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***THE COMMON LAW CONSTITUTION AT WORK: R (ON THE APPLICATION OF UNISON) V LORD CHANCELLOR***

Keywords: employment status, worker, Gig Economy, fundamental rights, access to a court

Abstract: This note considers the radical significance of Supreme Court's judgment in *R (On the Application of UNISON) v Lord Chancellor* on the unlawfulness of tribunal fees. It argues that the decision marks the coming of age of the 'common law constitution at work'. The radical potential of *UNISON* lies in its potential to generate horizontal legal effects in disputes between private parties. Recent litigation on employment status in the Gig Economy is analysed through the lens of *UNISON* and common law fundamental rights. The note identifies the various ways in which the common law tests of employment status might be 'constitutionalised' in the light of *UNISON*.

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**The Common Law Constitution at Work and the Principles of Public Law**

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In July 2017, the United Kingdom Supreme Court (UKSC) handed down a decision of high constitutional importance in *R (on the application of UNISON) v Lord Chancellor (UNISON)*.<sup>1</sup>

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<sup>1</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51. I am indebted to the following Blog posts and forthcoming articles, which responded to the ramifications of this case rapidly and impressively: M. Elliott, 'UNISON in the Supreme Court: Tribunal Fees, Constitutional Rights and the Rule of Law' <https://publiclawforeveryone.com/2017/07/26/unison-in-the-supreme-court-employment-fees-constitutional->

The UKSC struck down the tribunal fees regime as unlawful. In a powerful judgment that attracted the concurrence of the seven Justices, Lord Reed set out the principal ground of unlawfulness, which was its infringement of the constitutional right of access to the courts.<sup>2</sup> This fundamental constitutional right was described as ‘inherent in the rule of law’, a constitutional principle of great significance in the English common law.<sup>3</sup> The practical effect of the Fees Order, as experienced in the real lives of workers, was the effective prevention of their access to a court. *UNISON* now stands as testament to the vitality of the ‘common law constitution’, that is, ‘the ideas and values of which the rule of law consists are reflected and embedded in the ordinary common law.’<sup>4</sup>

The tribunal fee regime was implemented by the Coalition Government in 2013. It followed the publication of a Ministry of Justice consultation paper in January 2011 setting out the Government’s intention to implement fees for Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) claims.<sup>5</sup> Tribunal claims dropped off a cliff following its introduction.<sup>6</sup> The pattern of precipitous decline was certainly clear by the time of the second hearing in the Divisional Court.<sup>7</sup> The rapid and drastic real-world impact of tribunal fees was probably beyond even the wildest dreams of its most fervent political supporters. Lord Reed concluded that ‘there has been a dramatic and persistent fall in the number of claims brought in ETs...of the order of 66-70%’.<sup>8</sup> Furthermore, the remission scheme had not worked as expected, with the ‘proportion of claimants receiving remission...far lower than had been anticipated.’<sup>9</sup> The Lord Chancellor’s discretionary power to remit fees had been exercised only rarely.<sup>10</sup> The UKSC also referred to an Advisory, conciliation and arbitration service (Acas) survey,

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[rights-and-the-rule-of-law/](http://www.ier.org.uk/blog/its-common-law-wot-won-it); M. Ford QC, ‘It’s the Common Law wot won it’ <http://www.ier.org.uk/blog/its-common-law-wot-won-it> (last accessed 7th December 2017); M. Ford QC, ‘Employment Tribunals and the Rule of Law: R (UNISON) v Lord Chancellor in the Supreme Court’ ILJ (forthcoming, 2018).

<sup>2</sup> The UKSC also concluded that the Fees Order breached EU law and the principle of effective judicial protection. There was also a separate judgment by Lady Hale that offered a valuable critique of the Fees Order on the basis of indirect sex discrimination, in which all of the Justices concurred. This piece will focus on the common law arguments.

<sup>3</sup> *UNISON* n 1 above, [66].

<sup>4</sup> T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: OUP, 1993) 4.

<sup>5</sup> Ministry of Justice, *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal* (December 2011).

<sup>6</sup> For early academic criticism of the fees regime, see K.D. Ewing and J. Hendy QC, ‘Unfair Dismissal Law Changes: Unfair?’ (2012) 41 ILJ 115.

<sup>7</sup> [2014] EWHC 4198 (Admin); [2015] CMLR 4.

<sup>8</sup> *UNISON* n 1 above, [39].

<sup>9</sup> *UNISON* n 1 above, [43].

<sup>10</sup> *UNISON* n 1 above, [44].

published in 2015,<sup>11</sup> which found that a significant number of claimants did not pursue legal claims because of the practical unaffordability of fees.<sup>12</sup>

The UKSC judgment in *UNISON* was surprising in two respects. The first surprise was in its outcome. Prior to the judgment, UNISON had lost twice in the Divisional Court and once in the Court of Appeal. Few would have predicted the dramatic turn in fortunes in UKSC. In the lower courts, no judge had been prepared to leap the slender evidential gap between the aggregate statistics on tribunal claims to the unaffordability of the fees for individual claimants. Since the behavioural pattern might be explained on the basis that claimants were unwilling, as opposed to unable to pay, the principle of effectiveness in EU law was not breached. By contrast, the UKSC brought a dose of realism to its task, and this was reflected in a less formalistic approach to the empirical evidence.

The second surprise was the character of the legal arguments relied upon to challenge the lawfulness of the Fees Order. Prior to the UKSC judgment, legal arguments had focused on the ‘principle of effectiveness’ in EU law, supported by the jurisprudence of the European Court of Human Rights (ECtHR) under Article 6 of the European Convention on Human Rights (ECHR). In the UKSC, by contrast, the common law was positioned centre-stage in the challenge to the legality of the Fees Order. EU and ECHR principles played a supporting role to fundamental common law principles. As Lord Reed observed, ‘before this court, it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law. The case has therefore been argued primarily on the basis of the common law right of access to justice’.<sup>13</sup> While the substantive overlap between the common law right and the principles of EU law had already been noted in both the Divisional Court<sup>14</sup> and the Court of Appeal,<sup>15</sup> the priority accorded to the common law in the UKSC was striking.

