shorthold – to those that he (and the then tenant) agreed to with open eyes in 1983.

[119] *Malik* above n83, 45.

discretionary powers (a contractual mobility clause) in such a way as to defeat the implied duty of mutual trust and confidence.[120]

How might a court be persuaded to prefer the implied term as a limitation on express powers? Many years ago, as the HRA bedded down, Gillian Morris laid out a convincing case that such an express term, a waiver of rights, might not be effective as a matter of ECHR case-law.[121] First, to be effective, a waiver must have been entered into without constraint. Simply put, the inequality in bargaining at the outset for most workers might mean this is not the case. Secondly, not all rights can be the subject of waiver. Thirdly, and lastly, *Rommelfanger v Federal Republic of Germany* suggests that even waivers be subjected to a proportionality assessment in order to assess their validity.[122] Furthermore, and more widely, it would be open to a court to hold that any such express rights-limiting term was void on grounds of public policy. In *Blathwayte v Cawley*, the House of Lords held that a testamentary disposition which disentitled anyone who was or became Catholic was not void for that reason (or for uncertainty either). Critically for us, there are distinguishing factors at play in the employment context.[123] First, a will is not

[120] *United Bank v Akhtar* [1989] IRLR 507. That would not be the case for terms implied in fact: *Johnstone v Bloomsbury AHA* [1991] ICR 269, 276 Stuart Smith LJ.
[121] Morris above n86.
[122] App 12242/86, Commission decision 6 September 1989.
[123] *Blathwayte v Cawley* [1976] AC 397.

the striking of a bargain between two parties, whether or not evenly poised, as is the case for testamentary freedom. We have seen how courts have been prepared to make inroads into contractual freedom. Secondly, in the context of employment relations, it is unlikely that we are dealing with a private law position settled years before, as might be the case for a will. Lastly, Lord Simon posited that courts "are concerned with public policy only in so far as it has been manifested by parliamentary sanction or embodied in rules of law having binding judicial force."[124] This was not considered sufficiently persuasive in *Blathwayt*. Lord Wilberforce's words are instructive here:

> I do not doubt that conceptions of public policy should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move.[125]

There is now Parliamentary imprimatur from 1998 for the view that there is public support for rights being guaranteed, as part of the new rights-protecting constitutional settlement. That important public proclamation when passing the HRA marks a significant break with the past in two ways: the public signification of a change in public policy, the value of protecting human rights within and by the domestic legal system from which flows the related

[124] Ibid 427.
[125] Ibid 426.

idea that we no longer expect employees to suffer such binary protection of their home and work life.[126]

F. What might a workable rule look like?

How might a judge put into operation the new contractual duty, to make only proportionate deductions following industrial action? Where the time lost is quantifiable – a two-hour strike following which a whole day's pay is lost – the solution is simple. The employer can only lawfully deduct those hours. Where action is continuing and less susceptible to a temporal allocation, the fall-back must be provable loss. A court here might be persuaded to accept instead:

- time taken to catch-up and make good;
- in jobs where one such exists, a formal workload model though allowing the employer to explain why she thinks it would take longer than the time allocated;
- the demonstrable cost of cover, bearing in mind a duty to mitigate loss (so an employer cannot claim the Regional Manager's time for covering the round of a striking postal worker).

[126] See eg *Barbulescu v Romania* [2017] IRLR 1032.

What would be avoided is an employer being able to claim to deduct on Monday for an employee's failing to perform an hour-long task (but undertaking all others) and then again on Tuesday be able to deduct in full, for the previous day's failure. A workable, rights-responsive rule would not allow such double counting without proof of further accrued loss.[127]

Lord Wilson was wary of allowing "contracts of employment to set sail, unaccompanied" and so counselled of the need to "keep the contract of employment firmly within the harbour which the common law has solidly constructed for the entire fleet".[128] The solutions proposed here should not cause His Lordship undue concern. They remain firmly anchored within contractual orthodoxy. In both, the employee is initially in breach, by refusing to work the contract in its entirety. First, the employer who accepts partial performance and affirms the contract is left with a remedy in damages/equitable set-off. That is *Sim* and the implication of a term limiting an employer only to proportionate deductions from wages is likely not to add very much. The result may well be the same: nominal or very limited deductions. It might constrain the courts' seeming willingness, untethered to

[127] Other matters that would need clarification: the employer's set-off, bearing in mind the principle in *NCB v Galley* [1958] 1 WLR 16; third party losses along lines of *Falconer v ASLEF* [1986] IRLR 331; and the possibilities of quantum meruit (on which see fn68 above).
[128] *Geys v Societe Generale* [2012] UKSC 63 [97].