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<sup>11</sup> *UNISON* n 1 above, [45] - [46], discussing Acas, *Evaluation of Acas Early Conciliation 2015* (2015).

<sup>12</sup> *UNISON* n 1 above, [46].

<sup>13</sup> *UNISON* n 1 above, [64].

<sup>14</sup> *UNISON* n 7 above. Elias LJ observed (at [24]) that the EU principle of effectiveness ‘is closely related to the common law principle that access to a court is a fundamental right, and also to art. 6 of the ECHR which confers a right to a fair and public hearing.’

<sup>15</sup> [2015] EWCA Civ 935; [2016] 1 CMLR 25. In discussing domestic authorities concerned with measures posing a ‘real risk’ to access to justice, Underhill LJ observed (at [51]) that ‘In none of those decisions was the alleged unfairness or denial of access to justice formulated in terms of a breach of EU law or of Convention rights as such: the claimants relied straightforwardly on common law principles. But I do not see that as a matter of principle the particular source of the unlawfulness can make any difference.’

The basic structure of public law reasoning in the ‘common law constitution’ was set out by Lord Reed in the following way: ‘In determining the extent of the power conferred on the Lord Chancellor by section 42 (1) of the 2007 Act, the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles.’<sup>16</sup> The proper approach, according to Lord Reed, was that ‘the Fees Order will be ultra vires if there is a real risk that persons will be effectively prevented from having access to justice. That will be so because section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals.’<sup>17</sup> The novelty of this constitutional principle should not be over-stated. Older cases such as *Raymond v Honey*<sup>18</sup> and *Pyx Granite Co. v Ministry of Housing and Local Government*<sup>19</sup> may be understood as giving effect to it.

*UNISON* nevertheless represents an important reaffirmation of the common law principles which underpin and shape the process of statutory interpretation in determining vires. Indeed, the application of these principles in *UNISON* mirrors Elliott’s characterisation of the basic structure of the common law approach to protecting constitutional rights: ‘the common law approach – encapsulated in the so-called principle of legality – discloses three particular, closely related strands...conceptual reliance upon ultra vires reasoning; recourse to statutory construction as a primary vehicle for protection; and the provision of meaningful justificatory scrutiny.’<sup>20</sup> Each of these interlocking elements came together to form the basic legal crux of common law scrutiny in *UNISON*. It was unsurprising, therefore, that Lord Reed made extensive supportive references to common law authorities such as *R v Secretary of State for the Home Department, ex p Leech*,<sup>21</sup> *R (Daly) v Secretary of State for the Home Department*,<sup>22</sup> and *R v Lord Chancellor, ex p Witham*.<sup>23</sup>

The nature of the ‘common law constitution’ in *UNISON* is captured in T.R.S. Allan’s formulation of the relevant constitutional norm: ‘The strength of this constitutional right [of access to a court] justifies a strong presumption of parliamentary intent whereby statutory provisions restricting access to the courts are to be narrowly construed...There may well be

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<sup>16</sup> *UNISON* n 1 above, [65].

<sup>17</sup> *UNISON* n 1 above, [87].

<sup>18</sup> [1983] 1 AC 1.

<sup>19</sup> [1960] AC 260.

<sup>20</sup> See M. Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68 CLP 85, 97.

<sup>21</sup> [1994] QB 198.

<sup>22</sup> [2001] UKHL 26; [2001] 2 AC 532.

<sup>23</sup> [1998] QB 575.

constitutional limits even to the power of “clear words” to deny the citizen’s right to seek justice in the courts.<sup>24</sup> Where primary legislation authorized intrusion on the right of access to justice, Lord Reed observed that even this was subject to an implied limitation shaped by proportionality-style reasoning.<sup>25</sup>

In *UNISON*, Lord Reed elucidated the rule of law as a *common good* for citizens in the polity. As such, access to a court is itself a fundamental right contributing to a public good, not merely a private amenity for individuals to pursue their legal grievances. As Lord Reed put it, ‘People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.’<sup>26</sup> This reflects an ideal of the rule of law as protecting the liberty of citizens under a system of constitutional government. The law must be ‘reliably enforced and fairly and consistently applied’ so that civic independence is assured.<sup>27</sup> The common law’s concern with freedom as independence is especially acute for employees and workers, for ineffective systemic enforcement entails that ‘the party in the stronger bargaining position will always prevail.’<sup>28</sup>

These constitutional principles emboldened the UKSC to approach the available evidence differently to the lower courts. The test for whether the Fees Order was ultra vires was whether there was a ‘real risk’ that claimants would ‘effectively be prevented’ from having access to the court.<sup>29</sup> This displayed a welcome sensitivity to the real world occupied by workers. As such, the formula of ‘real risk’ meant that it was not necessary to adduce ‘conclusive evidence’ that people were prevented from bringing claims. The aggregate data was sufficient to establish a fall that was ‘so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable.’<sup>30</sup> This was reinforced by Lord Reed’s observation that affordability must be

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<sup>24</sup> Allan n 4 above, 142-143.

<sup>25</sup> *UNISON* n 1 above, [88] - [89].

<sup>26</sup> *UNISON* n 1 above, [71].

<sup>27</sup> T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: OUP, 2013) 89.

This has obvious affinities with republican work on freedom as non-domination, on which see P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP, 1997).

<sup>28</sup> *UNISON* n 1 above, [72]. From a common law constitutionalist perspective, Allan is critical of accounts of the rule of law that accord priority to ‘negative liberty’ and ‘negative rights’ (n 27 above, 129). Statutory rights, such as are contained in employment protection legislation, are necessary to remedy the demeaning dependence that might otherwise obtain in the employment relationship.

<sup>29</sup> *UNISON* n 1 above, [87] (*emphasis added*).

<sup>30</sup> *UNISON* n 1 above, [91].

decided ‘according to the likely impact of fees on behaviour in the real world.’<sup>31</sup> As such, the fees needed to be ‘reasonably affordable’, not theoretically affordable.<sup>32</sup> Finally, Lord Reed drew attention to statutory rights where the corresponding remedies were either low monetary awards or even non-pecuniary, such as the right to written statement of terms and conditions. In these circumstances, the costs of seeking justice would render its pursuit ‘futile or irrational’.<sup>33</sup> Even where claimants were seeking to vindicate statutory rights with higher monetary awards, the difficulties in predicting a successful outcome, compounded by the shocking figures on non-enforcement of ET awards, meant that enforcement was likely ‘irrational or futile’ in many of these cases too.<sup>34</sup> This undermined the public good represented by the effective general enforcement of statutory employment rights.

*UNISON* is an exemplar of common law constitutionalism. In public law doctrinal terms, how radical is it? Four observations are warranted.

First, the decision in *UNISON* was reached using well-established common law principles of judicial review. In this respect, it did not break new doctrinal ground. Lord Reed’s judgment was powerfully expressed, but other judges have arrived at a similar outcome using conventional doctrinal techniques.<sup>35</sup> Still, *UNISON* should be welcomed as further entrenching the fundamental status of the constitutional right of access to a court. Not all the current members of the UKSC share that view. For example, Lord Sumption (who did not sit in *UNISON*) has described *Witham* as a ‘minor corner of English public law’ that demonstrates the damaging transmutation of a political question about the distribution of public resources into a legal question about rights.<sup>36</sup> In his view, the issues in *Witham* were non-justiciable. Given these powerful regressive signals in extra-judicial writings, we should never take orthodox constitutional principles for granted.

Second, *UNISON* offers some important insights into fundamental constitutional principles. For example, Lord Reed observed that ‘at the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society

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<sup>31</sup> *UNISON* n 1 above, [93].

<sup>32</sup> *ibid.*

<sup>33</sup> *UNISON* n 1 above, [96].

<sup>34</sup> In this respect, the important scholarly intervention by A. Adams and J. Prassl should be borne in mind, and it is likely to have been influential in shaping the UKSC’s own reasoning: A. Adams and J. Prassl, ‘Vexatious Claims: Challenging the Case for Employment Tribunal Fees’ (2017) 80 MLR 412.

<sup>35</sup> *Chester v Bateson* [1920] 1 KB 829.

<sup>36</sup> Lord Sumption, ‘The Limits of Law’ in N.W. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart, 2016) 15, 19.

in this country...Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.<sup>37</sup> This may be understood, in Kavanagh's evocative description, as a 'collaborative conception of the separation of powers'.<sup>38</sup> It is 'collaborative' in identifying the institutional complementarities between courts and Parliament in supporting the goals of good legal governance. Collaboration is not a byword for quiescence, as the outcome in *UNISON* itself demonstrates. It may sometimes involve the courts vindicating certain core values against other constitutional actors, for example protecting the citizen's fundamental rights against legislative or executive encroachment. Nevertheless, the collaborative enterprise of good legal governance sometimes involves institutions working together to ensure the systemic effectiveness of legal rights. Where citizens enjoy reliable expectations that the law will be respected by others (especially the powerful), the equal civic standing of citizens is thereby assured.

Third, it is tempting to attribute the victory in *UNISON* to the strategic choice to prioritise the common law arguments over the arguments of EU and European human rights law. It should nevertheless be recognised that the UKSC also concluded that the Fees Order *did* breach the EU principle of effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union, because it imposed limitations on the exercise of EU rights that were disproportionate.<sup>39</sup> The boundaries of the common law constitution and EU and European human rights law were, in this respect, coterminous.

Finally, the constitutional right of access to a court, along with other rights associated with legal protection such as the right of access to legal advice, are already well-established common law rights.<sup>40</sup> The UKSC did not develop a general analysis of other common law fundamental rights. This is understandable, given the nature of the arguments before it, but it represents a missed opportunity. For example, some scholars have suggested that 'fundamental freedoms of speech, conscience, and association, together with the right to a fair trial and immunity from arbitrary arrest and detention, are integral parts of any legitimate regime'.<sup>41</sup> *UNISON* now creates an opening for workers and trade unions to argue for a broader category of common

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<sup>37</sup> *UNISON* n 1 above, [68].

<sup>38</sup> A. Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in N.W. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart, 2016) 121, 132.

<sup>39</sup> *UNISON* n 1 above, [117].

<sup>40</sup> Elliott n 20 above, 88.

<sup>41</sup> Allan n 27 above, 324.



law fundamental rights.<sup>42</sup> They might begin with the fundamental right to freedom of association.

If *UNISON* is to have radical potential as legal doctrine, it must be somewhere other than in public law. It should be acknowledged that many labour lawyers may be sceptical about the possibilities for a reconfiguration of ‘private’ common law, even as they acknowledge the worker-protective potential of ‘public’ common law.<sup>43</sup> In the next section, the possibility of *UNISON*’s ‘horizontal effect’ is examined within the context of ‘employment status’ litigation. If, as will be argued, the *UNISON* principles are developed horizontally, we may yet witness the radical potential of the ‘common law constitution at work’.