ordinary contractual principle, to sanction 'fair', ball-park set-offs without quantification or proof of actual loss. That is, it might require a shift from the artifice of *Royle.*[129] Secondly, where an employer rejects defective or part performance, while contractual orthodoxy entitles them to withhold performance – that is, withhold pay – if they make a disproportionate deduction, they risk putting themselves in breach, this time entitling the employee to seek damages. The contract remains alive and in full effect[130], as do all its terms, including the new suggested implied term of "rights-obedience" or the expanded *Malik* duty of trust and confidence. Both bind the employer and limit their discretion as a matter of law. So, even if they elect to reject, and despite the hold of *Miles* and *Wiluszynski* seemingly permitting open-ended deductions for the duration, an employer would nonetheless not be able to make disproportionate deductions from wages lest they themselves breach their own contractual obligations.

6. **CONCLUSIONS**

[129] *Royle* above n13.
[130] *White and Carter (Councils) Ltd* above n78*,* 427 Lord Reid

Workers have the right to withdraw their labour, alongside their colleagues, in pursuit of collectively agreed goals. Doing so serves both individualised objectives – improving one's work conditions or remedying identified grievances – and wider, socialised ones. Subjecting an individual worker to a pay deduction weakens the union as collective guarantor of workplace protection, whether in terms of improved wages or greater safety on the factory floor. Action against A, B and C is action against every worker or every member at least, and against the union. It is not being argued here that an employer should be required to withstand a strike or ASOS painlessly. We accept the right of management to deduct pay where work is not done. Being able to do so responds to a clear business need. What human rights law requires is a balancing of the competing imperatives, seeking to produce a more harmonious mediating of the underlying inherent tensions.

This article asserts that the current common law framework does not represent an appropriate, Convention-compatible position. A rule which allows an employer to deduct in full for the duration despite having received value, provided they make clear their non-acceptance of part performance, as established in *Wiluszynski*, does not respond to the human rights imperative of proportionality. The fact that might be tempered by apportionment (if a

worker is on ASOS) that affects only one day's work (*Miles*) or offering what is in effect an ex gratia payment (*Spackman*) does not alter the picture greatly. Rejecting that absolutism and returning to the moderation of *Sim*, a part work, part pay rule, would allow the introduction of a more evaluative test for deducting pay, one that is more responsive to all the competing concerns and interests at stake, not simply the managerial. Should an employer be able to continue receiving substantial benefit of performance in return for nothing, simply by virtue of a unilateral declaration?[131] Human rights norms suggest not.

This article has, in three parts, staked out the arguments by which those employees who face deductions, other than a day's pay for a day's strike, might maintain a case. First, such deductions are disproportionate and thus constitute a violation of the right to engage in industrial action comprised within Article 11 and in one case – continued deductions for failing to make up lost time – also constitute a violation of A1P1. Even threats to make a disproportionate, unlawful deduction – or an employee knowing when action is being contemplated that they might occur – might constitute a violation,

[131] *Deakin and Morris* above n26, 302.

since the "chill" might dissuade workers from exercising their rights.[132] Secondly, some, and possibly all, public sector employees might maintain a public law claim under s.7(1)(a) HRA to enforce their Convention rights directly against their 'core', and possibly hybrid, public authority employer. Lastly, all employees have the power to bring private law proceedings for breach of contract (and/or for unjust enrichment) in which litigation they can impress upon the court its own public authority duty to comply with their Convention rights. That would require, the argument continues at its narrowest, adapting the common law of *Miles* and *Wiluszynski* so as to accommodate a principle of proportionate deductions or, more widely, to implying a term of rights-obedience into the employment contract, with the same result.

The obvious and immediate hardship in monetary terms effected by the common law rule that allows a full deduction irrespective of time lost or the harm suffered constitutes a real and immediate threat to the effective realisation of the right to associate. If we conceive of the individualised rules in case law such as *Miles* and *Wiluszynski* as disguising collective harms, if we resite the common law as something more attuned to the human right to

[132] There is certainly Strasbourg jurisprudence on the right to peaceful assembly (so not entirely on all fours factually) that could support such a claim: see *Baczkowski v Poland* (2009) 48 EHRR 19, a case where a rally did go ahead but had not been unauthorised and thus banned (albeit the bans were overturned after the event). The uncertainty of the legal position and thus whether a deduction is likely might go to whether the interference – through those legal rules – is prescribed by law.

associate, the bigger puzzle hoves into view: the use of law by workers to offer resistance to managerial demands.