### The Common Law Constitution at Work and ‘Horizontal Effect’

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In the recent EAT decision on the ‘worker’ status of Uber drivers, the EAT explicitly referred to the *UNISON* decision in its reasoning.<sup>44</sup> This indicates the horizontal potential of *UNISON* in legal disputes between private parties. Collins has described ‘indirect horizontal effect’ as encompassing a range of legal techniques ‘that permits and usually requires a court to consider whether the application of fundamental rights to a private law dispute might affect the result, at least to the extent of favouring one interpretation of the existing law over another.’<sup>45</sup> In my view, the entire area of ‘employment status’ could be influenced by the constitutional principles in *UNISON*. The *Uber* decision indicates how this might happen.

In *Uber*, Eady HHJ observed that *UNISON* recognised that ‘the imbalance of power between the parties in the employment context has informed the introduction of the statutory rights (such as minimum wage and working time protections) that the Claimants seek to exercise in this case’.<sup>46</sup> This principle provided powerful normative support to a ‘purposive’ approach to the characterisation of work arrangements where there was an inequality of bargaining power

<sup>42</sup> I have argued in favour of a doctrine of common law fundamental rights in employment law, in A. Bogg, ‘Common Law and Statute in the Law of Employment’ (2016) 69 CLP 67, 100-111.

<sup>43</sup> M. Freedland and N. Kountouris, ‘Common Law and Voice’ in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014) 352.

<sup>44</sup> *Uber B.V. and others v Aslam and others* UKEAT/0056/17/DA, [98].

<sup>45</sup> H. Collins, ‘The Challenges Presented by Fundamental Rights to Private Law’ in K. Barker, K. Fairweather and R. Grantham (eds), *Private Law in the 21<sup>st</sup> Century* (Oxford: Hart, 2017) 213, 214.

<sup>46</sup> *Uber* n 44 above, [98].

between the parties.<sup>47</sup> Tribunals were not constrained by the terms set out in written documentation where this did not represent the ‘true agreement’ between the parties. As all labour lawyers know, the common law determination of employment status is pivotal to the practical question of whether fundamental employment rights enacted through legislation, such as basic working time or minimum wage protections, are enforceable. Legal disputes over employment status occur at a site where statute law and common law exist cheek by jowl. In this way, the question of *UNISON*’s ‘horizontal’ effect is no longer idle speculation. The EAT treated the constitutional principles in *UNISON* as relevant to the horizontal dispute between the Uber drivers and their employer.

This is unsurprising. Labour law has always been disruptive of the distinction between vertical and horizontal application of fundamental rights. The employment relationship is a site where ‘abuse of power’ can occur, and this implies the relevance of public law principles.<sup>48</sup> Furthermore, Lord Reed explained the special nature of statutory employment rights in *UNISON*: ‘When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect.’<sup>49</sup> For example, the right to a minimum or living wage might be understood as a right that is justified in part by its contribution to a culture of decent work as a public good. This notion of employment rights as possessing a *public* dimension explains why their enforcement is amenable to *UNISON* principles.<sup>50</sup>

The following sections defend and develop the argument that *UNISON*’s radical potential lies in its horizontal effect. It will examine the following issues: the ‘horizontal’ implications of access to a court and other common law fundamental rights; *UNISON* as entrenching a common law ‘favourability’ principle; and the role of general constitutional principles in directing the characterisation of work contracts.

### Access to a court and other common law fundamental rights

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<sup>47</sup> *Uber* n 44 above, [99].

<sup>48</sup> J. Laws, ‘Public Law and Employment Law: Abuse of Power’ [1997] PL 455.

<sup>49</sup> *UNISON* n 1 above, [72].

<sup>50</sup> For further discussion of the ‘private’ and ‘public’ dimensions of labour rights, from the perspective of corrective justice theories, see A. Bogg, ‘Labour, Love and Futility: Philosophical Perspectives on Labour Law’ (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 7, 16-30.

In *UNISON* the UKSC was concerned with vertical interference with access to a court. The sceptic might well ask what any of this has to do with the determination of worker status. After all, whether X is an employee or worker of Y is a matter that goes to the very definition of the primary right. That is to say, the relevant description of the primary right includes the individual's employment status (i.e. an *employee's* right not to be unfairly dismissed). Where X is *not* an employee or worker under the relevant legal test, her access to a court is not in point because she has no primary right. It is only where so-called 'tertiary' legal rules are concerned,<sup>51</sup> such as limitation periods, that it is intelligible to talk in terms of an interference with 'access to a court'. This is because 'tertiary' legal rules are directly concerned to regulate the access to courts of those who otherwise have primary rights to vindicate. Whereas if an element of the primary right is absent, there is no primary right to enforce.

This scepticism is fortified by the notorious episode of *Osman v United Kingdom*.<sup>52</sup> It will be recalled that in *Osman* the ECtHR found that there had been a violation of Article 6 where a claim for negligence against the police had been struck out in the domestic courts. In striking out the legal claim, the domestic court had done so on the basis that the police owed no duty of care to victims in the circumstances of the case. The ECtHR nevertheless treated the striking out as a violation of Article 6. The decision attracted fierce criticism for misunderstanding the relevant substantive and procedural national law.<sup>53</sup> If there was no common law duty of care, there could be no tort of negligence. Procedural rights should not have acoustic effects on the substantive law.

However, in *UNISON* Lord Reed was keen to emphasise the 'real world' of legal rights and their enforcement. Once this perspective is adopted, a sharp distinction between process rights and substantive rights becomes more difficult to maintain. The realities of employment litigation mean that *in practice* employment status is central to the systemic enforceability of statutory employment rights. This is acknowledged in the recent *Taylor Review of Modern Working Practices*, where the discussion of employment status is included in chapter 8 on

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<sup>51</sup> F. Wilmot-Smith, 'Illegality as a Rationing Rule' in S. Green and A. Bogg (eds), *Illegality after Patel v Mirza* (Oxford: Hart, forthcoming 2018).

<sup>52</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>53</sup> C.A. Gearty, 'Unravelling Osman' (2001) 64 MLR 159. For more recent discussion, see P. Giliker, *The Europeanisation of English Tort Law* (Oxford: Hart, 2014) 140-153.

‘Fairer Enforcement’.<sup>54</sup> This is an important recognition that the substantive question of employment status is also an ‘access to justice’ issue. In its discussion of the practical difficulties faced by claimants paying tribunal fees, the report observed:

‘While paying these fees represents a large financial risk, for many, particularly in atypical working arrangements, the jeopardy is two-fold. As well as the risk that they are not able to prove that they were treated unfairly (in the widest sense depending on the right being enforced), *they also carry the risk that they are not able to prove they are even entitled to bring their claim in the first place because their status is uncertain.* This is because one of the first things a tribunal will consider is whether the individual has the appropriate employment status to bring the case.’<sup>55</sup>

The analysis in the *Taylor Review* continues to be germane. The uncertainties around employment status, which forces workers to engage in the fraught business of predicting the application of complex legal rules to complex factual situations, mean that this will continue to be a strategic pressure point for employers resisting statutory claims. It will also persist as a practical deterrent to individuals deciding whether to pursue statutory claims against employers.

Collins has argued that the ‘distinction between constitutional structures and processes, on the one hand, and substantive rights in private law on the other, is not easy to maintain in practice.’<sup>56</sup> To support this point, he discusses the impact of a fundamental right to a home for consumers challenging repossession orders sought by mortgage lenders.<sup>57</sup> In these cases, an ostensibly procedural right – the right to a fair trial – has interacted dynamically with the fundamental right to a home and the fundamental right to an effective remedy, which in turn has had a transformative effect on the legal protection of consumers.<sup>58</sup>

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<sup>54</sup> M. Taylor, ‘Good Work; The Taylor Review of Modern Working Practices’ (Gov.uk, 2017) available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf) last accessed 26 September 2017 (*The Taylor Review*).

<sup>55</sup> *ibid* 61 (*emphasis added*).

<sup>56</sup> Collins n 45 above, 215.

<sup>57</sup> Case C-34/13 *Kusionova v SMART Capital as* (2014, CJEU) (not yet reported), discussed Collins n 45 above, 215.

<sup>58</sup> See also J. Rutgers, ‘The Right to Housing (Article 7 of the Charter) and Unfair Terms in General Conditions’ in H. Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Cambridge: Intersentia, 2017) 125.

This suggests that a zealous insistence on the distinction between process and substance can be problematic. It is important that the law does not become ossified. Private law doctrines must remain permeable to new doctrinal understandings informed by fundamental rights.<sup>59</sup> *UNISON* focused its discussion on the fundamental right of access to a court. It is certainly plausible that other fundamental rights such as freedom of expression and freedom of association would be protected under the common law. Where employment status disputes arise within the context of a claimant seeking to vindicate other fundamental rights protected under employment legislation, access to a court is an acute concern. Access to a court should operate as a 'abstract' right, supporting an inclusive approach to employment status where it is possible to do so given the reality of the working arrangements.<sup>60</sup>

### UNISON and the 'favourability principle'

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The principle of favourability is often treated as alien to common law systems. By contrast, it is central to many Civilian systems of labour law. As Freedland and Kountouris explain, in some jurisdictions it developed as a ranking principle where there were multiple norm-sources regulating personal employment contracts, such as constitutional law, statutes, collective agreements, and individual employment contracts.<sup>61</sup> In situations of conflicting norms, the principle of 'construction in favour of the worker', required that the norm most favourable to the worker should be applied.<sup>62</sup> According to Freedland and Kountouris, the favourability principle extends beyond simply providing rules for resolving norm conflicts.<sup>63</sup> The

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<sup>59</sup> For example, Collins raises the question whether the tort of nuisance might be extended to protect the interests of parties without a proprietary interest in the land, or whether a new tort might be created, on the basis of the fundamental right to a home: see Collins n 45 above, 219-220. A zealous use of the striking out procedure would impede the abilities of citizens to get those arguments before a court.

<sup>60</sup> On the distinction between 'abstract' rights and 'concrete' rights, see R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) 93, where the distinction is explained in the following way: 'An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. The grand rights of political rhetoric are in this way abstract.' We might understand access to a court as an abstract right operating with background gravitational force in cases of disputed employment status, which *inclines* the court to a finding of employee/worker status where it is possible to do so on the facts.

<sup>61</sup> M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP, 2011) 186.

<sup>62</sup> *ibid* 187.

<sup>63</sup> *ibid* 150.

favourability principle could be understood more broadly as favouring the development of protective norms to protect the weaker party.

Historically, the English common law was understood to rest upon the opposite axiom. In Kahn-Freund's oft-cited words:

'the law does and to some extent must conceal the realities of subordination behind the conceptual screen of contracts considered as concluded between equals. This may partly account for the propensity of lawyers to turn a blind eye to the realities of distribution of power in society.'<sup>64</sup>

In *UNISON*, Lord Reed observed that,

'Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract.'<sup>65</sup>

It followed from this fundamental principle that statutory rights needed to be 'effective' and 'enforceable in practice'.<sup>66</sup> *UNISON* resolves an important ambiguity in the common law. It can no longer be said that judges 'turn a blind eye' to the inequalities that abound in employment relationships. Judges at the highest level have now openly acknowledged that employment contracts are different to ordinary commercial contracts.

It was sometimes unclear whether these judicial observations were *descriptive* or *normative* propositions. As a descriptive proposition, the recognition of contractual inequality is simply a brute statement of sociological facts, without any necessary normative implications.<sup>67</sup> *UNISON*, by contrast, adopts a normative understanding, building upon Lord Clarke's

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<sup>64</sup> P. L. Davies and M. R. Freedland (eds), *Kahn-Freund's Labour and the Law* (London: Stevens, 3<sup>rd</sup> edition, 1983) 15.

<sup>65</sup> *UNISON* n 1 above, [6]

<sup>66</sup> *ibid.*

<sup>67</sup> This is a tenable reading of Lord Hoffmann's reflections on the special nature of the employment contract in *Johnson v Unisys Ltd*, within the context of a judgment that blocked the development of protective common law norms on the basis of statutory pre-emption. See *Johnson v Unisys Ltd* [2001] ICR 480, [35].

interpretive approach in *Autoclenz v Belcher (Autoclenz)*.<sup>68</sup> That is to say, the common law's principles and doctrines should be progressively refashioned so as to protect the weaker party in the contractual relation. This is reflected in Lord Reed's acknowledgment of the special role of protective employment rights, and the constitutional importance of ensuring their systemic effectiveness. It is also reflected in *Autoclenz*, where this recognition of contractual inequality led to a 'purposive' approach to the characterisation of personal work contracts.<sup>69</sup> After *UNISON*, the favourability principle should no longer be regarded a distinctive feature of Civilian labour law systems. It should now be recognised as a common law principle of fundamental constitutional significance.

### The role of general principles in the construction of contracts

There appears to be a difference in styles of judicial reasoning in comparing the recent EAT decision in *Uber* and the recent Court of Appeal decision in *Pimlico Plumbers*.<sup>70</sup> In *Uber*, Eady HHJ approached the construction of the specific contractual arrangements through the lens of general interpretive principles. Significantly, she appeared to draw a link between *UNISON* and *Autoclenz*, as a prelude to the court's interpretive task.<sup>71</sup> This meant that 'the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The ET's starting point was to determine the true nature of the parties' bargain, having regard to *all* the circumstances.'<sup>72</sup> In *Pimlico Plumbers*, by contrast, Underhill LJ was at pains to particularise the nature of the enquiry into the plumbers' employment status: 'the resolution of this issue has depended on an analysis of the contradictory and ill thought-out contractual paperwork in the context of the Judge's findings about what happened on the ground. That means that although employment lawyers will inevitably be interested in this case – the question of when a relationship is genuinely casual being a very live one at present – they should be careful about trying to draw any very general conclusions from it.'<sup>73</sup>

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<sup>68</sup> [2011] UKSC 41.

<sup>69</sup> *ibid* [35].

<sup>70</sup> *Pimlico Plumbers Ltd and another v Smith (Pimlico Plumbers)* [2017] EWCA Civ 51; [2017] ICR 657.

<sup>71</sup> *Uber* n 44 above, [98]-[99].

<sup>72</sup> *ibid*, [105].

<sup>73</sup> *Pimlico Plumbers* n 70 above, [143].

It is submitted that there is great virtue in embedding the process of contractual construction and characterization within the context of general constitutional principles. The legal characterisation of contractual work relations operates within a general framework of 'structural principles'. To this end, Mark Freedland has identified a class of 'structural principles', which function as general legal principles in the common law of employment.<sup>74</sup> These structural principles perform both 'attributive' and 'ascriptive' roles in the contract of employment: 'attributive' in shaping the identifying attributes of personal work contracts, and 'ascriptive' in assigning normative obligations to those contracts.<sup>75</sup>

For present purposes, the most important of Freedland's structural principles is the 'integration principle'. Freedland defines it in the following terms: 'where there is such an exchange or a series of exchanges of work and remuneration taking place in the context of a personal work relationship, the worker should be regarded and treated as being integrated into the organization of the employer or employing enterprise'.<sup>76</sup> In its guise as an attributive principle, the 'integration principle' favours the inclusion of personal work arrangements within the domain of employment contracts (and hence within the domain of statutory protective rights). *UNISON* provides a constitutionalised underpinning to Freedland's pro-inclusive 'integration principle'.

The favourability principle explains and justifies the enactment of protective statutory rights to protect the weaker party. These protective rights require effective systemic enforcement to ensure that the rule of law is vindicated. The common law of the personal employment contract should be developed purposively, as a 'collaborative' exercise in law-making, with the judges developing the common law to support protective statutory norms.<sup>77</sup> Without this systemic perspective on the rule of law, 'the party in the stronger bargaining position will always prevail'.<sup>78</sup> It is this basic normative concern that underpins Freedland's 'integration' principle. It is increasingly reflected in the evolving legal rules and principles for determining employment status.

The leading authority on the general interpretive approach to employment status is *Autoclenz*.<sup>79</sup> The car valeters signed comprehensive written contracts that contained 'terms inconsistent'

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<sup>74</sup> M. Freedland, 'The Legal Structure of the Contract of Employment' in M. Freedland and others (eds), *The Contract of Employment* (Oxford: OUP, 2016) 28.

<sup>75</sup> *ibid.*, 29-39.

<sup>76</sup> *ibid.*, 42.

<sup>77</sup> Kavanagh n 38 above.

<sup>78</sup> *UNISON* n 1 above, [72].

<sup>79</sup> *Autoclenz* n 68 above.



with employment status. If those written terms were contractually valid, the effect would be to negate a legal characterization that the car valeters were ‘employees’ or ‘workers’. This would have disqualified the individuals from bringing statutory claims under the working time and minimum wage legislation. The written contracts had been signed, which as a matter of ordinary contract law is generally dispositive: a signatory to a written contract is bound to its terms.<sup>80</sup> Taking its inspiration from landlord and tenant law and the problem of ‘sham’ arrangements, the Supreme Court determined that the written documentation was *not* the same as the ‘true agreement’. In an important statement of principle, Lord Clarke SCJ concluded that:

‘the relevant bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.’<sup>81</sup>

This ‘purposive’ approach to characterization enabled tribunals to disregard ‘terms inconsistent’ with employee or worker status in the written documentation if those terms did not reflect the *reality* of the working arrangements. In the words of Eady HHJ in *Uber*, the tribunal should examine ‘all the circumstances’ in determining the ‘true agreement’.<sup>82</sup> This has led to an attenuation of legal rules that continue to be central and operative in the general law of contract, such as the ‘signature rule’. There are some interesting parallels between *Autoclenz* and Collins’ discussion of the interpretation of legal instruments using fundamental rights as an interpretive framework.<sup>83</sup> Collins’ focus is on the interpretation of wills, to ensure their consistency with fundamental rights. His view is that the case law of the ECtHR establishes the following interpretive principle: ‘In the absence of detailed and explicit terminology to the contrary, there is a presumption that interpretations of private instruments will conform to Convention rights.’<sup>84</sup>

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<sup>80</sup> *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

<sup>81</sup> *Autoclenz* n 68 above, [35]

<sup>82</sup> *Uber* n 44 above, [105].

<sup>83</sup> Collins n 45 above, 231-233.

<sup>84</sup> *ibid*, 233.

*Autoclenz* can be understood as giving effect to a similar principle for employment contracts, though without any corresponding solicitude for ‘detailed and explicit terminology’ in the written documentation. The relative strength of the *Autoclenz* principle can be justified. The contract of employment is different to a testamentary instrument in that the legal system has opted to use the personal work contract as its chosen platform for allocating fundamental rights in protective legislation. In this way, the personal employment contract is not simply a ‘private instrument’; it performs a public institutional role through its allocation of employment rights, rights that are themselves based in important public goods.<sup>85</sup> Furthermore, the putative duty-bearer in the contractual relation has the opportunity and incentive to draft the contractual arrangements in order to circumvent the statutory implementation of fundamental rights.

In sum, *Autoclenz* is purposive in the following way. Where it is *possible* to characterize X as an employee or worker on a reasonable construction of the working arrangements, X should be characterized as such. The relevant purpose in ‘purposive’ is that of the court, and it is a constitutional purpose, which is to support the rule of law through the protection of fundamental rights which are implemented through protective employment statutes. This supports the systemic dimensions of the rule of law. It also involves little or no cost to the individualistic dimensions of the rule of law such as legal certainty, fair warning, predictability, and so forth. The legal characterization of the work relation should be congruent with the reasonable expectations of the parties. Ideally, neither party should be caught unawares by the court’s judgment. In most cases of disputed employment status, it is stretching credulity to suggest that the employer has been caught unawares. For example, in *Bates van Winkelhof v Clyde & Co LLP*, Lady Hale SCJ noted that the court had to work very hard to conclude that a member of an LLP was *not* a worker.<sup>86</sup> That will often be so in cases of disputed status where the actual work practices are conducted on the footing of an employment relationship, whatever the technical legal characterization.

The attentiveness to the ‘real world’ of rights enforcement in *UNISON* also echoes the interpretive approach in *Autoclenz*, which is to be attentive to the reality of working practices in determining the contractual obligations. *Autoclenz* confirmed that the courts should use an ‘objective’ approach to the characterisation of the contract. In so doing, Lord Clarke endorsed the approach taken by Aikens LJ in the Court of Appeal in *Autoclenz*.<sup>87</sup> Can this continuing

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<sup>85</sup> Bogg n 50 above.

<sup>86</sup> [2014] UKSC 32, [2014] 1 WLR 2047 [16].

<sup>87</sup> *Autoclenz* n 68 above, [32].

adherence to an ‘objective’ approach be reconciled with the Supreme Court’s endorsement of ‘purposive’ interpretation? I think that the two positions can be reconciled. As Chen-Wishart explains, ‘objectivity’ in contract can be interpreted in a variety of ways.<sup>88</sup> Most importantly, ‘objectivity’ without more does not discriminate between different perspectival senses of that term. It might mean ‘bystander’ objectivity, or objectivity from the perspective of the promisee, or objectivity from the perspective of the promisor. The ‘true’ agreement might shift, depending upon which perspectival sense of objectivity is being deployed.

This necessitates a principled choice by the courts to resolve the ambiguity. After *Autoclenz* and *UNISON*, the appropriate perspective to adopt is ‘worker objectivity’. In other words, the court should ask how a reasonable worker would interpret the employer’s conduct in determining the contractual obligations between them. This would ensure that the arrangements are construed in favour of the protection of the weaker party, which has affinities with the *contra proferentem* rule in general contract law.<sup>89</sup> Moreover, and following *Autoclenz*, this perspectival objectivity would be ‘contextual’ rather than ‘formal’, incorporating a consideration of the entire factual matrix of the parties’ working arrangements.<sup>90</sup> In this way, the test remains recognizably contractual. However, the relevant doctrinal techniques are developed in the light of general principles such as ‘favourability’. Hence *UNISON* sharpens our understanding of the radical potential of *Autoclenz*.

It also supports a different legal approach in situations where there appears to be no contract between the parties. Such an approach would have been very welcome in the recent Court of Appeal case of *Smith v Carillion (JM) Ltd*.<sup>91</sup> This case constituted an extreme version of the status problem, in that there was seemingly no contract at all between the claimant and the defendant. Mr Smith had been employed in a triangular agency arrangement in the construction industry. It was conceded that the end user had provided information about Mr Smith’s trade union activities to a blacklisting organization, the Consulting Association, and that this constituted a detriment that had the purpose of penalizing him for taking part in the activities of an independent trade union. The claims related to historic discrimination, and at the relevant

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<sup>88</sup> M. Chen-Wishart, ‘Contractual Mistake, Intention in Formation and Vitiating: the Oxymoron of *Smith v Hughes*’ in J. W. Neyers, R. Bronaugh and S.G.A. Pitel (eds), *Exploring Contract Law* (Oxford: Hart, 2009) 341, 348-355.

<sup>89</sup> For further discussion, see S. Deakin, ‘Interpreting Employment Contracts: Judges, Employers and Workers’ in S. Worthington (ed), *Commercial Law and Commercial Practice* (Oxford: Hart, 2003) 433.

<sup>90</sup> On the distinction between ‘formal’ and ‘contextual’ objectivity, see Chen-Wishart n 88 above, 351-355.

<sup>91</sup> *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467.

time, the statutory protection was confined to ‘employees’. Statutory protection was extended to the wider category of ‘worker’ in 2004. The Court of Appeal rejected Mr Smith’s appeal. There was no contract between the end user and Mr Smith, and the facts did not meet the strict common law threshold of necessity in order to imply such a contract at the relevant time.<sup>92</sup> Nor could the interpretative obligation under the Human Rights Act 1998 be brought into play, to the effect that the statutory provision protecting him from detriment should be construed widely in light of Mr Smith’s Article 11 and Article 8 rights, because the conduct of the end user predated the enactment of that legislation.

This decision ought to have been approached on the basis of common law fundamental rights. In applying the common law necessity test for the implication of a contract, the fundamental rights dimension of *Carillion* should be recognised. The blacklisting of trade unionists is a serious violation of the very core of freedom of association. Its consequences were very severe in destroying Mr Smith’s ability to secure employment in his chosen occupation. The implication of a contract of employment between Mr Smith and the end user was necessary to enable Mr Smith to seek protection of his fundamental right to freedom of association. After *UNISON*, the common law test of contractual implication should be relaxed in fundamental rights cases. For example, the test of implication might simply require that the facts were *capable of sustaining* the implication of a contract of employment. This would at least have given Mr Smith the opportunity to have his day in court and test out the substantive merits of his fundamental rights claim, rather than being shut out on a legal technicality. That is an access to court issue, in practice even if not in theory. And we now know that it is the practical dimension that counts after *UNISON*.

### ***Legal and Political Constitutionalism***

*UNISON* may stand as the most important labour law judgment to be handed down by the Supreme Court in a generation. Time will tell. It should be acknowledged that the very idea of a ‘common law constitution at work’ will be regarded by many as provocative, slightly hysterical or perhaps just a very silly claim. The common law has operated as a repressive and reactionary political tool to suppress and pacify workers and trade unions. It has often subverted

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<sup>92</sup> *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545.

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the legislative purposes of protective statutes.<sup>93</sup> Its judges are scarcely more representative as a group than when J.A.G. Griffith penned the first edition of *The Politics of the Judiciary* in 1977.<sup>94</sup> We should always be vigilant and wary when the common law is portrayed as a progressive alternative. The wisdom of the sceptic cannot easily be parried. History is on her side.<sup>95</sup>

Against that view, *UNISON* secured the abolition of tribunal fees where conventional forms of political action had failed. For all its strong critical rhetoric,<sup>96</sup> it is implausible that the House of Commons Justice Committee would have prompted a volte-face by the Government.<sup>97</sup> The recommendations on tribunal fees in the *Taylor Review* were exposed as feeble following the *UNISON* judgment.<sup>98</sup> The use of constitutional litigation, on the basis of fundamental rights, provided a powerful moral language with which to challenge the deep injustice of the tribunal fees; and the authoritative nature of legal judgment has been transformative for millions of workers at a stroke.

The enforcement of a fundamental constitutional right simultaneously vindicated the common good. In this respect, *UNISON* also suggests that many criticisms of ‘labour rights as human rights’ (such as the alleged ‘individualism’ of rights discourse) are overblown swipes at a parade of strawmen. There is nothing individualistic about the constitutional victory in *UNISON*. Nor is there anything individualistic about its conception of rights or the rule of law. Of course, we would fall into a different trap if we were to claim that constitutional litigation operates as a complete substitute for political mobilisation. That would simply be to replace one set of dogmas for another. There are many ways in which the justice system can be undermined, for example by starving the employment tribunals of public resources. Like a virus, stealth deregulation mutates rapidly in response to its environment. Political and legal strategies must be deployed together in a coordinated way. *UNISON* marks the beginning of the political struggle, not its end.

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<sup>93</sup> S. Anderman, ‘The interpretation of protective employment statutes and contracts of employment’ (2000) 29 ILJ 223.

<sup>94</sup> J.A.G. Griffith, *The Politics of the Judiciary* (Glasgow: Fontana, 1977).

<sup>95</sup> For a general discussion of the notions of ‘political’ and ‘legal’ constitution in labour law, critiquing the theorisation of the common law by labour law scholars, see A. Bogg, ‘The Hero’s Journey: Lord Wedderburn and the “Political Constitution” of Labour Law’ (2015) 44 ILJ 299.

<sup>96</sup> House of Commons Justice Committee, *Courts and tribunals fees*, Second Report of Session 2016-17 (HC 167, 20<sup>th</sup> June 2016) esp para [59].

<sup>97</sup> See the flimsy response in Government Response to the Justice Committee’s Second Report of session 2016/17, *Courts and Tribunals Fees* (Cm 9300, November 2016) 5-6.

<sup>98</sup> *Taylor Review* n 54 above, chapter 8.

It might also be objected that the common law's pantheon of fundamental rights is meagre and narrow, with even freedom of association occupying an uncertain status when compared with the unambiguous language of the ECHR. This is a fair criticism. In the end, however, we must remember that the common law's fecundity is not solely a matter of judicial preference. The common law is also moved by the arguments that are put to the courts. In this sense, courts are *reactive* deliberative actors. As Allan has argued, the common law constitution is constituted by internal 'interpretative' argument.<sup>99</sup> Each of us must engage in moral and political argument to determine the contours of constitutional principles and fundamental rights, to construct the law that we have in common. It is thus a shared and discursive undertaking. It is now time for workers to reclaim the common law as their own. *UNISON* represents a remarkable opportunity for workers, trade unions and their legal advisers to put the common law constitution to work, guided by the needs of the labour movement and working people.

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<sup>99</sup> Allan n 27 above, 333-349.